Divider 1

Affidavit of Lukhanyo Bruce Matthews Calata

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY OF THE ORIGINAL

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18/01/2025

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STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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FOUNDING AFFIDAVIT

TABLE OF CONTENTS

INTRODUCTION 16
RELIEF SOUGHT 17
STRUCTURE OF AFFIDAVIT 21
OVERVIEW 23
The Betrayal 24
THE PARTIES 27
The applicants 27
The respondents 31
STANDING 33
JURISDICTION 35
BACKGROUND TO THE POLITICAL INTERFERENCE 35
Apartheid violations 35
The TRC process 37
Early attempts to secure justice 39
Post TRC developments 45
Lack of delivery 51
THE POLITICAL INTERFERENCE 61
Opening the door to political interference 62
Closing down of the TRC Cases 64
The President must decide 70
No investigations 72
The Amnesty Task Team 77
The Secret Further Report of the Amnesty Task Team 82
Response of the ATT 86
Moratorium on investigating and prosecuting the TRC cases 89
Direct intervention to stop prosecutions 91
Amendments to the Prosecution Policy 93
Developments post the amendments to the Prosecution Policy 99
The politicians intervene 105
The axe falls on the TRC cases 111

LC
NGI

The knives are out for Pikoli 119
Ginwala Enquiry 123
Striking down of the Guidelines 125
Special Dispensation on Political Pardons 126
TRC cases remain stuck 130
The missing Cradock Four docket 139
Simelane family takes legal action 141
NPA under pressure 144
Historic reopening of the Timol inquest 145
Rodrigues permanent stay application 146
The NPA admits to the political interference 149
WAS THERE A POLITICAL AGREEMENT NOT TO PROSECUTE? 154
Deliberations on a further immunity 156
Compilation of dockets and threats of private prosecutions 163
Former President Mbeki denies involvement in political interference 164
DEVELOPMENTS POST THE POLITICAL INTERFERENCE 167
Timol inquest follow-up 173
Reopened inquests: Neil Aggett and Dr Hoosen Haffejee 175
COSAS 4 families take legal action 177
Cradock Four families take legal action 179
Imam Abdullah Haron reopened inquest 182
CALL FOR CHANGE IN APPROACH TO APARTHEID-ERA PROSECUTIONS 183
NPA presentation to Justice Portfolio Committee in November 2023 190
THE CALL FOR AN INDEPENDENT COMMISSION OF INQUIRY 194
Approach to the Zondo Commission 195
Placing the President on terms 200
Justice Minister's plan for an internal inquiry 204
The Ntsebeza Inquiry 209
President placed on terms again 211
VIOLATIONS OF THE LAW 213
The NPA was required to resist political pressure 217
GROUNDS FOR DECLARATION AND CONSTITUTIONAL DAMAGES 218
Denial of justice 219
Violated Rights 230
Rule of law 230

LC
NGI

Principle of Legality 231
Human Dignity 232
Right to life 233
Right to freedom and security of the person 233
Right to equality 233
Violation of South Africa's international law obligations 234
CONSTITUTIONAL DAMAGES AND QUANTUM 236
Advancing truth, justice and closure 239
Monitoring 242
Memorialisation, commemoration and public education 243
Proposed Trust 244
GROUNDS FOR COMMISSION OF INQUIRY RELIEF 245
Commissions and the search for truth 246
Duty on the President to establish a commission of inquiry 247
Irrational or arbitrary decision 248
Irrational process or means 253
Violation of the rule of law and Bill of Rights 254
Sufficient grounds 255
GROUNDS FOR A MANDAMUS 256
Clear right 256
Injury actually committed or reasonably apprehended 257
No alternative remedy 258
CONCLUSION 258

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I, the undersigned

LUKHANYO BRUCE MATTHEWS CALATA

do hereby make oath and state as follows:

INTRODUCTION

1 I am an adult male journalist, author and filmmaker born on 18 November 1981. I am currently employed as the Political Editor at Newzroom Afrika based in Johannesburg.

2 I am the son of the late Fort Calata who, along with Matthew Goniwe, Sicelo Mhlauli and Sparrow Mkonto, became known posthumously as the Cradock Four. On 27 June 1985 they were abducted, tortured, murdered and their bodies burned by the Security Branch of the erstwhile South African Police.

3 In bringing this application I also represent the interests of Nomonde Liza Calata, my mother and the widow of the late Fort Calata, as well as Dorothy Calata-Dombo and Tumani Pauline Calata, who are my sisters and the daughters of the late Fort Calata. I deal with standing and our interests in more detail later in this affidavit.

4 All the applicants in these proceedings have family members who laid down their lives for our freedom and democracy or are themselves survivors of gross human rights violations. They were murdered, forcibly disappeared or seriously injured. We have been denied justice and closure for the heinous crimes that were committed against us and our loved ones during apartheid due to the suppression of the investigations and prosecutions through political interference (**the interference** or **the political interference**).

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5 We bring this application to address, to the extent possible, the grave injustices caused by the interference. We seek to have our constitutional rights to dignity and justice, which were deeply violated by the interference, vindicated. We also seek the truth behind how such brazen interference in the administration of justice occurred to ensure that such injustices never happen again.

6 I am authorised to bring this application on behalf of the applicants. Confirmatory and supporting affidavits are filed evenly with this affidavit in respect of each of the applicants.

7 The facts deposed to in this affidavit are within my personal knowledge, unless otherwise stated or indicated by the context, and are true and correct to the best of my knowledge. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be correct. Where necessary, confirmatory or supporting affidavits deposed to by those persons with personal knowledge accompany this affidavit.

RELIEF SOUGHT

8 The relief sought by the applicants is summarised below. An order is sought:

8.1 Declaring the conduct of the first to sixth respondents in unlawfully refraining and/or obstructing, the investigation and/or prosecution of apartheid-era cases referred by the Truth and Reconciliation Commission (**TRC**) to the National Prosecuting Authority (**the NPA**) (**the TRC cases**), or to otherwise unlawfully abandon or undermine such cases (**the interference**) to be:

8.1.1 a violation of the rights of applicants, and more generally the rights of survivors and families of victims of apartheid-era crimes (**the**

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families) to their constitutional rights of human dignity and equality and the right to life and bodily integrity of the victims in terms of sections 9, 10, 11 and 12 of the Constitution, Act 108 of 1996 (**the Constitution**);

8.1.2 inconsistent with the constitutional values set out in section 1(a) and the rule of law as enshrined in section 1(c) of the Constitution;

8.1.3 inconsistent with the principles, values and obligations arising from the Promotion of National Unity and Reconciliation Act, 34 of 1995 (**the TRC Act**) read with the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 (**the Interim Constitution**);

8.1.4 in breach of the duties and obligations contained in the Constitution, the National Prosecuting Authority Act, 32 of 1998 (**the NPA Act**) and the South African Police Service Act, 68 of 1995 (**the SAPS Act**) to investigate and prosecute serious crime and not to interfere with the legal duties of prosecutors and law enforcement officers; and

8.1.5 inconsistent with South Africa's international law obligations in terms of sections 231 to 233, read with section 39(b), of the Constitution.

8.2 The awarding of constitutional damages for purposes of affirming constitutional values, vindicating the rights of the applicants and families, deterring future interference and to enable families and organisations supporting families to:

8.2.1 advance truth, justice and closure by assisting them to pursue investigations, inquests, private prosecutions and related litigation;

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8.2.2 play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases; and

8.2.3 pursue commemoration, memorialisation and public education activities, including the holding of public events, publishing of books and making of documentaries.

8.3 The creation of an independent trust in accordance with the provisions of the Trust Property Control Act 57 of 1998 to hold and disburse any funds awarded as constitutional damages in furtherance of the objects set out above.

9 Declaring the failure and/or refusal by the second respondent (**the President**) to establish a commission of inquiry into the suppression of the investigation and prosecution of the TRC cases (**the decision**) to be:

9.1 inconsistent with his constitutional responsibilities under section 84(2)(f) read with sections 1(c), 7(2), 83(b) and 237 of the Constitution, and

9.2 a violation of the survivors and families of victims of apartheid-era crimes' right to equality, dignity and the right to life and bodily integrity of the victims in terms of sections 9, 10, 11 and 12 of the Constitution.

10 Reviewing and setting aside the President's failure and/or refusal to appoint a commission of inquiry as described above.

11 Directing the President to:

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11.1 promulgate in the Government Gazette, within thirty (30) calendar days of this order, the establishment of a commission of inquiry in terms of section 84(2)(f) of the Constitution, which commission of inquiry shall be headed by a sitting or retired judge designated by the Chief Justice, and shall be tasked to inquire into:

11.1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the NPA and/or the South African Police Service (**SAPS**) to stop investigating and/or prosecuting the TRC cases;

11.1.2 whether any members of the NPA and/or the SAPS improperly colluded with such attempts to influence or pressure them; and

11.1.3 to make recommendations flowing from its conclusions, for actions to be taken by organs of state, including prosecutions to be instituted against persons found to have acted unlawfully in:

(a) attempting to influence or pressure members of the NPA and/or the SAPS to stop investigating and/or prosecuting the TRC cases, and/or

(b) colluding with or succumbing to such attempts;

11.2 to make the provisions of the Commissions Act 8 of 1947 applicable to the abovementioned commission of inquiry in the aforesaid proclamation in the Government Gazette.

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STRUCTURE OF AFFIDAVIT

12 The scheme of this affidavit necessitates me addressing the following topics:

12.1 First, I provide an overview of this application, and in particular I describe the fundamental betrayal committed by the post-apartheid state against families and victims connected to apartheid-era crimes.

12.2 Second, I describe the parties to the application.

12.3 Third, I set out the applicants' standing to pursue this application and the jurisdiction of this court to deal with these proceedings.

12.4 Fourth, I deal with the background to the political interference, including an overview of apartheid-era violations, the TRC process, early attempts to secure justice, post TRC developments and the dire lack of delivery in the TRC cases.

12.5 Fifth, I address the political interference in the TRC cases, starting with its genesis, the closing down of the cases, the various forms of interference employed, the moratorium imposed and direct interventions to stop the cases, as well as disclosures made in litigation.

12.6 Sixth, I turn to the question of whether the suppression of the TRC cases was the product of a political agreement, and I consider various interactions between senior government officials and former apartheid security personnel regarding an immunity and other arrangements aimed at avoiding prosecutions.

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12.7 Seventh, I deal with the post-interference developments, including the efforts to reopen inquests, and litigation the families launched to compel or prompt action on the part of the NPA and the South African Police Service (**SAPS**).

12.8 Eighth, I deal with calls for a specialised unit, such as an investigating directorate, where prosecutors and detectives could work together to tackle the TRC cases; as well as the response of the state declining this approach.

12.9 Ninth, I address the requests for an independent commission of inquiry into the suppression of the TRC cases, the plan by the former Minister of Justice to circumnavigate an independent and open inquiry, and the Ntsebeza inquiry launched by the NPA.

12.10 Tenth, I list the statutory and constitutional provisions that have been violated by the political interference that resulted in the suppression of most of the TRC cases.

12.11 Eleventh, I set out the grounds for the declaratory relief and constitutional damages sought, which includes the impact of the denial of justice on families and survivors, and the violation of the rule of law, various rights and international law obligations.

12.12 Twelfth, I explain the type and form of constitutional damages sought by the applicants and motivate the quantum claimed.

12.13 Thirteenth, I set out the grounds for the declaratory relief setting aside the President's refusal or failure to establish a commission of inquiry into the suppression of the TRC cases.

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12.14 Finally, I set out the grounds for the mandatory order sought compelling the President to establish an inquiry under the Commissions Act.

OVERVIEW

13 The state-sanctioned abduction, torture, murder of my father and the desecration of his body have had a profound effect on me and my family. The inhuman acts of brutality committed against the family members of my co-applicants, and certain of the applicants themselves, have had similarly devastating effects on them. Their stories are told in their supporting affidavits which accompany this application.

14 We had to endure the murders and disappearances of our family members during apartheid. The post-apartheid era of political interference and denial of justice stand as a deep betrayal of their ultimate sacrifices. The interference adds insult to our injuries and exacerbates our emotional and psychological trauma, as well as the pain and suffering we have endured.

15 We are at our wits' end as to why successive post-apartheid governments turned their backs, not only on us, but on our loved ones and so many others who paid the ultimate price for our freedom and democracy.

16 The evidence discloses that decisions were taken at the highest political levels to undermine, and ultimately to block the investigation and prosecution of the cases referred by the TRC to the NPA.

17 The story of the Cradock Four is well known and I will not burden these papers by repeating that story here. The full story, together with our quest for justice, is set out in the legal application I brought against the NPA in 2021 to compel a prosecutorial decision before the Gauteng Division in *Calata and Others vs National*

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Director of Public Prosecutions and Others Case Number: 35447/2021. A copy of these voluminous papers can be provided on request.

18 The brutal murders of our family members and the pain that we endure have defined us and our life choices. We have spent decades searching for the truth and struggling to do justice to the lives of our loved ones, which were so brutally cut short. We have done so in the face of the intransigence of the post-apartheid state, which has misled us and treated us with contempt.

19 For most of us, it is too late. Our life-long struggle for accountability has come to naught. Suspects and witnesses have died, bringing an end to any prospect of prosecutions in most cases. These cases can never be resurrected.

20 Family members have also passed on. On 29 August 2020, Nyameka Goniwe, wife of Matthew Goniwe, passed away. Matthew's daughter, Nobuzwe, died on 22 July 2024 at the age of 49. They died before seeing justice done in Matthew's brutal murder. The cruel indifference of the post-apartheid state robbed them of justice, peace and closure. The damage done to us, our families and communities is incalculable. We are deeply scarred and will remain so until our dying day.

The Betrayal

21 Families of apartheid-era victims have conducted themselves with resilience and remarkable patience.

22 We committed ourselves to the historic compromises that were required to move from South Africa's oppressive past to a democratic future. We participated in the TRC process (to be described below) in good faith. This involved having to accept

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that perpetrators granted amnesty would not face prosecution or civil damages claims.

23 There was a general expectation founded on the constitutional obligations of the post-apartheid state that the state would prosecute perpetrators who were not amnestied and provide victims with reparations. For this reason, we did not sue the new South African state for the transgressions of the apartheid state.

24 In this regard, according to the TRC Report (Volume 6, section 1 page 36), read with figures released by the Department of Justice (**DOJ**), of the 7112 persons who applied for amnesty (relating to more than 14 000 incidents), some 5034 were rejected on the papers (in chambers) for not meeting the basic requirements for amnesty, while the balance were referred to hearings before the Amnesty Committee. The DOJ's summary of amnesty decisions is annexed hereto marked **FA1**.

25 Some 849 of these applicants were granted amnesty while approximately 358 applications were refused. Murders comprised the biggest category of the crimes for which amnesty was refused, some 189 cases, which involved at least 353 deaths. An excel spreadsheet compiled by my legal team listing the details of each refusal, is annexed hereto marked **FA2**.

26 At that time, we felt it was fundamentally wrong to sue the democratic state in such a context. This was especially the case since state funds were meant to be used for reparations. We gave up our claims, and in so doing, we spared the post-apartheid state from having to pay a vast sum of money.

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27 However, the state reneged on both of its constitutional obligations in relation to the post-TRC process. It failed to prosecute and has provided wholly inadequate reparations. Its cruel and misguided "closed list policy" excluded many thousands of victims from the benefits of reparations. R2 billion in the President's Fund remains unspent. Successive post-apartheid governments have destroyed the social compact struck with us.

28 Had we known at the time the TRC was concluding its operations that the post-apartheid government had no intention of prosecuting those who had not received amnesty, most of us would have pursued civil claims against those perpetrators and the state, in cases where harm was committed by agents of the apartheid state.

29 The bulk of these claims would have been for loss of support since most cases in which amnesty was refused involved murders and enforced disappearances. Many of those killed by state agents were breadwinners. It would be difficult to quantify, but the potential amounts of such claims would have been substantial, probably running into hundreds of millions of rands. Such amounts would be even higher, if one includes the many cases involving perpetrators who committed murders in the course and scope of their employment with the apartheid state, but who did not apply for amnesty.

30 We approach this Honourable Court for constitutional damages, not to compensate us for what we have endured, but for purposes of vindicating the violation of our rights to human dignity and justice visited upon us by the political interference, and to deter future such violations. Such damages will enable us to pursue truth and justice in the cases where this is still possible; help us to monitor and hold to account the authorities going forward; and to commemorate the lives of our loved ones.

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31 For several years we have been asking for an independent and open commission of inquiry into the suppression of the TRC cases. President Ramaphosa and the former Minister of Justice, Ronald Lamola, have ignored our requests. The former Minister instead spoke of holding an internal enquiry, which is likely to be carefully stage managed and held largely behind closed doors to spare government the close scrutiny of an open inquiry.

32 We will accept nothing less than a fully transparent commission of inquiry armed with the normal powers of compulsion under the Commissions Act. For this reason, we seek an order compelling the President to establish an independent commission to expose the truth behind how such a monumental miscarriage of justice occurred; and to explore ways of ensuring this never happens again in South Africa.

THE PARTIES

The applicants

33 I am the first applicant. I am the son of the late Fort Calata, one of the Cradock Four. On 27 June 1985, the Cradock Four were abducted, assaulted, murdered and their bodies burned by the Security Branch (**SB**) of the erstwhile South African Police (**SAP**).

34 The second applicant is **ALEGRIA KUTSAKA NYOKA**, the sister of the late student activist and East Rand COSAS (Congress of South African Students) leader, Caiphus Nyoka. Caiphus was killed by members of the SAP Riot Unit and the Benoni SB at his family home in Daveyton on 24 August 1987. A copy of Alegria's supporting affidavit is filed evenly herewith.

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35 The third applicant is **BONAKELE JACOBS**, the brother of the late Mxolisi 'Dicky' Jacobs who died while in detention in Upington in 1986. A copy of his supporting affidavit is filed evenly herewith.

36 The fourth applicant is **FATIMA HARON-MASOET** the daughter of the late Imam Haron who was tortured and killed while in SB detention in Cape Town during 1969. A copy of her supporting affidavit is filed evenly herewith.

37 The fifth applicant is **TRYPHINA NOMANDLOVU MOKGATLE**, the eldest sister of the late Zandisile Musi, one of the COSAS Four, who was seriously injured in a bombing orchestrated by the SB on 15 February 1982 and who has subsequently passed away. A copy of Tryphina's supporting affidavit is filed evenly herewith.

38 The sixth applicant is **KARL WEBER**, a survivor of the Highgate Hotel Massacre in East London on 1 May 1993. A copy of his supporting affidavit is filed evenly herewith.

39 The seventh applicant is **KIM TURNER**, one of the daughters of the late academic and anti-apartheid activist Dr Richard 'Rick' Turner. Rick Turner was assassinated by the security forces on 8 January 1978 at his Durban home in the presence of his daughters. A copy of Kim's supporting affidavit is filed evenly herewith.

40 The eighth applicant is **LYNDENE PAGE**, the sister of the late Deon Harris, who was killed on 1 May 1993 in the Highgate Hotel Massacre. A copy of her supporting affidavit is filed evenly herewith.

41 The ninth applicant is **MBUSO KHOZA**, the son of Musawakhe 'Sbho' Phewa. Sbho was an underground Umkhonto we Sizwe (**MK**) operative from Lamontville,

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KwaZulu Natal. Sbho was forcefully disappeared and murdered at the hands of the SB in May 1987. A copy of Mbuso's supporting affidavit is filed evenly herewith.

42 The tenth applicant is **NEVILLE BELING** who survived the 1 May 1993 Highgate Hotel Massacre. A copy of his supporting affidavit is filed evenly herewith.

43 The eleventh applicant is **NOMBUYISELO MHLAULI**, an adult female former manager at the South African Social Security Agency and widow of Sicelo Mhlauli, one of the Cradock Four. A copy of her supporting affidavit is filed evenly herewith.

44 The twelfth applicant is **SARAH BIBI LALL** the sister of the late Dr Hoosen Haffejee who was tortured and killed at the Brighton Police Station in Durban in 1977. A copy of her supporting affidavit is filed evenly herewith.

45 The thirteenth applicant is **SIZAKELE ERNESTINA SIMELANE**, the mother of the late Nokuthula Simelane who was abducted, tortured and murdered by the SB in 1983. A copy of her supporting affidavit is filed evenly herewith.

46 The fourteenth applicant is **SINDISWA ELIZABETH MKONTO**, an adult female and former teacher at Masizame Creche in Lingelihle, and widow of Sparrow Thomas Mkonto, one of the Cradock Four. A copy of her supporting affidavit is filed evenly herewith.

47 The fifteenth applicant is **STEPHANS MBUTI MABELANE**, the brother of the late Matthews 'Mojo' Mabelane, who died in detention on 15 February 1977 while under interrogation by the SB at John Vorster Square. A copy of his supporting affidavit is filed evenly herewith.

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48 The sixteenth applicant is **THULI KUBHEKA**, the daughter of the late MK operative Ntombikayise Priscilla Kubheka who was abducted, tortured and murdered near Winklespruit by the SB in May 1987. A copy of her supporting affidavit is filed evenly herewith.

49 The seventeenth applicant is **HLEKANI EDITH RIKHOTSO**, the sister of Ignatius 'Iggy' Mthebule. Iggy, a former MK operative, disappeared at the hands of the SB in 1987 in Johannesburg. He was never seen again and is presumed to have been murdered. A copy of Hlekani's supporting affidavit is filed evenly herewith.

50 The eighteenth applicant **TSHIDISO MOTASI**, the son of the late Richard and Busisiwe Irene Motasi. Richard and Busisiwe were shot dead by the SB on 1 December 1987 at the family's Hammanskraal home, in Tshidiso's presence. A copy of Tshidiso's supporting affidavit is filed evenly herewith.

51 The sixteenth applicant is **NOMALI RITA GALELA**, the wife of the late Twasile Champion Galela, one of the Pebco 3. Champion was a member of the Port Elizabeth Black Civic Organisation who was kidnapped by the Port Elizabeth SB and the Vlakplaas unit on 8 May 1985 and murdered days later at Post Chalmers. A copy of Nomali's supporting affidavit is filed evenly herewith.

52 The twentieth applicant is **PHUMEZA MANDISA HASHE**, the daughter of the late Sipho Hashe, one of the Pebco 3. Sipho was kidnapped by the Port Elizabeth SB and the Vlakplaas unit on 8 May 1985 and murdered days later. A copy of Phumeza's supporting affidavit is filed evenly herewith.

53 The twenty-first applicant is **MKHONTOWESIZWE GODOLOZI**, the son of the late Qaqawuli Godolozi, one of the Pebco 3. Qaqawuli was kidnapped by the Port

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Elizabeth SB and Vlakplaas unit on 8 May 1985 and murdered days later. A copy of Mkhontowesizwe's supporting affidavit is filed evenly herewith.

54 The twenty-second applicant is **MOGAPI SOLOMON TLHAPI**, the brother of Nicholas Ramatua 'Boiki' Tlhapi. Boiki was forcefully disappeared from the Stilfontein police station while in the hands of the Security Police in March 1986 and is presumed to have been murdered. A copy of Mogapi's supporting affidavit is filed evenly herewith.

55 The twenty-third applicant is the **FOUNDATION FOR HUMAN RIGHTS** (**FHR**), a non-governmental human rights organisation with its principal place of business at Metal Box Building, 7th Floor, 25 Owl Street cnr Stanley Avenue, Auckland Park, Johannesburg. The FHR was established in 1996 by then President of South Africa, Nelson Mandela, and the European Union to address the historical legacy of apartheid and build a culture of human rights. One of its major programmes is the Unfinished Business of the Truth and Reconciliation Commission which supports victims of apartheid-era to pursue justice and closure. A copy of the supporting affidavit of Dr Zaheed Kimmie, Executive Director of the FHR, is filed evenly herewith. A copy of the FHR's Memorandum of Incorporation is attached marked **FA3** and an extract from the minutes of a board meeting authorising the FHR's participation in these proceedings is attached marked **FA4**.

The respondents

56 The first respondent is the **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** with its offices located at the Union Buildings, Government Avenue, Pretoria.

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57 The second respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** cited in his official capacity. The President's office is located at the Union Buildings, Government Avenue, Pretoria.

58 The third respondent is the **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** cited in her official capacity, with her office located at the Momentum Centre, 329 Pretorius Street, Pretoria. The Minister of Justice is also cited in terms of section 179(6) of the Constitution, as the cabinet minister responsible for the NPA.

59 The fourth respondent is the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** cited in her official capacity, with her office located at the VGM Building, Corner of Westlake and Hartley, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. The NDPP is cited in terms of section 179(1)(a) of the Constitution as the head of the NPA.

60 The fifth respondent is the **MINISTER OF POLICE** cited in his official capacity, with his office located at the Wachthuis Building, 231 Pretorius Street, Pretoria. The Minister of Police is cited in terms of section 206(1) of the Constitution as the cabinet minister responsible for the SAPS.

61 The sixth respondent is the **NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE** cited in his official capacity, with his office located on the corner of Park Street and Hamilton Street, Arcadia, Pretoria. The National Commissioner of the SAPS is cited as he is, in terms of section 207 of the Constitution, responsible for the control and management of the SAPS

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STANDING

62 The individual applicants being the first to twenty second applicants comprise survivors and families of the victims of the TRC cases.

63 The organisational applicant, being the Foundation for Human Rights, acts in the public interest.

64 This application is brought:

64.1 by me and the second to twenty second applicants acting:

64.1.1 in our own interest as survivors of apartheid-era crimes and family members of victims of apartheid-era crimes as contemplated in section 38(a) of the Constitution. We are directly impacted by such crimes and the subsequent interference that resulted in the blocking of post TRC investigations and prosecutions. Consequently, we have a direct interest in vindicating our rights which were violated by the interference;

64.1.2 in the interests of all survivors of apartheid-era crimes and the families belonging to the group or class of persons whose loved ones perished or were forcibly disappeared in apartheid-era crimes and whose cases were suppressed by the interference, in terms of section 38(c) of the Constitution; and

64.1.3 in the public interest in terms of section 38(d) of the Constitution.

64.2 by the FHR acting:

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64.2.1 in terms of s 38(a) of the Constitution since its interests, goals and activities are undermined and adversely affected by the interference;

64.2.2 in the interests of all survivors of apartheid-era crimes and the families belonging to the group or class of persons whose loved ones perished or were forcibly disappeared in apartheid-era crimes and whose cases were suppressed by the interference, in terms of section 38(c) of the Constitution; and

64.2.3 in the public interest in terms of s 38(d) of the Constitution.

65 In bringing this application, all applicants act in the public interest on the basis that the interference is objectively unconstitutional on the grounds set out in this application and, in particular, on the basis that it violated several rights enshrined in the Bill of Rights as well as the principles of the rule of law and the separation of powers.

66 In this regard it is asserted that:

66.1 The general public has an interest in the relief sought in this application, which arises from the principle of the rule of law which is the very fabric of our society.

66.2 Where fundamental rights are infringed, and the rule of law and separation of powers threatened, the interests of the general public are by definition implicated.

66.3 The most effective manner in which to challenge the offending conduct is for the applicants, in particular the institutional applicant, the FHR, which has a

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particular duty to advance these constitutional principles, to litigate in the public interest.

66.4 Many of the people affected by the challenged conduct are vulnerable people who have experienced the might of the state at its most brutal and some may not be in a position to bring a challenge of this nature.

66.5 Although it is not known with precision as to how many people are affected by the interference, it is likely that many would be directly or indirectly affected, since the TRC referred a few hundred cases to the NPA, and virtually all remain unresolved.

67 Rule 16A of the Rules of this Honourable Court will also be complied with in order to ensure that all affected persons will have an opportunity to present evidence and/ or argument to the Court.

JURISDICTION

68 This Honourable Court has jurisdiction to determine this application as the respondents are located within the jurisdiction of this Honourable Court.

BACKGROUND TO THE POLITICAL INTERFERENCE

69 The context to the political interference in the TRC cases is set out below.

Apartheid violations

70 The Constitutional Court has held that the practice of apartheid constituted a crime against humanity. There is ample evidence in the public domain substantiating the conclusion that South Africa's pre-1994 order amounted to "*an institutionalised*

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regime of systematic oppression and domination by the white racial group over the black racial group" (which is the definition of the crime of apartheid in the Rome Statute). The TRC found that very serious crimes were committed during the apartheid-era. In particular, the TRC Report (Vol 5 Ch. 6, Findings and Conclusions, p 222) found that the security forces of the apartheid state committed a host of gross violations of human rights, including:

70.1 extra-judicial killings in the form of state-planned and executed assassinations, killings following abduction and interrogation, ambushes and entrapment killings;

70.2 the desecration and mutilation of body parts;

70.3 kidnappings and disappearances;

70.4 torture, severe ill treatment, abuse and harassment;

70.5 destruction of homes or offices through arson, bombings or sabotage;

70.6 manipulation of social divisions to turn one group against another, resulting, at times, in violent clashes; and

70.7 establishment and provision of support to offensive paramilitary units or hit squads for deployment internally against opponents of the government.

71 Tens of thousands of anti-apartheid activists were detained without charge or trial. Thousands of political activists were tried, convicted and imprisoned. According to South African History Online some 1,301 political prisoners served time on Robben Island. The total number of political prisoners held at all prisons runs into several thousands.

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72 The TRC concluded that under apartheid, the security forces were a law unto themselves. The vast majority of murders and crimes carried out by them were covered up.

73 We did not expect the apartheid police to investigate themselves or other security services. They acted entirely without restraint and without the slightest fear of having to face justice. Compliant investigating officers, prosecutors and magistrates ensured that apartheid security forces enjoyed near total impunity.

74 We did expect the post-apartheid state to pursue justice. However, a near blanket impunity for apartheid era crimes has been extended into the post-apartheid era, mainly through political interference, as is described below.

The TRC process

75 South Africa's ground-breaking transition required a limitation of the fundamental rights of the victims of gross human rights violations during that period. This was justified by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy, equality and peaceful co-existence.

76 The principles set out in the postscript to the Interim Constitution were reflected in the design of the TRC Act. Perpetrators of politically motivated crimes who made full disclosure were eligible for amnesty for those crimes, which included immunity from criminal prosecution and civil law actions. Conversely, those perpetrators who were refused amnesty, or who chose not to apply for amnesty, were meant to face the consequences, namely criminal prosecution.

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77 In requiring victims and the wider community to forgo their rights to justice under the rule of law, the state made an effective compact with victims. This compact required the state to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied.

78 I am advised that there is nothing in the constitutional and statutory design of the TRC process which contemplated or authorised the extension of the rights of perpetrators to further leniency or indemnity from prosecution beyond the winding up of that commission.

79 The TRC's Final Report, released on 21 March 2003, stressed that amnesty should not be seen as promoting impunity. The TRC highlighted the imperative need for "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law (Vol 6, Ch1, p 593, para 24).

80 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. We did so on the basis that there would be a genuine follow-up of those offenders who spurned the process of truth and reconciliation and those who were refused amnesty. This part of South Africa's historic pledge with victims has not been kept. Contrary to this obligation, in the aftermath of the TRC, the state chose to abandon its obligations by blocking the TRC cases.

81 The political pressure described in this affidavit served to shape the approach or policy of the NPA and the SAPS in relation to the TRC cases, post the winding up of the TRC. This approach is evidenced by various steps aimed at ensuring political control over prosecutorial decisions dealing with these cases.

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Early attempts to secure justice

82 Early attempts to secure justice are disclosed in a memorandum dated 24 October 2006, authored by the first head of the NPA's Priority Crimes Litigation Unit, Adv Anton Ackermann SC (**Ackermann**). It was addressed to the then Deputy NDPP, Dr Silas Ramaite. The memorandum is attached as annex RCM12 (at p849) to an affidavit (at pp 796 – 879) filed by Adv Raymond Christopher Macadam (**Macadam**) in the Joao Rodrigues stay of prosecution case in *Rodrigues v NDPP & Others* Case No. 76755/18, Gauteng Division. A copy of the aforesaid Macadam affidavit is annexed hereto marked **FA5**. These early attempts to pursue justice are set out below:

82.1 After the closure of the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation (**the Goldstone Commission**) in 1994 the evidence unearthed by that inquiry was referred to the Transvaal Attorney General, Dr J D'Oliveira. A team of detectives from the SAPS was seconded to his office to conduct the investigations (**the D'Oliveira unit**).

82.2 The D'Oliveira unit was divided into two groups. One focussed on offences committed by apartheid security force members led by Dr D'Oliveira and the other on offences committed by liberation movements and right-wing groups led by Deputy Attorney General Fick, who was supported by police officers Director Nel and Senior Superintendent Britz.

82.3 On 7 November 1996, Dr J D'Oliveira requested the National Commissioner of Police to instruct all his Provincial Commissioners to submit all unsolved criminal dockets dealing with the conflicts of the past to his office.

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83 In parallel with the work of the TRC there were attempts to address some apartheid-era crimes. In 1996 the D'Oliveira unit prosecuted former SB commander of Vlakplaas, Eugene de Kock (**De Kock**), on 121 charges including murder and multiple other offences.

83.1 In August 1996 De Kock was found guilty on 89 of the 121 charges against him, including six of murder. In October 1996 he was sentenced to two life sentences plus 212 years' imprisonment.

83.2 The conviction of De Kock should have opened the door to prosecutions of the entire hierarchy in the erstwhile SB of the SAP. This never materialised. To this day De Kock is widely seen as the 'fall guy' for what the trial judge referred to as the "*rotten system*" that permitted such crimes.

84 In a case connected to the De Kock prosecution, SB officers Peter McIntyre, Andries Venter, Jaques Else and Philip de Beer were charged in 1996 with the murder of Sweet Sambo, who died in police custody in 1991. Since the accused had previously been acquitted on other charges in connection with Sambo's death in 1994, they were acquitted.

85 In 1996 the D'Oliveira unit charged Jack Cronjé and Jaques Hechter of the Northern Transvaal SB with 27 counts of murder committed between 1986 and 1987. Both applied for amnesty, which were subsequently granted (Amnesty Decisions AC/99/0031 and AC/99/0030), bringing an end to that case.

86 In 1997, former Vlakplaas commander Dirk Coetzee and four other Vlakplaas operatives were charged with the 1981 murder of lawyer and political activist Griffiths Mxenge in Durban. Coetzee and two others were found guilty in May 1997

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but shortly thereafter received amnesty by the TRC (Amnesty Decision no AC/97/0041).

87 In 1998, Ferdi Barnard, an operative of the Civil Cooperation Bureau (**CCB**), a covert unit of the South African Defence Force (**SADF**) was convicted of the 1989 murder of anti-apartheid academic, David Webster, and the attempted murder of Dullah Omar. He was sentenced to life imprisonment and released on parole in 2019.

88 Between 1995 and 1997, the Investigation Task Unit (**ITU**), which had been established by the Police Ministry in 1994 to investigate hit squad activity in the KwaZulu Natal region was involved in the following matters:

88.1 The murder trial of former Defence Minister Magnus Malan, and most of the top hierarchy of the SADF, for the 1987 KwaMakutha massacre in which 13 women and children were shot dead under a secret military operation styled as 'Operation Marion'.

88.1.1 Notwithstanding an abundance of documentary and witness evidence, all the accused were acquitted in what was widely seen as a bungled prosecution by the then KwaZulu Natal Attorney General Timothy McNally (**McNally**).

88.1.2 In May 2024 the NPA in KwaZulu Natal was asked to consider preferring charges against a former senior military officer who was central to the planning and oversight of Operation Marion, but who had not applied for amnesty and was not previously charged. Substantial information and evidence were provided to the NPA, but nothing further has been heard.

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88.2 On 2 June 1996, the ITU submitted a docket to McNally seeking the prosecution of eight senior Inkatha Freedom Party (**IFP**), KwaZulu Police and Government officials, including a homeland cabinet minister on multiple murder charges. The docket was titled "*The case against persons involved in the establishment and perpetration of hit squad activity in Esikhaweni and surrounding areas*." McNally declined to prosecute, and these cases were never taken forward, even after McNally's resignation. In March 2023 the docket was resubmitted to the NPA in KwaZulu Natal, but nothing further has been heard.

88.3 McNally declined to prosecute former IFP operative Philip Powel for possession of illegal firearms and refused to prosecute former KwaZulu Police Commissioner Roy During for obstructing the course of justice in relation to a large arms cache that had been hidden in the KwaZulu Legislative Assembly building.

88.4 The ITU secured seven murder convictions against ANC hit squad members, connected to the Self Defence Units in the Midlands region, particularly in the town of Richmond. On the closure of the ITU these cases were handed over to the National Investigation Task Unit. Later in the 1990s the Murder and Robbery Unit and the Investigation Directorate Organised Crime secured an additional 23 murder convictions against ANC members.

88.5 The ITU also investigated hit squads connected to the IFP's Self Protection Units but realizing that McNally would not act against the IFP, it abandoned this case, and the ITU closed in mid-1997.

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89 During the 1990s, post 1994, at least 30 ANC, UDF and UDM aligned persons were convicted of murder and other serious crimes, just in the KwaZulu Natal province.

89.1 This is gleaned from the list of convicted persons recommended for pardon under former President Thabo Mbeki's Special Dispensation for Political Pardons (to be dealt with below) which dealt mainly with convictions secured in the 1990s and thereafter for alleged political crimes.

89.2 The list, a copy of which can be made available on request, disclosed that 81 convicted persons were associated with the ANC, PAC and civic organisations. Eleven were Afrikaner Weerstandsbeweging (**AWB**) and Freedom Front Plus members and 21 were IFP members. Only five were connected to the former National Party or the SAP, (all five convicted of the attempted murder of the Rev. Frank Chikane, to be discussed below).

89.3 These numbers belie claims made by organisations such as AfriForum, and the ironically styled Foundation for Equality before the Law, that only former Apartheid regime personnel have been targeted in the post-apartheid era.

90 In 1997 Colonel Wouter Basson faced 67 charges, including 16 of murder and 24 of fraud, relating to his activities as head of the apartheid government's chemical and biological warfare programme from 1982 to 1992. In April 2002, Basson was acquitted by the Pretoria High Court following a failed attempt by the prosecution to have the presiding Judge recused on grounds of bias. In 2005, the Constitutional Court partly reversed this decision to acquit Basson, holding that crimes committed outside South Africa could be prosecuted within the domestic courts. However, these charges were not pursued.

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91 In 2002, two Ciskei Defence Force soldiers, Vakele Archiebald Mkosana and Mzamile Thomas Gonya were acquitted of murder and attempted murder charges for their role in the 1992 Bisho Massacre, with the court accepting their plea of self-defence. Also in 2002, Worcester riot unit member, Michael Luff, was acquitted of the 1985 murder of protestor William Dyasi.

92 The cases described above cannot be referred to as 'TRC cases' as they were pursued independently of the TRC around the same time of the TRC's operations. Notably, these cases took place before the imposition of the political interference.

93 Until the end of President Nelson Mandela's term there did not appear to be political opposition to justice for apartheid crimes. On the occasion of the tabling of the TRC Report in Parliament in February 1999, President Mandela stated that "*accountability does need to be established and where evidence exists of a serious crime, prosecution should be instituted within a fixed time frame.*"

94 The two specialised units, the ITU and the D'Oliveira unit, helped to pioneer the approach of prosecution led investigations in South Africa, with prosecutors and investigators working together as teams under one roof, with proven success. As will be seen below, such a specialised approach is desperately needed in relation to the TRC cases, but the government has ignored all pleas in recent years to adopt this model, resulting in the stagnation of most of the cases. A request to the Ministry of Justice to establish a dedicated court to focus on the TRC cases has also fallen on deaf ears.

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Post TRC developments

95 According to former TRC commissioners Adv Dumisa Ntsebeza SC (**Ntsebeza**) and Yasmin Sooka (**Sooka**), in October 1998, the TRC prepared a letter addressed to then National Director of Public Prosecutions, Bulelani Ngcuka (**Ngcuka**), which was accompanied by a list of cases which the Commission asked the NPA to investigate further with a view to prosecution. It is likely that the letter and list were transmitted to the NDPP on 27 or 28 October 1998, which was the date of the last full meeting of the Commission before it ceased its official activities. Unfortunately, a copy of the aforesaid letter and list cannot be located, but the NPA may have this correspondence on record. The confirmatory affidavits of Ntsebeza SC and Sooka are annexed hereto marked **FA6** and **FA7** respectively.

96 According to Ackermann, in 1998 the investigation dockets held by the D'Oliveira unit were transferred to the NPA.

96.1 In terms of a directive issued in 1999 by the then NDPP, the TRC related cases were transferred from the then Directorate of Special Operations (**DSO**), and from the various offices of the Directors of Public Prosecutions (**DPPs**) and the SAPS to the office of the NDPP.

96.2 A copy of Ackermann's affidavit dated 7 May 2015 (filed in support of Thembi Nkadimeng's application to compel a prosecutorial decision in the case of the murder of her sister, Nokuthula Simelane), is annexed hereto marked **FA8**. This application was brought in *Nkadimeng v NDPP and Others,* Gauteng Division under case no 35554/2015 (**Nkadimeng 2**). There was an earlier

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application in which Thembi Nkadimeng was the lead applicant, which will be dealt with below.

97 In early 1999, a working group called the Human Rights Investigative Unit (**HRIU**) was established within the NPA by the then NDPP, Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The part-time head of the Unit was Adv Vincent Saldanha, and his deputy was former prosecutor, Adv Brink Ferreira. It was mandated to review, investigate and prosecute TRC cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty.

98 During February 1999 a meeting took place between the TRC, represented by Commissioners Sooka and Ntsebeza, and the NPA. At this meeting, NDPP Bulelani Ngcuka introduced Adv Saldanha who had been appointed to lead the HRIU. The meeting discussed the process for identifying potential cases for prosecution.

99 On 8 or 9 March 1999, Sooka met with Adv Saldanha to discuss the report prepared by the TRC dated 7 March 1999 titled "Report for the Office of the National Director of Public Prosecutions," a copy of which is annexed hereto marked **FA9**.

99.1 This report indicated that the Commission had "*begun a process of establishing mechanisms for identifying potential cases.*" It added that the TRC had "*identified a range of categories and/ or issues around which we believe prosecutions can be considered*" and that there should be "*discussion around these categories to determine viability as well as prioritisation.*"

99.2 The report proposed categories and the types of gross human rights violations that should be investigated, including:

99.2.1 Torture;

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99.2.2 Post-Caprivi hit squads;

99.2.3 Security force cover-ups;

99.2.4 Unlawful destruction of documents;

99.2.5 Gun-running;

99.2.6 Target identification and assassinations;

99.2.7 Cross-border raids;

99.2.8 Recipients of section 30 notices and persons who were the subject of section 29 investigative enquiries; and

99.2.9 Amnesty applicants who were denied amnesty.

99.3 The report also referred to cases identified by regional offices and attached preliminary work-in-progress lists from the KwaZulu Natal, Eastern Cape and Western Cape regions, copies of which are annexed here to marked **FA10**, **FA11** and **FA12** respectively.

100 On 11 March 1999, Sooka sent a letter to Adv Saldanha seeking feedback on the report "*regarding potential prosecutions*" and undertaking to take steps to procure the information he requested. A copy of this letter is annexed hereto marked **FA13**. The TRC commenced referring cases for potential prosecution to the NPA and also alerted them to sources of possible evidence in relation to the crimes.

101 The HRIU continued operations until 2000, however it instituted no prosecutions. In 2000, the dockets held by the HRIU were transferred to the DSO, more widely known as the Scorpions. A working group was established within the DSO to handle

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the TRC cases known as the Special National Projects Unit (**SNPU**), which was headed by Macadam.

102 The NPA, per Adv CB Ferreira, addressed a letter dated 31 August 2000 (but date stamped 11 September 2000) to the TRC in relation to the cases that had been referred for further investigation. We are not in possession of this letter. However, the TRC's legal adviser and evidence leader, Adv PC Prior responded by way of an undated letter (presumably in September 2000) titled "*Human Rights Files and other Relevant Records*". In this letter Adv Prior acknowledged receipt of the NPA's letter and indicated that the TRC would respond in due course. Attached to Adv Prior's letter was a list of 226 TRC cases in table format. This list appears to have been compiled from the TRC Amnesty database. A copy of the letter and table are annexed hereto marked **FA14**.

103 Notwithstanding the above evidence confirming that various lists were handed over to the NPA by the TRC, on 17 September 2024, Adv Rodney de Kock, the Deputy NDPP, stated before a 'TRC matters update meeting' of the Justice and Constitutional Development Portfolio Committee that the NPA had gone through all available TRC information but stressed that no list of cases of perpetrators were referred to the NPA. A copy of the Parliamentary Monitoring Group summary of this meeting is annexed hereto marked **FA15**.

104 It appeared that the NPA devoted few resources to the SNPU. According to the author, Ole Bubenzer (**Bubenzer**) in his 2009 book, *Post-TRC Prosecutions in South Africa*, this was because the NPA was concerned that some cases would have to be withdrawn if amnesties were granted, since at that time the Amnesty Committee was still concluding its work. A copy of Bubenzer's confirmatory affidavit

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is annexed hereto marked **FA16**. A copy of Bubenzer's book can be supplied on request.

105 However, according to Bubenzer, there were many cases in which amnesty had already been denied or not applied for, such as the case against former SAP General Izak Johannes "Krappies" Engelbrecht, in which an indictment had apparently been prepared by the D'Oliveira Unit. In 2016, the SAPS responded to an access to information request for a copy of the Engelbrecht docket stating that "*it could not be found*". A copy of the request is annexed hereto marked **FA17**. By 1999 the D'Oliveira Unit had reportedly already prepared about 20 charge sheets. None of these charge sheets would see the light of day in a court.

106 The SNPU operated until 2003, but like the HRIU, it too instituted no prosecutions. On 24 March 2003, the Priority Crimes Litigation Unit (**PCLU**) was created within the NPA by Presidential Proclamation. Under the same proclamation, Ackermann was appointed to head the unit. Macadam was transferred from the DSO to become the Deputy Director at the PLCU. Part of the PCLU's mandate was to deal with the TRC cases.

107 In May 2003, NDPP Ngcuka decided that all TRC-related cases in which amnesty had not been granted were '*priority crimes*' in terms of the PCLU proclamation. According to Ackermann, this resulted in more than 400 investigation dockets being transferred to the PCLU. Official duties commenced during July 2003.

108 'According to the NPA's Annual report 2002/2003, the PCLU instituted an audit of all available cases and registered some 459 cases that were handed over from the TRC, the D'Oliveira Unit and DPP offices. About 160 cases were excluded from

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further consideration. Sixteen cases were prioritised for prosecution, of which three were prepared almost immediately for indictment.

109 Macadam, in his affidavit filed in the Rodrigues stay of prosecution case, recorded the steps he and Ackermann took to identify which of the TRC cases required attention:

109.1 All the DPPs were visited and invited to hand over TRC cases which they were not in a position to finalise themselves.

109.2 A meeting was held with the Divisional Head of the Detective Services of the SAPS who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

109.3 Two former TRC researchers were appointed to trawl the TRC archives in order to identify cases warranting attention.

109.4 Interviews were conducted with former members of the TRC and the D'Oliveira unit.

109.5 Ackermann and Macadam also entertained requests for investigations from victims and other members of civil society. This resulted in other cases being brought to their attention, including the Ahmed Timol matter.

110 The NDPP reported in a document titled "*About PCLU*" released on 23 March 2003 that the NPA is attending to the cases of some 500 persons who had been reported missing by the TRC. A copy of this document is annexed hereto marked **FA18**. A small Task Team evaluated the TRC Report to identify cases for investigation.

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According to the NDPP's report approximately 150 cases were identified for immediate investigation.

111 However, before the PCLU could get going, the political interference intervened which prevented the unit from carrying out its mandate in respect of the TRC cases. The few cases the staff managed to get off the ground were the ones that had been previously investigated with largely complete dockets. As will be set out below it became difficult, if not impossible, for the unit to build new cases.

Lack of delivery

112 The NPA has been in possession of various lists of TRC cases from 1998. In 2003, the TRC cases were declared priority crimes by the then NDPP. Accordingly, it may be asked what the NPA and SAPS have delivered in the last 20 to 25 years. The record is a pitiful one.

113 In order not to unduly burden these papers the correspondence and underlying documentation referred to in this section have not been annexed but can be supplied on request.

114 Bubenzer noted that while "*the D'Oliveira Unit of the 1990s constituted a well-equipped team of experienced prosecutors and investigators with strong political support, support for TRC-related prosecutions after 1998 declined drastically.*" Indeed, as will be seen below not only was political support withdrawn and the PCLU denied investigators, but withering political interference was to obstruct the cases from proceeding.

115 We are only aware of the following post-TRC developments in respect of matters that have been launched or concluded in court:

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115.1 *S v Khwezi Ngoma and Others*, which involved four APLA cadres who attacked the Willowvale police station in 1994 resulting in the death of a policeman. The accused did not apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges, but it was rejected, and they entered into plea agreements and received suspended sentences.

115.2 In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism under the Internal Security Act entered into a plea agreement and was given a wholly suspended sentence.

115.3 In 2004, former SB officers Gideon Nieuwoudt, Johannes Martin van Zyl, and Johannes Koole were charged with the 1985 kidnapping and murder of three leading anti-apartheid activists, known as the PEBCO 3. This was the first and only case that the PCLU brought in respect of perpetrators who had been denied amnesty.

115.3.1 Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some five years because of the failure or refusal of the DOJ to file answering papers. Nieuwoudt died in August 2005.

115.3.2 In 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of Van Zyl. Charges were then provisionally withdrawn against Van Zyl and Koole. Inexplicably, the DOJ never convened an Amnesty Committee and the NPA

never reinstated the cases against Van Zyl and Koole, who have both since died.

115.3.3 To date no steps have been taken against the surviving suspects, notwithstanding the urging of family members over many years. Only two remain alive, former Vlakplaas members Gerhardus Cornelius Beeslaar, who is nearly 87 years old and Joseph Tshepo Mamasela who is in his 70s.

115.4 In 2005, Buyile Roni Blani, an ANC supporter, who had been charged in 1985 for his role in the mob killing of two people, but who had fled the country, entered into a plea and sentence agreement and was sentenced to five years imprisonment, four of which were suspended.

115.5 *S v Aron Tyani & Another*, which related to the murder of Stembele Zokwe, an MK cadre, in 1988 by the Transkei Security Police. The accused were convicted and sentenced to terms of imprisonment in 2005.

115.6 During 2007, and in defiance of political instructions, the PCLU went ahead with an attempted murder case against former Police Minister, Adriaan Vlok, former Commissioner of Police, General Johann van der Merwe, Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden for the 1989 poisoning of Rev. Frank Chikane. On 17 August 2007, this resulted in a plea and sentence agreement being confirmed with wholly suspended sentences. This was one of the factors that precipitated the suspension of the then NDPP, Adv Vusumzi Patrick Pikoli (**Pikoli**), on 23 September 2007, as well as the removal of Ackermann from involvement in the TRC cases.

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115.7 In 2015, following the filing of a High Court application by Thembi Nkadimeng to compel a prosecutorial decision in *Nkadimeng 2*, an indictment was issued in 2016 against four former SB members for the kidnapping and the murder of MK operative, Nokuthula Simelane. Two of the accused have since died and one, Willem Helm Johannes Coetzee, claims to be mentally unfit to stand trial. Coetzee's trialability inquiry has been ongoing for more than two years and holding up the trial, some eight years after the indictment was issued.

115.8 Between 2017 and 2023 five apartheid-era inquests were reopened, four of which were at the instance and pressing of the families. These were the inquests into the deaths in SB detention of Ahmed Timol, Neil Aggett, Hoosen Haffejee and Imam Haron. In all these cases, the families' legal representatives had to threaten the NPA and/or the Minister of Justice with legal action in order to get the inquests reopened. Correspondence in this regard can be supplied on request. The inquest courts in all four cases recommended that the NPA pursue perjury and other charges against several former SB officers. To date, with the exception of the late Jao Rodrigues, none have been charged.

115.9 Following the reopened inquest into the death of Ahmed Timol in 2017, which had been spearheaded by the Timol family and their representatives, former police officer Jao Rodrigues was charged with murder in 2018. Rodrigues died in September 2021 before he could stand trial.

115.10 In 2020 family members of the COSAS 4 filed an application with the Krugersdorp Magistrate's Court seeking an order for the disinterment and

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forensic examination of the bodies. This prompted the NPA to act and in 2021 kidnapping and murder charges were preferred against two former SB and Vlakplaas members.

115.10.1 Crimes against humanity charges were subsequently added to the indictment, the very first time that such charges had been pursued in South Africa. Various challenges, as well Stalingrad type parallel civil litigation launched by the accused, have delayed the start of the trial. In 2022, at the prompting and intervention by the families, the High Court ordered the SAPS to pay the reasonable legal costs of accused no. 2, Christiaan Rorich.

115.10.2 The application by accused no. 1, Tlhomedi Ephrahim Mfalapitsa, to overturn the refusal to grant him amnesty was dismissed by Judge Stuart Wilson on 11 November 2024. Between 18 and 21 November 2024 the trial court heard the objection of the accused to the crimes against humanity charges. Judgment was reserved and the trial was postponed to 14 April 2025.

115.11 In July 2023 the inquest proceedings into the 1982 death in detention of Ernest Moabi Dipale at John Vorster Square were concluded. The court found that Dipale did not commit suicide, but that the SB was responsible for his death. The court identified SB officers Nicholas Johannes Deetlefs and Joe Mamasela as key suspects whose involvement should be further investigated. Deetlefs died in September 2023.

115.12 In August 2022 murder charges were preferred against three former police officers, Johan Marais, Leon Louis Van Den Berg and Abram Hercules

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Engelbrecht, for the 1987 murder of student activist, Caiphus Nyoka. This followed a long struggle by the Nyoka family for justice.

115.12.1 On 9 October 2020, the family's attorneys, Webber Wentzel, placed the Deputy NDPP and the Head of the SAPS' Directorate for Priority Crimes Investigation (**DPCI**) on terms, demanding that the DPCI finalise its investigations and the NPA make a prosecutorial decision, failing which the High Court would be approached for an appropriate order.

115.12.2 A fourth police officer, Pieter Egbert Stander, was indicted in 2024. One of the accused, Johan Marais, pleaded guilty on 12 November 2024. The remaining three co-accused appeared before the Gauteng High Court sitting at Benoni at the start of the trial on 18 November 2024. The trial was postponed to 2 December 2024 when one of the accused terminated his counsel's brief.

115.12.3 On 5 December 2024, Judge Mahomed Ismail ruled that evidence led at the 1988 inquest (GO 112/1988) was "provisionally admissible", holding that not allowing the state to lead that evidence would be "tantamount to suppressing crucial and vital evidence."

115.12.4 The trial was postponed to 12 May 2025.

115.13 In November 2023, former "A" team gang member Wesley Madonsela was sentenced by the Durban Regional Court to 10 years imprisonment for

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murdering 17-year-old United Democratic Front activist Siphelele Nxumalo in 1989.

115.14 In relation to the 1987 enforced disappearances of Ntombikayise Kubheka and Musawakhe "Sbho" Phewa an inquest was opened during 2022 but did not proceed; and in November 2023 the DPP KwaZulu-Natal decided to pursue a prosecution of four persons: Hendrik Johannes Petrus Botha, Salmon Johannes Gerhardus Du Preez, Martinus Dawid Ras Jnr and Jakob Albert Coetzer. On 12 November 2024, Lawrence Gerald Wasserman was also charged with murder and all five accused appeared before the Umlazi Magistrate's Court, when the matter was postponed 28 January 2025. Four days later, it was reported that Wasserman had died while traveling on a plane between Durban and Johannesburg on 16 November 2024.

115.15 In January 2024, the NPA indicted four former SB officers for the 1985 murder of Jameson Ngoloyi Mngomezulu. The officers indicted are: Gerhardus Stephanus Schoon, Paul Jacobus van Dyk, Frederick Johannes Louw and Douw Gerbrandt Willemse. No further developments have been released by the NPA, and this case also appears to have stalled.

115.16 In May 2024, then Justice Minister, Ronald Lamola, authorised the reopening of the inquests into the deaths of Chief Albert Luthuli, Griffiths Mxenge and Booi Mantyi, but there appear to be no further developments in these matters. A statement released by the ANC dated 19 October 2024

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appeared to indicate that a judge had been appointed to preside over the Mxenge inquest before the KwaZulu Natal High Court.

115.17 In 2023, the NPA indicated to the legal representatives for the families and survivors of the 1993 Highgate Massacre that an inquest will be held. The inquest is set down for hearing from 27 January to 7 February 2025 at the High Court in East London.

115.18 On 1 March 2024, the NPA advised the lawyers for the Turner family that they had requested the Minister of Justice to reopen the inquest into the 1978 murder of Dr Rick Turner in Durban. However, since then all efforts to secure dates for the inquest and a progress report on the investigation have proved fruitless.

115.19 On 7 November 2024, the NPA confirmed in writing that the Minister of Justice had approved the reopening of the inquest into the death of Ramatua Nicholas "Boiki" Tlhapi. In March 1986, Tlhapi, an activist from Ikageng near Potchefstroom, disappeared from the Jouberton police station, while in a seriously injured state and was never seen again. On 13 December 2024, the Minister of Justice requested the Judge President of the North-West Division to designate a judge to preside over the re-opened inquest.

116 The record of delivery is dismal. It amounts to five concluded reopened inquests (between 2017 and 2023), four plea and sentence agreements (all occurred between 16 and 21 years ago) and two concluded criminal trials, one some 18 years ago of Transkei police officials, and the other in 2023 resulting in the conviction and imprisonment of a gang member. There are only five criminal cases before the

courts and all have been the subject of delays, in one matter, for some eight years. In the Nyoka matter, one of the accused has entered a guilty plea. The NPA has released different figures in relation to pending court cases and closed cases, but to date it has not disclosed the names of these cases.

117 According to a presentation made by the NPA to the Portfolio Committee on Justice and Constitutional Development on 17 September 2024, 30 matters had been finalised, but the NPA only disclosed the finalised Aggett, Dipale, Haffejee and Haron inquests. It also made reference to the finalised inquest of Zama Sokhulu, without providing any details.

117.1 In relation to 'matters on the criminal roll' the presentation referred to the COSAS 4, Nokuthula Simelane and Nyoka cases, as well as *S v Botha and Others* (connected to the Khubeka case) and *S v Schoon and Others* (connected to the Mngomezulu case) which were both remanded to November 2024 and described cryptically as "state attorney - legal representation". Under the heading of "Indictments" the NPA refers to three unnamed "*indictments to be served pending verification of addresses of perpetrators*".

117.2 Under the heading 'Notable Inquests' 15 matters are mentioned, but most appear to be stalled. In six cases, judges have apparently not been appointed, five are described as "*shortage of capacity*". One (Cradock 4) was described as a "*challenge with representation*". Only the Mthunsi Njakazi inquest had commenced, while the Oupa Madondo and Highgate Hotel cases were scheduled for November 2024 and January 2025 respectively. The presentation also claimed that memoranda for 10

LC
NGI

unnamed inquests were underway. Slides 27 to 32 of this presentation are annexed hereto marked **FA19**.

118 In comparison, other similarly placed countries where truth commissions recommended prosecutions have achieved considerably more, such as the case of Chile:

118.1 Since 1998, Chile's courts have resolved hundreds of cases of dictatorship-era killings, disappearances, and torture, and sent dozens of perpetrators to jail.

118.2 As of July 2023, Chile's Supreme Court had handed down verdicts in more than 530 cases for dictatorship-era crimes against humanity. Another 2,000 cases were still under investigation or awaiting resolution before lower courts.

118.3 Some 234 former regime agents have been imprisoned for their crimes, with dozens more – 57 in 2023 alone – escaping justice only through the '*biological impunity*' provided by death.

118.4 Between October 2022 and October 2023, 67 Supreme Court criminal verdicts were handed down, including the conviction and sentencing to jail of 59 former secret police agents. A copy of the article: Cath Collins, *Chile's 'Pinochet Cases' at 25: an ongoing sea change*, Justiceinfo.net, 16 October 2023 is annexed hereto marked **FA20**.

119 In Argentina, as at the end of 2021, the Office of the Prosecutor for Crimes Against Humanity had investigated 3,525 people for crimes against humanity, of whom 1,044 were convicted (as part of 264 sentences handed down). In Peru, following

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the winding up of the truth commission, as at the end of 2019, prosecutors had secured 44 convictions for conflict related crimes. Source materials for these examples can be supplied on request.

120 The main reason for South Africa's woeful performance has been the political interference that effectively suppressed the pursuit of apartheid-era crimes within a few years of the closure of the TRC. The history of the political interference is set out below.

THE POLITICAL INTERFERENCE

121 In May 2021 during an interview in an *Al Jazeera* documentary titled "*My Father Died For This*", ANC legal adviser Krish Naidoo claimed that the Cradock Four case, as with the other TRC cases, "*simply fell through the cracks*." His statement was deeply insulting to our intelligence. A copy of this documentary can be made available on request.

122 In fact, the TRC cases were deliberately suppressed following a plan or arrangement hatched at the highest levels of government and across multiple departments. This is the real explanation for the delay. The interference stands as a deep betrayal of those who laid down their lives for freedom in South Africa, including my father and other fallen comrades.

123 In this section of the affidavit, unless otherwise stated, all factual references are drawn from the affidavits of Advocates Christopher Macadam (**FA5**), Anton Ackermann (**FA8**) and Vusumzi (Vusi) Pikoli (**FA22**).

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NGI

Opening the door to political interference

124 On 12 March 2003, the TRC Report's final volume (vol 6) was released. On 15 April 2003, President Mbeki made a statement to the National Houses of Parliament and the Nation on the *Occasion of the Tabling of the Report of the TRC* a copy of which is annexed hereto marked **FA21**. In relation to criminal accountability and the TRC's follow-up process President Mbeki stated:

> "Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.
>
> The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?
>
> Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society.
>
> Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be. This reality cannot be avoided.
>
> Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

LC
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> We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.
>
> However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.
>
> This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts. ...
>
> This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.
>
> Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.
>
> Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard."

125 According to Adv Pikoli, who was the NDPP between February 2005 and September 2007, what followed Mbeki's speech in relation to the TRC cases "*was anything but the 'normal legal processes.*" A copy of Pikoli's affidavit that was filed in *Nkadimeng 2* (TN7 at pp 170 – 216) is annexed hereto marked **FA22**.

126 It appears that the seeds of the political interference were laid in the deliberations that led to the strategies that are reflected in Mbeki's speech.

126.1 While Mbeki appeared to disavow another amnesty because of its constitutional implications, he nonetheless made it clear that certain arrangements would have to be made to accommodate the many perpetrators who did not take part in the TRC process.

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126.2 He indicated that while the NPA would be permitted to continue with its normal work, it would nonetheless be required to work with "*our intelligence agencies*" to enable those who still wish to speak the truth "*to enter into arrangements that are standard in the normal execution of justice*".

126.3 Mbeki stressed that individuals who still wished to seek justice or take up any human rights violation grievance could approach the courts. He noted the relevant departments were examining the modalities as well as whether any fresh legislation was needed.

127 Mbeki signalled that in relation to the TRC cases it was not going to be business as usual. Unlike other cases involving serious crimes such as murder, the TRC cases were going to be treated differently. Perpetrators in these cases would be offered some form of leniency or alternatives to criminal prosecution. Family members could play a role in these "*legal arrangements*" and if still aggrieved could approach the courts, presumably to pursue private prosecutions or some form of civil litigation against the perpetrators.

128 Mbeki was articulating government policy that effectively said that the pursuit of justice in the TRC cases was not to be prioritised and that special arrangements were going to be put into place. His reference to the involvement of the "*intelligence agencies*" was a portend of what was to follow, in which such agencies came to impose their will on prosecutorial decisions.

Closing down of the TRC Cases

129 Following Mbeki's speech, those wielding power and influence wasted little time in closing down the TRC Cases. Within a few weeks of the speech, attempts by PCLU

prosecutors to commence investigations were blocked when they were refused investigative support by both the DSO and SAPS.

130 As mentioned above, the PCLU was engaged in identifying key TRC cases for further investigation, and they were entertaining requests from family members. One of the requests made to Macadam was from Imtiaz Cajee, nephew of Ahmed Timol who died in security detention in 1971. On 5 May 2003, Macadam sent a letter to Andrew Leask, the Chief Investigating Officer at the DSO (**Leask**) asking him to investigate the Timol case. A copy of this letter is attached to Macadam's aforesaid affidavit (**FA5**) as annex RCM1 (at p807).

131 On 15 May 2003, Macadam submitted a report to the NDPP, the Head of the DSO and the head of DSO operations setting out the TRC cases which had been identified for investigation, which included the Timol case. A copy of this report is attached to Macadam's affidavit (**FA5**) as annex RCM2 (at p809).

131.1 According to Macadam the following cases were being prepared for prosecution:

131.1.1 The murder of four policemen in the Motherwell Bombing. The targets in this investigation were members of the Port Elizabeth SB and the Vlakplaas Unit, including Major General Nick van Rensburg.

131.1.2 The prosecution of Major General Nick van Rensburg for ordering the killing of askari Brian Ngqulunga.

131.1.3 The prosecution of the SB members responsible for kidnapping the PEBCO 3 from the Port Elizabeth Airport in 1985.

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131.1.4 The prosecution of AZAPO leader George Wauchope for murder and other charges.

131.1.5 The prosecution of Phillip Powell for possessing hand grenades and other illegal weapons in April 1994.

131.1.6 The prosecution of JM Ngcobo and others for the concealment and possession of an arms cache at the Nqutu Bunker in May 1999.

131.1.7 The prosecution of the CCB members responsible for the bombing of the Early Learning Centre in Athlone.

131.2 The next category of cases was titled "POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE" and included:

131.2.1 The murder of the PEBCO 3. It was noted that a kidnapping prosecution could encourage one or more suspects to speak about the murders for a "lesser sentence".

131.2.2 The murder of the Cradock Four. It was noted that the same suspects behind these murders were also involved in the Motherwell and PEBCO 3 killings, and that prosecutions in those killings could encourage suspects to come forward in the Cradock Four case in order to secure a "lesser sentence".

131.3 The next category of cases was titled "NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES" and included:

131.3.1 The murder of the COSAS 4.

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131.3.2 The murder of askari Adriano 'Strongman' Bambo, who was allegedly murdered by the SB to prevent him disclosing details about the murder of Nokuthula Simelane and others.

131.3.3 The murder of a detainee on the East Rand by Willem Helm Johannes 'Timol' Coetzee.

131.3.4 The murder of askari Dan Mabolo.

131.3.5 Allegations by an IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988.

131.3.6 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit.

131.3.7 Six to eight dockets linking the AWB to pre-election bombings previously dealt with by Adv Fick.

131.4 The next category of cases was titled "HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE" and included:

131.4.1 The murder of Victoria Mxenge.

131.4.2 The kidnapping, torture and murder of Ntombikayise Khubeka.

131.4.3 The kidnapping, torture and murder of Nokuthula Simelane

131.4.4 The decision by the DPP (Pretoria) not to prosecute SAP General Krappies Engelbrecht.

131.4.5 The un-investigated allegations against SAP General Bassie Smit.

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131.4.6 The Ciskei coup d'etat.

131.4.7 The Transkei coup d'etat.

131.4.8 The pre-election train violence in Gauteng.

131.4.9 The murder of Reggie Hadebe.

131.4.10 The murder of Dulcie September.

131.4.11 The refusal of amnesty to 37 high ranking ANC officials.

131.4.12 The decision by the DPP KwaZulu Natal not to prosecute IFP hit squads.

131.5 Other categories were titled "*CASES IN THE PROCESS OF BEING CLOSED*", "ASSISTANCE TO OTHER AGENCIES" and "*REPARATIONS RELATED ACTIVITIES*". Another category dealt with cases that had been put on hold pending the appeal in the Basson case in relation to jurisdiction for conspiracy to commit crimes outside South Africa. These cases included:

131.5.1 The murder of Anton Lubowski.

131.5.2 The Lesotho Raid (also known as the Maseru Raid).

131.5.3 The Botswana Raid (also known as the Gaborone Raid).

131.5.4 The Swaziland Raid.

131.6 Macadam concluded his letter with certain "Policy Considerations":

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131.6.1 Prosecutions not to be conducted on a piece meal basis except where special circumstances demand (e.g. witness on point of death, accused about to leave South Africa or engaged in current criminal activities).

131.6.2 Once all the cases earmarked for prosecution have been investigated, a presentation will be given to the NDPP in order for him to confirm the prosecution strategy.

131.6.3 Thereafter prosecutions will be instituted. After convictions have been obtained attention will be given to cases which currently have evidence since convictions may act as incentive for perpetrators to come forward.

132 If only a fraction of the cases listed in Macadam's report had been resolved in the early 2000s it would have brought significant closure for the concerned families and given considerable impetus for the finalisation of the balance of cases.

133 The minutes of the Justice Portfolio Committee meeting on 10 June 2003 in respect of the NPA reflected:

> "Some cases emerging from the Truth and Reconciliation Commission are ready to proceed. In others the NPA awaits rulings from the Supreme Court of Appeal and from the reconvened TRC Amnesty Committee. **The Chair interjected to ask if any legislative change was needed to deal with TRC cases where immunity from prosecution was to be offered**. Mr Ngcuka replied that he could see no need for a change in legislation." (emphasis added)

134 At the DSO, it was Special Director Adv MG 'Geoph' Ledwaba (**Ledwaba**) who made decisions on the opening of new investigations. Accordingly, Ackermann and Macadam met with Ledwaba to ask the DSO to conduct investigations referred to in

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the aforesaid report. Ledwaba was firm in his refusal to take on the TRC cases. In his affidavit, Macadam noted the following about that meeting:

> "The meeting was unpleasant as Ledwaba **made it clear in no uncertain terms that the DSO would not investigate any TRC matters** and that these should all be referred to SAPS." (emphasis added)

135 A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is annexed to Macadam's affidavit (**FA5**) as annex RCM3 (at p814). In this letter he instructed Leask as follows:

> "TRC cases
> I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv Tongwane must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators, and you are accordingly authorized to conduct the necessary handovers."

136 This refusal of the DSO to investigate the TRC cases was a remarkable decision, given that the DSO had previously been seized with the TRC cases and just weeks earlier the NDPP had declared the TRC cases to be "*priority crimes*".

The President must decide

137 It is reflected in Macadam's affidavit that he and Ackermann then met with Commissioner Johannes De Beer, the Divisional Head of the Detective Service of the SAPS (**De Beer**) and requested the SAPS to take over the investigations.

137.1 On 26 September 2003, De Beer replied to Ackermann informing him that the request had been discussed with the National Commissioner of the

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SAPS, Jacob "Jackie" Sello Selebi (**Selebi**). In his letter De Beer advised that the SAPS would not provide investigators for the TRC cases.

137.2 He indicated that the investigation of the TRC matters was a DSO responsibility and the NDPP would need to approach the President for a decision as to which agency should conduct the investigations. A copy of this letter is attached to Macadam's affidavit (**FA5**) as annex RCM4 (at p816).

137.3 According to Macadam, NDPP Bulelani Ngcuka never approached the President.

138 De Beer explained as follows in his letter:

> "I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner, It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. **Our understanding was that this referral was politically inspired**. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).
>
> From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: "In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard. You are aware of the fact that the capacity created for the D 'Oliveira Committee is presently with the DSO.
>
> In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

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> **If the President indicates that the South African Police Service should be involved in the investigations, the Instruction should be obtained in writing.** Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues.
>
> You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary." (emphasis added)

139 It is notable that the SAPS regarded the TRC cases as a political issue. It is also noteworthy that the only state entities authorised to conduct official criminal investigations in South Africa both refused to touch the TRC cases. It is highly unlikely that their decisions were spontaneous or mere coincidences. It is apparent that by May 2003 both the SAPS and the NPA were reluctant to take on the TRC cases, and in all probability had been told not to do so from a political level.

140 The fact that the NPA was told to contact the President reflected that the question of investigating the TRC cases was now a purely political one, and a sensitive one at that. It appeared that only the head of state could make that decision, regardless of what the law and Constitution said about investigative authority.

141 It is remarkable that NDPP Ngcuka did not contact the President for a decision on this question. The failure to do so probably suggests that approaching the President was seen as a futile exercise.

No investigations

142 Thereafter Ackermann and Macadam made a last-ditch attempt to persuade Special Director Ledwaba at the DSO to reconsider his decision not to investigate the TRC cases. Ackermann sent Ledwaba a letter (styled as an "Internal Memorandum") dated 11 November 2003 appealing him to appoint investigating officers. It was

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NGI

pointed out in the letter that "*if the DSO did not provide investigators the PCLU would not be able to deliver on its mandate*." Both the NDPP and Head of the DSO were copied on the letter, a copy of which is attached to Macadam's affidavit (**FA5**) as annex RCM5 (at p818). This letter is reproduced below:

"1. In the light of current developments, I am constrained to document the history of the above saga.

i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition, Advocate Sonn gave the President a full briefing on the matter.

ii) In 2002 the SNPU was established in order to investigate the cases.

iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP.

iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC, cases identified for prosecution.

My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.

v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.

vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)

vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate

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experience to the DSO in order to capacitate it to conduct these investigations.

viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.

ix) On 3 November 2003 you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.

x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.

xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations.

You informed him:

a) That you are not prepared to sign any declarations

b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases.

c) That during the course of 10 November 2003 another Investigator will be appointed.

d) The President should not be approached to involve SAPS.

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted.

There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreplaceable damage.

Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of Section 28(1)(b). This chapter in our country's history must be closed without further delay."

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143 Ackermann's heartfelt plea fell on deaf ears. Ledwaba was not moved to act, even though he was advised that the NPA was under local and international pressure, and cases were prescribing. Ackermann's warning that the failure to proceed with the TRC cases would bring the NPA into disrepute, and do irreparable harm to its image, was precisely what happened.

144 The DSO persisted in its refusal to appoint investigators, as did the SAPS. According to Macadam this effectively brought an end to the TRC cases as it meant that no new investigations of the TRC matters could be opened.

145 The TRC cases were effectively closed down before the end of 2003, before the PCLU could commence real case work. The few cases taken forward subsequently were those in which investigation dockets had already been completed.

146 On 25 February 2004 Macadam wrote to Imtiaz Cajee, nephew of Timol, advising him of "*negative results*" of the investigation that had purportedly been launched, a copy of which is annexed here to marked **FA23** (also annexed to Macadam's affidavit as RCM9 at p834).

146.1 Macadam did not disclose to Cajee that the investigations into the Timol case and the other TRC cases were blocked before they could even start. The only 'investigation' carried out was the canvassing of an aspect with the late Ivor Powell, a Cape Town based journalist. This singular activity did not constitute an investigation.

146.2 Even if only the most basic investigation had been carried out, key suspects who were still alive could have been held to account. The lead SB

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interrogators who tortured and murdered Timol, Captains JZ Van Niekerk and JH Gloy died on 31 October 2006 and 30 July 2012 respectively; while Maj Gen CA Buys, (Head of the SAP CID) who led the cover-up, died on 25 February 2007.

146.3 The NPA had some nine years to act before the last key suspect died. Not only did it not take any action but on 29 November 2006, the NPA in an internal report, titled: "*Report of the Progress made by the Task Team on TRC Cases*", attached to Macadam's (**FA5**) affidavit as annex RCM10 (at p835), confirmed that it had closed the Timol case:

> "The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.
>
> The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the deceased had definitely been murdered and all other crimes had prescribed.
>
> The matter was therefore closed."

146.4 The above entry was misleading as it did not disclose that no investigation officer was ever appointed, and no other steps were taken apart from contacting the journalist. It was also misleading to suggest that "*no other evidence*" was available since there had been no investigation. In 2017, some 11 years later, the family's legal team was able to assemble sufficient evidence to persuade an Inquest Court that the SB had murdered Timol. However, by then all key perpetrators had died.

147 The refusal by both the SAPS and the DSO to investigate some of the most serious crimes committed in South Africa deeply violated their legal and constitutional obligations.

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The Amnesty Task Team

148 A Director-General's Forum chaired by Adv Pikoli, the then Director General of the DOJ, met on 23 February 2004 to consider how to give effect to the President's objectives set out in his speech the year before. Essentially this involved how to deal with the TRC cases, which Pikoli described in his affidavit, as being "*politically sensitive*" (TN7 at pp 170 – 216 in *Nkadimeng 2*). The Forum appointed a Task Team to report on a mechanism to give effect to the President's objectives. This task team was known as the "Amnesty Task Team" (**ATT**).

149 The ATT was required to:

149.1 explore options for the NPA and the intelligence agencies to accommodate persons who still wish to disclose the truth about past conflicts.

149.2 consider a further process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

149.3 advise whether legislative enactments were required.

150 The original terms of reference for the ATT (as attached to Macadam's affidavit (**FA5**) as annex RCM14 (at p863) were to consider and report on:

150.1 The criteria the NPA applies in deciding on current and impending prosecution of cases flowing from the conflict of the past.

150.2 The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflicts of the past.

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150.3 Bearing in mind the abovementioned guidelines, whether legislative enactments were required.

150.4 Whether any of the two Bills that have already been formulated can be taken forward, while taking into account the views of the intelligence agencies.

151 The names of the two bills were not disclosed but presumably one of them was the Indemnity Bill (first 2 pages at RCM13 at p861). The views of the Intelligence Agencies were also not disclosed.

152 The ATT comprised the following members:

152.1 Deon Rudman (Chairperson): DOJ

152.2 Yvonne Mabule: National Intelligence Agency (**NIA**)

152.3 Vincent Mogotloane: NIA

152.4 Gerhard Nel: NPA

152.5 Lungisa Dyosi: NPA

152.6 Ray Lalla: SAPS

152.7 Joy Rathebe: Department of Defence (**DOD**)

153 The ATT was requested to submit its report to the Director General's Forum by close of business on 1 March 2004. The ATT met on 26 February 2004 and again on 1 March 2004.

154 The undated 2004 secret report, titled "*Report: Amnesty Task Team*", which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The*

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National Director of Public Prosecutions & Others (TPD case no 32709/07 [2008] ZAGPHC 422) (**Nkadimeng 1**) as annex TN42 at p431. It is annexed hereto marked **FA24**. The report set out the ATT's mandate, background, proposals and concerns.

155 The ATT Report noted that a further amnesty would face challenges because of constitutional issues but nonetheless the team still had to find ways to accommodate those perpetrators who did not take part in the TRC process. In relation to its first task, the ATT recommended the creation of a Departmental Task Team comprising representatives from:

155.1 Department of Justice and Constitutional Development,

155.2 The Intelligence Agencies,

155.3 South African National Defence Force,

155.4 South African Police Service,

155.5 Correctional Services,

155.6 National Prosecuting Authority,

155.7 Office of the President.

156 The functions of the proposed Departmental Task Team would, *inter alia*, be the following:

156.1 Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, it must consider the advisability of the institution of such criminal proceedings and make recommendations to the NDPP.

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156.2 To consider applications received from convicted persons alleging that they had been convicted of political offences with a view to making recommendations for their parole or pardon, and in making such recommendations to consider various criteria. Aside from the TRC's amnesty criteria, other considerations included, *inter alia*:

156.2.1 Whether a prosecution "politically" reflects the aims of the TRC Act and is not in conflict with the requirements of objectivity.

156.2.2 Various humanitarian concerns.

156.2.3 Whether a prosecution could lead to conflict and traumatisation of victims.

156.2.4 The perpetrator's sensitivity to the need for restitution.

156.2.5 The degree of remorse shown by the offender and his attitude towards reconciliation.

156.2.6 The degree of indoctrination to which the offender was subjected.

156.2.7 The extent to which to which the perpetrator carried out instructions.

156.2.8 Renunciation of violence and willingness to abide by the Constitution.

156.3 The Task Team noted that their proposals have various shortcomings, including:

156.3.1 A possible negation of the constitutional rights of victims, the public at large and alleged offenders.

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156.3.2 The possibility of the institution of private prosecutions.

156.3.3 The absence of any guarantee that alleged offenders will not be prosecuted, meaning that they might be reluctant to make full disclosure.

156.3.4 Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in past conflicts.

157 According to Pikoli in his affidavit in *Nkadimeng 2,* the recommendation of the Interdepartmental Task Team for 'a two-stage process', which would have required its recommendation before the NDPP could prosecute was rejected. This was because it would have been a violation of the NDPP's prosecutorial independence enshrined in section 179 of the Constitution. Although the Task Team's role was meant to be advisory in nature it soon became apparent that the non-NPA members of the team saw their role as supervisory rather than advisory. Indeed, as will be seen below, the 'two-stage process' was reintroduced causing a crisis of conscience for Pikoli.

158 With regard to the ATT's second task, namely, to consider a further amnesty process, the team was of the view that the only way to address the concerns was to provide a further amnesty similar to that of the TRC process.

158.1 Some members argued against another amnesty, pointing out it would undermine the TRC process, while others supported a new amnesty to encourage more disclosures.

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158.2 The ATT decided not to make a recommendation on the question of another amnesty but to leave it in the hands of government.

158.3 It attached a draft Indemnity Bill to the report (as annex B) in case government decided to proceed with a further amnesty. The annex was not attached to the report in the version disclosed in *Nkadimeng 2*. However, the first 2 pages of the draft bill were attached to Macadam's affidavit (**FA5**) as RCM13 at p861. It would have provided for a rerun of the TRC's amnesty process.

159 With regard to the ATT's third task, namely, to advise on any legislative steps needed, it noted that its recommendations in relation to the first task do not require any legislation. However, it noted:

> "Should Government, however, decide on a further amnesty process ..., legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court."

160 Much of the ATT's report was accepted by government and implemented, as is evident by the 2005 amendments to the Prosecution Policy and the introduction by President Mbeki of a Special Dispensation for Political Pardons in 2007, to be discussed below.

The Secret Further Report of the Amnesty Task Team

161 The secret Further Report of the ATT was disclosed by Macadam in his affidavit (**FA5**) as annex RCM15 at p864. Perhaps more than any other document, the Further Report reveals the real intent of those behind the political interference. The

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report is undated, but it would have been generated in 2004 in the weeks or months following the submission of the ATT's first report to the Heads of Department Forum on 4 March 2004.

162 The report reveals that the Heads of Department Forum discussed the first ATT Report with members of the Task Team, "*whereafter they deliberated the Task Team's proposals and recommendations in camera*". Following these deliberations, the Heads of Department Forum indicated that they preferred the Task Team's recommendations relating to the establishment of a Departmental Task Team (referred to as Option I). However, they requested the Task Team to further consider the following aspects:

162.1 In performing its functions, the proposed Inter-departmental Task Team (**ITT**) must make use of existing structures rather than parallel structures.

162.2 Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the NDPP decides not to prosecute; and investigate the possibility and desirability of legislation, if required.

162.3 The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.

162.4 It is important that the proposed Task Team, the Inter-Ministerial Committee and the NDPP, in performing their functions and reaching decisions, should take the national interest into account.

162.5 Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court (**ICC**).

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162.6 Advise the Forum on a timeline for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

163 Perhaps most revealing was the Forum's instruction to the ATT to explore ways in which private prosecution and civil litigation could be eliminated where the NDPP decides not to prosecute, including the possibility of fresh legislation to achieve this end. This exposes the intent to come up with a means to guarantee maximum impunity for apartheid-era perpetrators.

164 The fear that victims and families could turn to the ICC, in the event that avenues for accountability in South Africa were completely closed, presented a real fear to the Forum.

165 Equally chilling was the desire of the Forum for the ITT to "*work under the direct supervision of an Inter-Ministerial Committee*".

165.1 If there was any doubt that the prosecution process in relation to the TRC cases was to be under the thumb of political overlords, it was dispelled by this requirement. This is in fact what transpired.

165.2 As will be discussed below, towards the end of 2006, the ITT was instructed that it must submit a final recommendation to a "*Committee of Directors General*" in respect of each TRC case, which in turn must advise the NDPP in respect of who to prosecute or not.

165.3 In addition, it emerged that at least by 2007, if not earlier, there was a "*Cabinet Committee on Post TRC matters*", which was a subcommittee of the Justice, Crime Prevention and Security Cluster.

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166 The proposal that all players in the process, including the NDPP, should "*take the national interest into account*" when making decisions in relation to the TRC cases was 'shorthand' for the expectation that all involved, particularly the NPA, would be expected to 'do the right thing.'

166.1 Needless to say, no attempt was made to define what the national interest meant in this context, although I am advised that the 'national interest' is not necessarily the same as the 'public interest'.

166.2 The national interest constitutes the interests of the state, usually as defined by its government. Typically, politicians invoke the 'national interest' in seeking support for a particular course of action.

166.3 The public interest on the other hand typically refers to the collective interests of a community or society, in particular when steps are taken on behalf of disadvantaged, marginalised and vulnerable people; as well as the pursuit of objectives that benefit society as a whole, such as the protection of civil liberties.

166.4 I am advised that while the national and public interest may coincide, in this instance it does not. The shielding of perpetrators of serious crimes from scrutiny and justice may have served the narrow or expedient interests of the state at that time, but it hardly served the public interests of victim communities or society more generally.

166.5 It goes without saying that the national interests, as espoused by the ATT, were also diametrically opposed to the 'interests of justice'.

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Response of the ATT

167 The ATT then met to work out how to take the Heads of Department Forum's directives forward. They consulted legal experts who advised that setting up the Departmental or ITT Team did not require legislation.

167.1 Only a Memorandum of Understanding would be needed, although all existing structures, such as the NPA, would have to "*commit themselves and give their full support and cooperation*" to the process.

167.2 It was apparent that for this to work, everybody would have to 'play the game'. As it turned out, they could count on almost everybody in all departments to 'play the game,' or at least 'look the other way'.

167.3 However, two key persons in the NPA, Pikoli and Ackermann, were not willing to bow to political instruction. The charade could not work without them playing along. As will be seen below, the former would be shown the door while the latter was sidelined.

168 According to the Further Report, the question of "*eliminating private prosecution[s] and civil litigation in cases of a no prosecution* [ ] *elicited much debate*" within the ATT.

168.1 The ATT spoke to two State Law Advisers and obtained a legal opinion from Adv JH Bruwer, which was attached to the report, although it was not attached to the copy annexed to Macadam's affidavit. There appeared to be agreement that "*legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality and the right of access to courts*".

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168.2 They also doubted that "*the motivation for such legislation would meet the requirements of section 36 (the limitations clause) of the Constitution*", which would be "*seen as a further amnesty process.*"

168.3 The ATT drew the Heads of Department Forum's attention to an article in the *Rapport* of 7 March 2004 where Archbishop Desmond Tutu was quoted as saying that those who did not receive amnesty should face prosecution and any new initiative to stop prosecutions "*would be seen as negating the amnesty process of the TRC.*"

168.4 The ATT advised that the only way to eliminate private prosecutions and civil litigation would be by way of legislation and a Constitutional amendment which "*would not be desirable.*"

168.5 It is interesting to note that in *Nkadimeng 1,* the Minister of Justice and the NPA argued that the Prosecution Policy amendments did not promote impunity because families and victims could still bring their own private prosecutions, even though they lacked investigative powers and the resources of the State. Judge Legodi, recognising the absurdity of this claim, noted in his judgment in *Nkadimeng 1* that "*crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted.*"

168.6 It is not known if the State Law Advisors and Adv Bruwer were asked to provide an opinion on the constitutionality of the proposed amendments to the Prosecution Policy, which provided for an effective back door amnesty. Archbishop Desmond Tutu filed a supporting affidavit in the legal challenge to the new policy (in *Nkadimeng 1*), where he stated that the efforts of the

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State "*represented a betrayal of all those who participated in good faith in the TRC process. It completely undermined the very basis of the South African TRC.*" An unsigned copy of the Archbishop's affidavit is annexed hereto marked **FA25**.

169 In relation to the proposed establishment of an Inter-Ministerial Committee it is recorded in the Further Report that "*the Task Team supports this proposal.*" The members of the ATT demonstrated their subservience in agreeing with the Heads of Department Forum. However, they were constrained to provide the views of the State Law Advisers who indicated that a further structure could prove cumbersome and "*might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.*"

170 The ATT cast further ignominy on itself when in response to the proposal that the "*national interest should be the paramount objective,*" it responded in servile fashion: "*the Task Team wholeheartedly agrees with this viewpoint of the Forum.*" The ATT was more than happy to open the door to the imposition of the dominant political views onto prosecutorial decisions.

171 In relation to the involvement of the ICC, the ATT relied on the advice of Adv Bruwer who concluded that it was "*not inconceivable that a complainant who is prohibited [...] from instituting a private prosecution in the national court may approach the International Criminal Court for relief.*"

172 In relation to the question of setting a timeline for the Departmental Task Team to complete its work, the ATT declined to propose a timeline but proposed that "*the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into*

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account the extent to which its objectives are achieved." Perhaps the ATT realised it should leave this decision in the hands of the office holder who was really calling the shots. In doing so, the ATT confirmed loudly and clearly that the question of the TRC cases was now firmly in the hands of those in political control.

Moratorium on investigating and prosecuting the TRC cases

173 It eventually emerged that between 2003 and 2004 an effective moratorium was placed on the investigation and prosecution of the TRC cases. When complainants such as Thembi Nkadimeng, sister of the late Nokuthula Simelane (who had been abducted, tortured and murdered by the SB) approached the PCLU they were told by prosecutors that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new 'policy' was issued, an effective moratorium on pursuing the TRC cases was in place. (In this regard see the founding affidavit of Thembi Nkadimeng filed in *Nkadimeng 2*. This affidavit is voluminous, but a copy can be supplied on request).

174 It is not known who authorised the halting of investigations, but since it involved suspending work on a large number of serious crimes, mostly involving murder, it is highly likely that the authority must have come from the very top. In addition, the heads of the NPA, DSO and SAPS must all have acquiesced in this decision, together with the cabinet ministers overseeing those departments.

175 The moratorium was confirmed in a letter from Acting NDPP, Dr MS Ramaite SC (**Ramaite**), dated 31 January 2013 to Nkadimeng, a copy of which is annexed hereto marked **FA26** in which he stated:

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> "It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases."

176 Before the imposition of the moratorium the views of the victims and families were not sought. Those most impacted by this massive suspension of the rule of law were not notified in advance or given an opportunity to make representations. They were kept in the dark, and only learned of it after the fact, when they pressed the PCLU for answers.

177 No time limit was placed on the moratorium. No announcement was made of it in any press statement, nor was it mentioned in any annual report in advance of its imposition, or indeed at the time it was imposed. As far as we are aware, no prior written authorisation was ever issued to authorise the suspension of the cases. It was apparently meant to last until the so-called guidelines were finalised, for which no date had been set. In effect, hundreds of murder cases were placed on ice indefinitely on the strength of unwritten arrangements.

178 I am advised that imposing this moratorium on the pursuit of the TRC cases was a deeply unlawful move by the authorities. There was no legal basis to single out these cases for different treatment to other serious crimes. Indeed, the abandoning of these matters pending future guidelines was particularly egregious since several of the crimes prescribed in this period (such as assault GBH) and, as pointed out by Ackermann, witnesses and suspects were dying.

179 It turned out the guidelines were amendments to the NPA's Prosecution Policy, which were only issued in December 2005. This meant that the moratorium was in place for between two and three years. As will be seen below, the issuing of the

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guidelines did not result in the reopening of investigations into the TRC cases. Indeed, the clampdown only tightened.

Direct intervention to stop prosecutions

180 NDPP Ngcuka resigned in July 2004 and Ramaite was appointed as the Acting National Director of Public Prosecutions.

181 Ackermann, in defiance of the moratorium, pursued certain cases during 2004 in which investigations had already been finalised. These were the Blani and PEBCO 3 matters referred to above.

182 Ackermann also decided to prosecute three former SB members for their role in the 1989 poisoning of Reverend Frank Chikane, the former head of the South African Council of Churches. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary.

182.1 Basson was formerly the head of South Africa's secret chemical and biological warfare project. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

182.2 According to Ackermann in his affidavit in *Nkadimeng 2* (TN8 at pp 218 – 235 at para 17) (**FA8**), on the morning of 11 November 2004, the police were on the verge of effecting the arrests of three suspects. On the same morning Ackermann received a phone call from the late Jan Wagener (**Wagener**), the attorney for the suspects. Wagener told Ackermann that he would receive a phone call from a senior official in the Ministry of Justice,

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and that he would be told that the case against his clients must be placed on hold.

182.3 Shortly thereafter Ackermann received a phone call from an official in the then Ministry of Justice. He was informed by the said official that a decision had been taken that the Chikane matter should be placed on hold pending the development of guidelines to deal with the TRC cases. Ackermann refused to follow this order and told the official that only the NDPP could give him such an instruction. The official told him that he would shortly receive a phone call from Adv Ramaite, the Acting NDPP.

182.4 A few minutes later Ramaite called Ackermann and instructed him not to proceed with the arrests. Ramaite also ordered Ackermann to immediately halt work on all TRC cases. Ackermann indicated in his affidavit that it could be safely assumed that the Acting NDPP was instructed at a political level to suspend these cases.

183 According to an interview conducted by the author Ole Bubenzer with Wagener in Pretoria on 8 May 2006 (reflected at page 130 of Bubenzer's book), when Wagener was advised that the arrests were going to be effected, he immediately intervened politically and put great pressure on the government to stop the proceedings. Wagener claimed that authorisation to suspend the arrests came from President Mbeki "*in an extraordinarily swift move*".

184 Macadam in his affidavit (**FA5**) confirmed that Ackermann advised him that a moratorium on the investigation and prosecution of the TRC cases had been put in place.

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185 All TRC related investigations and prosecutions were halted and no TRC case proceeded between November 2004 and August 2007. Another two and a half years were wasted.

Amendments to the Prosecution Policy

186 On 1 February 2005, Pikoli was appointed NDPP by the President. His appointment was for a 10-year term as contemplated in section 12(1) of the NPA Act.

187 In line with the recommendations of the ATT, guidelines were drawn up with the aim of incorporating them as amendments to the Prosecution Policy. Ackermann consulted with Gerhard Nel, senior prosecutor in the DSO, who played a leading role in formulating the proposed amendments.

188 According to Ackermann, the PCLU drew up two legal opinions assessing the constitutionality of the proposed amendments to the Prosecution Policy and submitted these to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings, Ackermann voiced his opposition to the proposed amendments.

189 Macadam shared the view that the proposed amendments were unconstitutional in that they permitted the NPA not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

190 During 2005, Ackermann again met with representatives of the family of Nokuthula Simelane who requested him to proceed with various charges against certain suspects and to pursue certain lines of inquiry. The FHR, on behalf of the Simelane family, presented the PCLU with a memorandum dated 18 August 2005 setting out

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the basis for the proposed charges. Ackermann again advised them that his hands were tied pending the new guidelines.

191 No victim, family or organisation representing their interests was consulted during the drawing up of the amendments to the Prosecution Policy. However, during an interview with the author Ole Bubenzer on 8 May 2006, Wagener, who acted for several of the perpetrators, said that representatives of the former security police were consulted informally on a very occasional basis (reflected at page 132 of Bubenzer's book).

192 Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by section 179(5) of the Constitution and section 21 of the NPA Act, amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments were largely based on the recommendations crafted by the ATT. According to the minutes of the Justice Portfolio Committee on 17 January 2006, it was Gerhard Nel who addressed the meeting on behalf of the NPA introducing the amendments to the NPA's prosecution policy.

193 The amendments were contained in Appendix A to the Prosecution Policy and were titled: "PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994" (**the Amendments** or **the Guidelines** or the **amended Prosecuting Policy**), a copy of which is annexed hereto marked **FA27**.

194 The amendments were introduced as having been formulated "*in view of*" the "*essential features*" of the response of the President on behalf of government to the

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TRC's final report to the joint sitting of Parliament on 15 April 2003. Ironically, the policy claimed that it was giving due weight to, *inter alia*:

194.1 The human rights culture which underscores the Constitution, and the status accorded to victims in terms of the TRC.

194.2 The constitutional right to life and the non-prescriptivity of the crime of murder.

194.3 The fact that the TRC's amnesty did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused.

194.4 The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

194.5 The NPA represents the community and is under an international obligation to prosecute crimes of apartheid.

194.6 The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice.

194.7 The equality provisions of the Constitution.

194.8 Government did not intend to mandate the NDPP to perpetuate the TRC amnesty process.

195 While the amendments to the policy professed to be pursuing various noble objects, including not perpetuating the TRC amnesty – the maintenance of impunity was what was intended, and is what transpired in practice.

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196 Part B of the policy set out the "*procedural arrangements*" for those wanting to make representations to the NDPP in respect of their crimes arising from conflicts of the past and which were committed before 11 May 1994. These included *inter alia*:

196.1 Representations to the NDPP must include full disclosure in relation to the crime for which the applicant seeks a decision not to prosecute.

196.2 Regional DPPs had to immediately transfer all their cases to the Office of the NDPP.

196.3 The PCLU would be assisted in the execution of its duties by a senior designated official from the following State departments:

196.3.1 The National Intelligence Agency.

196.3.2 The Detective Division of the South African Police Service.

196.3.3 The DOJ.

196.3.4 The DSO.

196.4 The NDPP must approve all decisions to investigate or prosecute or not.

196.5 The NDPP may obtain the views of any private or public person or institution, or intelligence agencies and the Commissioner of the SAPS, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

196.6 The NDPP must inform the Minister of Justice in advance of all decisions he intends taking in respect of matters relating to conflicts of the past.

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196.7 The NDPP must speak with the Minister of Justice before making public statements on any matter arising from the conflicts of the past.

196.8 All state agencies are requested not to use any information disclosed by perpetrators in these procedures in any subsequent criminal trial against such persons.

197 Part B was aimed at ensuring a tight grip on the TRC cases. The NPA's work and decisions on these matters would be under the close scrutiny of groups such as the NIA, DOJ and SAPS. The NDPP had to speak with the Minister of Justice before taking any decisions in relation to the cases or making any public statements in connection with them.

198 Part C of the policy set out the criteria that had to be applied when making decisions to prosecute cases from conflicts of the past. A decision not to prosecute could be made on the back of several factors which included:

198.1 Whether the applicant has made full disclosure relating to his crime.

198.2 Whether the crime was "*associated with a political objective committed in the course of conflicts of the past*" and was "*proportional*" to the political objective in question, which were a replica of the TRC's amnesty criteria.

198.3 The degree of the applicant's co-operation and the personal circumstances of the applicant, including:

198.3.1 whether the ill-health of or other humanitarian considerations justified non-prosecution of the case;

198.3.2 the offender's sensitivity to the need for restitution;

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198.3.3 the degree of remorse shown and his attitude towards reconciliation;

198.3.4 renunciation of violence and willingness to abide by the Constitution; and

198.3.5 degree of indoctrination to which the offender was subjected.

198.4 The extent to which prosecution or non-prosecution facilitate or undermine "*nation-building through transformation, reconciliation, development and reconstruction within and of our society*".

198.5 Whether the prosecution may lead to conflict or further traumatisation of victims.

198.6 Any further criteria, which might be deemed necessary.

199 The Part C criteria not only provided for a rerun of the TRC's amnesty criteria behind closed doors but also opened the door to practically any excuse not to prosecute. These included whether a prosecution might undermine reconciliation and whether a perpetrator was subjected to indoctrination, which was imposed on all who grew up in Apartheid South Africa. The amendments pretty much guaranteed the perpetuation of impunity, especially if the NDPP in place was willing to play along.

200 Once the amendments came into force, Ackermann again expressed his opposition to them as he felt that they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. He complained to various officials in the NPA, including the NDPP, that the

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guidelines were aimed solely at accommodating perpetrators and providing them with avenues to escape justice.

Developments post the amendments to the Prosecution Policy

201 Once the new guidelines had been issued in terms of the Prosecution Policy amendments, this should have brought an end to the so-called moratorium imposed on the TRC cases. This was not to be. The clampdown continued, with renewed vigour.

202 In the NPA Annual Report of 2005/06, Pikoli indicated that he was "*sad to report*" that "*not much has been achieved*" with regard to the TRC cases, despite all their attempts to take them forward:

> "Following Government's response to the final Report of the TRC, and because it is important for the prosecuting authority to deal with these matters on a uniform basis in terms of specifically defined criteria, the National Director, with the concurrence of the Minister for Justice and Constitutional Development and after consultation with the various Directors of Public Prosecutions issued prosecution policy and policy directives in terms of section 179(5)(a) and (b) of the Constitution regarding the handling of such cases arising from conflicts of the past. This prosecution policy and policy directives, which must be observed in the prosecution process, were tabled in Parliament towards the end of 2005 and came into operation on 1 December 2005. During January and February 2006, the NPA briefed the Portfolio Committee on Justice and Constitutional Development and the Committee on Security and Constitutional Affairs of the National Council of Provinces regarding the contents of these directives. **I am sad to report, as at the time of writing this report, that not much has been achieved in this regard despite all the attempts that have been made in taking this matter forward**." (Bold added)

203 Significantly, the annual report also confirmed that the TRC cases had been "*placed on hold*" pending the approval of the prosecution guidelines:

> **"In late 2004, the Acting National Director requested that prosecutions for TRC cases be placed on hold pending the formulation and approval**

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> **of prosecution guidelines relating to these matters. The guidelines were only finally approved in early 2006.** The PCLU, as a result of complaints by various persons, identified at least 15 cases which warrant further investigations in order to determine whether prosecutions are justified. On an ongoing basis, the PCLU receives requests from victims to look into cases where amnesty has been refused or not applied for. Where these matters can be followed up without further investigations and where no prosecutions are warranted, they are disposed of. Seven such matters have been dealt with in this manner. In 2006, the Directors of Prosecution: Mthata and Pretoria seconded two Senior State Advocates to the PCLU to assist with these matters." (Bold added)

204 Copies of the relevant pages of this annual report are annexed hereto marked **FA28**. A copy of the full report can be made available on request.

205 While the annual report confirmed on a *post facto* basis that the suspension or moratorium on the TRC cases was imposed in late 2004, in reality it was already in place during 2003, as set out above.

206 Interestingly the decision to halt the TRC cases was styled as a "*request*" by the Acting NDPP. It was not disclosed who this request was directed to.

207 With the exception of the Frank Chikane attempted murder case, which did not require further investigation, the PCLU was unable to pursue any other TRC cases.

208 According to Ackermann, the SAPS and DSO persisted in their refusal to provide investigators. It also proved difficult to even convene meetings of the ITT (referred to in Part B of the amendments) who were "*meant to advise the PCLU on what cases to pursue.*" Pikoli had hoped that the ITT, particularly the SAPS and the NIA would provide investigative and intelligence support for these cases, however, this support was "*never provided.*"

209 Once the guidelines were issued in December 2005, Ackermann wished to proceed with the five cases he had identified that had good prosecution prospects and the

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11 cases which required substantial investigation. These cases were identified as "*major priorities*" for the PCLU for the 2006 – 2007 period. In addition, during 2006 he was getting more requests from victims' families for further investigations in their cases.

210 According to Pikoli, once the Prosecution Policy amendments became effective in December 2005, he reviewed the available evidence implicating the three suspects in the Chikane attempted murder case, which, in his opinion warranted prosecution. None had applied for amnesty, so he gave the initial instruction to proceed with the prosecution in February 2006.

211 The NPA made a presentation to the Justice Portfolio Committee on 8 March 2006, a copy of which is annexed hereto marked **FA29**. In relation to its performance in respect of the TRC prosecutions it disclosed the following at slide 39:

> "PERFORMANCE AGAINST TARGETS: 2004 / 2005
>
> 1. TRC Prosecutions
>
> - Audit of 300 cases on hand in NPA structures.
> - Closure of 167 cases. No grounds for prosecution.
> - Prosecutions instituted in S v Terreblanche, S v Blani and S v Nieuwoudt & 2 Others.
> - **Further prosecutions put on hold in November 2004 pending the formulation of guidelines.**
> - Assistance provided to reconvene Motherwell amnesty hearing." (Bold added)

212 In the same presentation dealing with performance targets for the year 2005/06 the following was noted at slide 43:

> "PERFORMANCE AGAINST TARGETS: 2005 / 2006

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1. TRC Prosecutions

- Failure to finalise guidelines **results in no further prosecutions being instituted.**
- Late 2005 Constitutional Court sets aside TPD and Supreme Court of Appeal rulings in respect of jurisdiction for conspiracies for external crimes in S v Wouter Basson." (Bold added).

213 In March 2006, Ackermann again met with the representatives of the Simelane family, who in addition to the crimes of kidnapping and murder, wished the NPA to charge certain suspects with torture, as a crime against humanity in terms of customary international law, since such crimes never prescribe. Ackermann had to advise them that he was unable to take the case forward "*as there were no investigators attached to the PCLU*", and his requests to the SAPS and the DSO for competent and experienced investigators had fallen on deaf ears.

214 The Simelane family lawyers wrote to Pikoli, the NDPP at the time, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. Thereafter Ackermann urged the family lawyers to seek an inquest rather than a prosecution. This is because he realised that there would be no investigations, let alone prosecutions "*taking place in the political context that prevailed at the time,*" as set out in his affidavit in *Nkadimeng 2* (TN8 at p217) (**FA8**). At that time the family was reluctant to pursue an inquest when the evidence warranted a prosecution.

215 Annex RCM10 (at p835) to Macadam's affidavit (**FA5**) reveals that on 30 October 2004, Ackermann addressed an internal memorandum to Pikoli and Ramaite in order to respond to a request made by the "TRC Committee" on 25 October 2006 to furnish details regarding all the cases closed by the PCLU, and in particular what led to the prosecution of one Blani. The "TRC Committee" was presumably either

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the Interdepartmental Task Team or the Inter-Ministerial Committee, referred to above. The memorandum disclosed that some 27 cases had been closed for various reasons. Notable cases on the list included:

215.1 Death in detention of Ahmed Timol.

215.2 Death in detention of Steve Biko.

215.3 Murders committed by IFP aligned Ermelo Black Cats gang in Ermelo.

215.4 Ciskei coup d'état, also known as Operation Katzen.

215.5 General Basie Smit, former SB commander, for various offences.

215.6 Refusal of amnesty to Mbeki and 37 high ranking ANC members.

215.7 IFP Hit Squads in Esikhaweni and elsewhere in KZN.

215.8 Bombing of the Early Learning Centre and other activities of the CCB.

216 In the same memorandum, Ackermann referred to an attempt to resurrect the investigation of the TRC cases, but he objected strenuously to the planned reappointment by the SAPS of Senior Superintendent Karel Johannes 'Suiker' Britz.

> "**The reappointment of Senior Superintendent Britz**
>
> At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to Investigate the dockets in possession of SAPS.
>
> I wish to express my concern at this. Britz was a former member of the SB, who, prior to the PCLU being involved with TRC cases, assisted the OPP: Pretoria with cases involving the Liberation Movement.
>
> Former Police Commissioner General van der Merwe had formed an organization entitled *"The Foundation for Equality before the* Law" which was intended to ensure that no further prosecutions of SB members would take place.

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> When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization but had regular contact with General van der Merwe.
>
> In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were SB members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of SB members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.
>
> When the issue of prosecuting SB members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.
>
> The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.
>
> This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the OPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.
>
> I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe."

217 This passage disclosed the attempt of the SAPS to insert an investigator, the late 'Suiker' Britz, who had become known as an apartheid-era fixer, into the TRC cases. The memorandum alleged that Britz was "*sympathetic*" to former members of the SB and opposed their prosecutions. According to Ackermann, Britz had leaked

LC

NGI

information and a docket to retired General Johann van der Merwe. In addition, Britz's main preoccupation appeared to be that of agitating for a terrorism charge against Mbeki.

218 I am advised that some 12 years later when there was an attempt to pursue the TRC cases afresh by the DPCI, the late investigator, Frank Dutton (who was then the FHR's private investigator), complained that SAPS had again appointed investigators to the TRC cases who were either former SB members, or sympathetic to the former SB. Correspondence to this effect can be supplied on request.

219 Following Pikoli's decision to proceed with the Chikane attempted murder case, the three suspects made representations to him in terms of the Guidelines for a decision not to prosecute. Pikoli set up a team under Adv JP (Torie) Pretorius to review their representations which concluded after a few months that the three had declined to disclose the full truth. Ackermann refused to participate in this review as he viewed the process as unconstitutional. After considering the review report, Pikoli wrote to the lawyers of the three suspects in July 2006 informing them that their representations were unsuccessful, and he intended to pursue with the prosecution.

220 The decision to prosecute those implicated in the attempted murder of Chikane was the tipping point which saw the complete unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

The politicians intervene

221 During 2006, it became increasingly clear to government that NDPP Pikoli and PCLU head Ackermann would pursue TRC cases when they were in a position to

LC
NGI

do so. The first complaint levelled by government functionaries against the NPA was that Ackermann was seen as a loose cannon.

222 Pikoli, in his affidavit in *Nkadimeng 2* (TN7 at p 170) (**FA22**), records that in early 2006, SAPS Commissioner Jackie Selebi objected to Ackermann's participation in the TRC cases claiming that he intended to prosecute the leadership of the ANC. This was notwithstanding Pikoli's denial that any such plans were in place. Pikoli reminded Selebi that Ackermann was appointed as PCLU head under Presidential proclamation, and it was not for the SAPS to dictate who should discharge the mandate given to the PCLU.

223 Pikoli then approached the Presidency in order to seek the collaboration of the role-players in the ITT to support the TRC cases. A meeting was arranged in mid-2006 by Reverend Frank Chikane, who was then Director General in the Presidency. Coincidentally this was the same Chikane who was the victim of poisoning by the SB in 1989. The meeting was attended by Chikane, the Directors General of Justice and the NIA, Selebi, the Secretary of the Defence Secretariat, Mr. Loyiso Jafta, Chief Director in the Presidency and Pikoli. Selebi again complained about Ackermann's involvement in the process.

224 Later in 2006, Pikoli was summoned to a meeting which was convened at the home of Minister Zola Skweyiya, then Minister of Social Development. The meeting was attended by the Minister of Police Charles Nqakula, Minister of Defence Mosiuoa Lekota, Thoko Didiza, Acting Minister of Justice (representing Minister Brigitte Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza. Pikoli was advised that the meeting was going to deal with the prosecution in the Chikane matter.

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225 At this meeting it became clear that there was a fear that cases like the Chikane matter would open the door to prosecutions of ANC members. In his affidavit in *Nkadimeng 2* (**FA22**), Pikoli quoted from his affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> "The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to prosecute.
>
> The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.
>
> The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.
>
> I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.
>
> ...
>
> The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

226 This meeting pointed to what was probably the overriding concern of government, namely that pursuing a TRC case, like the Chikane matter, would place pressure on the NPA to pursue cases against ANC members.

227 In 2006 Pikoli was again summoned to a further meeting which took place at the office of the Presidency. At this meeting Pikoli proposed that Dr Silas Ramaite, the

LC
NGI

Deputy National Director of Prosecutions, should chair the Task Team, given the adverse views of Ackermann and to get the Task Team working. The proposal was accepted.

228 Subsequent to this meeting, there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and it was accepted. After this meeting, in early October 2006, Pikoli again sent letters to the various Directors General, Selebi and the DSO inviting them each to nominate a senior official to serve on the ITT.

229 The ITT met for the first time on 12 October 2006. Pikoli attended the opening session of the first meeting together with his adviser, Ms. Kalyani Pillay, the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Pikoli did not participate further in the activities of the Task Team. According to Macadam, the NPA representatives on the ITT were Ackermann and Ramaite. Macadam noted in his affidavit (at p 796 at para 30, p801) affidavit (**FA5**) that on occasions when he stood in for Ackermann at meetings of the ITT, that:

> "... the task team was predominantly comprised of members of the intelligence community who were **more intent on cross-examining me as to why matters should be investigated** rather than addressing the issue of all the outstanding cases." (Bold added)

230 It is interesting to note that Mr. Loyiso Jafta, Chief Director in the Presidency, who had an intelligence and security background, was present at the meetings of the ITT. Strictly speaking he should not have been there, as Part B of the Amendments, did not provide for a member of the Presidency to be part of the group assessing

LC
NGI

the TRC cases. This indicated that the Presidency intended to have direct involvement in the decisions relating to the TRC cases.

231 Meanwhile Pikoli had received further representations from the suspects in the Chikane matter claiming that they had received indemnity against prosecution in terms of the Indemnity Act 35 of 1990. Pikoli sought an independent opinion from a senior counsel who advised him in November 2006 that the claimed indemnities were no bar to prosecution and that Act 35 of 1990 had been repealed in 1995.

232 Ramaite reported to Pikoli that at the ITT meeting on 25 October 2006, Ackermann had presented an audit report of all the TRC cases in the possession of the PCLU. Ramaite also reported to Pikoli that at the 6 November 2006 meeting of the ITT, Joseph Lekalakala, a senior officer in the SAPS Crime Intelligence Division, stated that National Commissioner Selebi believed that Chikane was not interested in a prosecution. However, Ackermann advised that Chikane had left the matter in the hands of the NPA.

233 In early December 2006 Pikoli was advised by Ramaite that Selebi was insisting that Chikane had not been consulted about the proposed prosecution. This claim was rejected by Pikoli since he knew that Chikane had been extensively consulted. According to Pikoli, he had personally met with Chikane during 2006 and 2007, who advised that while he may have forgiven his perpetrators, insofar as the application of the law was concerned, the matter must take its ordinary course. Pikoli asserted that Chikane said that if a decision was made to prosecute, he would accept that. Although Pikoli was aware that Ackermann had discussed the matter with Chikane as far back as 2004, he instructed Ackermann in December 2006 to once again visit Chikane to confirm his position.

LC
NGI

234 According to Ackermann, on 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General PC Jacobs, representing the view of the National Commissioner, which bluntly stated that before any prosecutorial decision could be made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP who to prosecute or not.

235 Towards the end of 2006 it became clear to Pikoli that "*powerful elements within government structures were determined to impose their will on my prosecutorial decisions*." In this regard in his *Nkadimeng 2* affidavit (TN7 at p 170) (**FA22**), Pikoli quoted from his affidavit filed before the Ginwala Enquiry:

> "In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two-stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.
>
> It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

236 The penny finally dropped with Pikoli towards the end of 2006. Up until this point he had operated on a good faith basis that his counterparts in the other departments in the ITT would support him to resolve the TRC cases. In fact, they never had any such intention. It is quite apparent that they saw their role as clamping down on the cases from proceeding. Since it appeared to them that Pikoli might act on an

LC
NGI

independent basis, the communication from Maj Gen Philip Jacobs made it abundantly clear that Pikoli was not to act without their permission.

237 It was becoming apparent that the central concern of government leadership was that the pursuit of the TRC cases could precipitate cases against ANC members, and for that reason all cases had to be stopped, even if it meant denying justice to the families of Nokuthula Simelane, the Cradock Four and others.

The axe falls on the TRC cases

238 In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DOJ, Pikoli advised Selebi and the Directors General that a serious misunderstanding had arisen. Pikoli resolved to approach the Minister of Justice and request her guidance. According to Pikoli, pending such response, "*the functioning of the Task Team was compromised by the uncertainty*" and it held no further meetings until 8 August 2007.

239 On 5 January 2007, Justice Minister Mabandla disclosed in a press statement the need for the development of a policy on presidential pardons for prisoners who alleged that their offences were politically motivated. A copy of this press statement is annexed hereto marked **FA30**. According to the Minister the matter was complex and, since there was no legal precedent, "*a political solution*" was required. The proposal was in line with the recommendations of the ATT. The Minister noted that:

239.1 Some applicants for pardons did not apply for amnesty from the TRC because their political parties did not support the TRC.

239.2 Some of the applicants pleaded ignorance of the TRC processes.

LC

NGI

239.3 Some of the crimes committed by the applicants committed took place after the cut-off date for TRC amnesty applications.

240 Towards the end of January 2007, Ackermann and Adv Mthunizi Mhaga (also of the PCLU) reported to Pikoli that they had met with Chikane on 22 January 2007 who confirmed that he was not against a prosecution and that the matter should take its course. Pikoli then wrote to the attorneys of the three suspects on 25 January 2007 and informed them that the matter would now proceed.

241 Around this time, the former Minister of Police, Adriaan Vlok, and the former Commissioner of Police, General Johann van der Merwe, both made representations to Pikoli in terms of the Guidelines. They both admitted to authorising the murder of Chikane and requested Pikoli not to prosecute them in the light of this disclosure. However, according to Pikoli they declined to make full disclosure in response to requests for information and he declined to grant them immunity from prosecution in terms of the Guidelines.

242 On 6 February 2007, Pikoli had a meeting with Minister Mabandla. During this meeting it appeared that she had gained the impression that Pikoli had previously agreed not to pursue the TRC cases.

243 On 8 February 2007, Mabandla addressed a letter to Pikoli titled "TRC MATTERS", a copy of which is annexed hereto marked **FA31** (attached to Pikoli's affidavit as VPP2 at p208), in which she stated the following:

> "I must advise you at the outset that the media articles **alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise**. In our discussions you briefly mentioned to me **that the NPA will not go ahead with prosecutions**. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty." (Bold added).

LC
NGI

244 An example of one of the articles in the press is from the Beeld newspaper titled "*Cops up for apartheid crimes*" which was published on 7 February 2007. A copy of this article is annexed hereto marked **FA32** (VPP3 at p209).

245 According to Pikoli, he was at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters would not be prosecuted. Pikoli in his affidavit in *Nkadimeng 2* (**FA22**) (TN7 at p 170) stated that he:

> "...found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice."

246 Pikoli decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the problems experienced in implementing this policy. This "*internal secret memorandum*" was titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007, a copy of which is annexed hereto marked **FA33**. This memorandum (at p134) was annexed to Pikoli's affidavit before the Ginwala Commission marked as "TRC1". It was also attached to Pikoli's supplementary 'in camera' affidavit in *Nkadimeng 2* (at p130).

247 In this memorandum Pikoli bluntly concluded that there had been "*improper interference*" with the work of the NPA in relation to the TRC cases and that he had been "*obstructed from taking them forward*." He complained that such interference impinged upon his conscience and his oath of office. Moreover, he was now unable

LC
NGJ

to deal with these cases in terms of the normal legal processes and he sought guidance on the way forward. In particular Pikoli pointed out that:

247.1 The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

247.2 The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases.

247.3 There were differences in interpretation in relation to the role of the other state departments in relation to the "*prosecutorial decision-making process*".

248 Pikoli concluded by stating that:

> "I have now reached a point where I honestly believe that **there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions** on this particular matter.
>
> It would appear that there is **a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along**. My conscience and oath of office that I took, does not allow that.
>
> Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Bold added).

249 Remarkably, Pikoli never received any response from Minister Mabandla to his memorandum, not even the barest denial that her department was complicit in the improper interference in the work of the NPA. Given the alarming matters he raised and given that the law criminalises obstruction of the work of the prosecuting authority, Pikoli indicated in his affidavit in *Nkadimeng 2* (**FA22**) that he was shocked

LC
NGI

he did not get an immediate response from the Minister. This suggested to Pikoli that the Minister preferred for the deadlock between the NPA and the DOJ, SAPS, NIA to remain in place. This meant that the ongoing suppression of the TRC cases would persist.

250 On 3 May 2007, Pikoli and Ackermann appeared before the Justice Portfolio Committee in Parliament. The minutes, a copy of which is annexed hereto marked **FA34**, reflect the following discussion in which Pikoli was remarkably frank about what was stopping the prosecutions of the TRC cases.

> "Discussion
>
> **Mr Joubert asked what was causing the delay in prosecutions of the TRC and when these might be finalised.**
>
> Adv Anton Ackermann, Special Director: NPA, replied that in October 1998 the TRC had recommended prosecutions. A Human Rights division was established in the NPA to evaluate the cases and to prosecute. When the DSO was created in January 2001 the Human Rights Division was disbanded, and its work was transferred to the DSO. Adv Ackermann, when joining the NPA, was given a mandate in March 2003 to declare priority crimes. All 400 TRC prosecutions had been immediately declared as priority crimes. In April 2003 the President had stated that there would be no further amnesty processes and ruled that prosecutions would be instituted and that a number of agencies must assist in the prosecutions. Adv Ackermann personally declined to prosecute 92 cases. Sixteen were identified for investigation and potential prosecution. On 9 November 2004 Adv Ackermann was stopped when trying to arrest three security policemen and charge them with poisoning of identified people. Dr Ramaite had instructed him not to proceed with the arrest, but rather to formulate guidelines how prosecutions should be conducted. This formulation took two years. In early 2006 the guidelines were approved. They did not make provision for a committee but stated that in the execution of the prosecution duties other agencies must assist. A Task Team was established, and a number of meetings were held. Adv Ackermann commented that it was unfortunate that to date no meaningful results had been achieved from these meetings. **The Annual Report of 2006 also noted on page 4 that not much had been achieved, despite all the attempts to take this matter forward. He maintained that the PCLU was not the cause of the delays and he suggested that perhaps the National Director of Public Prosecutions should comment further.**

LC
NGI

> **Adv Vusi Pikoli, National Director of Public Prosecutions, added that this was a politically sensitive issue.** The legal processes must solve the problem. **Whenever there was an attempt to charge members of the former Police Services there was political intervention, and effectively the NPA was being held to ransom by the former generals**. On the other side the families of the victims were pressing for prosecution. The guidelines were not universally accepted and some NGOs, including Legal Resources Centre, wished to challenge the constitutionality of the guidelines. There were ongoing discussions as to how best to proceed. The President, in addressing parliament, indicated clearly that the matters would be dealt with, and so this was an ongoing matter.
>
> The Chairperson stated that she was aware of some efforts from the Department of Justice. She asked that Adv Pikoli provide the Committee with a full report on the events to date in writing, so that the Committee could try to assist as this clearly went beyond just the one case cited by Adv Ackermann. It was undesirable that these problems should still be delaying matters." (Bold added).

251 The blunt statement by Pikoli that the prosecution of the TRC cases "*was a politically sensitive issue*" and "*whenever there was an attempt to charge members of the former Police Services there was political intervention, and effectively the NPA was being held to ransom by the former generals*" should have set alarm bells ringing.

251.1 Pikoli was expressing his abject frustration that former apartheid generals seemed to be able to exert extraordinary influence over the justice system; and were able to engineer political interventions when their people were being pursued.

251.2 The fact that the Justice Portfolio Committee, across the political spectrum, did not raise the alarm and call for an independent inquiry into the alleged violation of the rule of law, is nothing less than shameful. After all, this was not anybody making a wild claim, it was the NDPP, South Africa's chief prosecutor.

LC
NGI

251.3 Their dereliction of duty cost our country dearly. If they had cast aside their political interests and acted in the interests of equality, justice and the rule of law, much of the damage wrought by the political interference could have been avoided.

252 In July 2007, Thembi Nkadimeng, sister of the slain and disappeared Nokuthula Simelane, together with the wives of the Cradock Four filed an application in the High Court to have the amendments to the Prosecution Policy declared unconstitutional and set aside. They argued that the amendments were designed for the sole purpose of guaranteeing impunity for apartheid-era perpetrators – and ultimately to deny them truth, justice and closure. The proceedings were opposed by the Minister of Justice and the NDPP. These proceedings are referred to as *Nkadimeng 1*. A copy of these voluminous papers can be supplied on request.

253 Also in July 2007, after several months of negotiation between the PCLU and the attorneys of the accused in the Chikane attempted murder case, a plea and sentence agreement was reached. On 10 July 2007, Pikoli sent a memorandum to the Minister informing her of the fact that the case had been set down for hearing in court on 17 August 2007 and that all the accused will plead guilty to a charge of attempting to murder Chikane by means of poisoning. She was also advised that the court would be asked to confirm the plea and sentencing agreement.

254 Around 10 July 2007 Pikoli went on compassionate leave because of the illness and subsequent death of his mother. In his absence, on 17 July 2007, Ramaite and Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

LC
NGI

255 On 17 August 2007, those implicated in the Chikane case pleaded guilty in exchange for suspended sentences in terms of section 105A of the Criminal Procedure Act. Vlok and Van der Merwe were sentenced to ten years in prison suspended for five years, while the other three received five-year prison sentences, suspended for five years. A copy of the plea and sentence agreement is annexed hereto marked **FA35**.

256 According to Ackermann, this case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the SB in October 1988, as well as other senior officers of the both the SAPS and the SADF. However, this was now the end of the line. No further cases were pursued which, according to Ackermann, can be attributed wholly to the political interference in the work of the NPA.

257 According to Pikoli in his affidavit in *Nkadimeng 2*, he would have preferred a full prosecution because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They confined their disclosure to facts that for the most part were already in the public domain and declined to reveal information about the compiling of the hit lists and who was behind their compilation. They did not reveal other names on the lists, nor the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

258 While a full prosecution would have produced greater truth and accountability, Pikoli was of the view that the political headwinds were too strong. He stated that:

> "there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials.

LC
NGI

> Moreover, I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances."

259 Pikoli's concerns proved to be prescient. Within a few weeks he was removed from office and the Chikane case was the last indictment issued in a TRC related case for some 10 years. The TRC cases would remain suppressed until the family of Nokuthula Simelane went to court in 2015 seeking an order compelling a prosecutorial decision (*Nkadimeng 2*).

The knives are out for Pikoli

260 Shortly after the Chikane plea and sentence agreement had been confirmed in court, a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. According to Pikoli, the claim was made on the basis of a note that Ackermann had prepared more than four years previously, when he first looked at the universe of possible cases. That note was forged to suggest it was made recently and that Ackermann was targeting the ANC leadership. A copy of this newspaper article is annexed hereto marked **FA36** (VPP4 at p211). The NPA responded by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport were denied. A copy of this press statement is annexed hereto marked **FA37** (VPP5 at p213).

261 At this time, the then Director-General of the Department of Justice, Menzi Simelane, had approached Pikoli and raised concerns about Ackermann's handling of the TRC cases. He asked Pikoli to relieve Ackermann from his duties in respect of those cases. Pikoli declined to do so.

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262 After the newspaper article was published, Pikoli was summoned to a meeting of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Selebi. Cabinet Ministers included the Minister for National Intelligence Services Ronnie Kasrils, Minister Mabandla, and Minister Skweyiya amongst others.

263 The fact that there was a special Cabinet Committee on the post TRC cases speaks volumes. The existence of such a high-level committee devoted to a particular class of criminal cases pointed the importance of these cases to Cabinet, and that the cases had become the subject of political intervention.

264 Pikoli's account of this meeting in his *Nkadimeng 2* affidavit (**FA22**), is that the those at the meeting immediately demanded answers from him about TRC prosecutions.

264.1 According to Pikoli, Selebi said to him that the "*gloves are now off*" and that he was "*declaring war*" on him. In response Pikoli told Selebi: "*for once in your life can you tell the truth and shame the devil*".

264.2 Those present were particularly concerned that the NPA was instituting an investigation into certain members of the SAPS, in relation to the fabricated Ackermann letter.

264.3 Minister Mabandla told Pikoli to stop this investigation, to which Pikoli responded that the investigation will proceed.

264.4 Pikoli explained to the meeting that:

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264.4.1 the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

264.4.2 the NPA was actively preparing for those prosecutions and that it should not be stopped from doing its job.

264.4.3 it was his role as the NDPP to decide who would be charged.

265 On 28 August 2007, Pikoli received a faxed letter (dated 8 August 2007) from the Minister, which is annexed hereto marked **FA38** (VPP6 at p214). She referred to the meeting held on 23 August 2007 and noted that SAPS held a different view in respect of the forgery of certain NPA documents. She complained that she had not been advised of the decision to investigate and wanted to know the basis thereof.

266 Pikoli responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked **FA39** (VPP7 at p215). In this letter Pikoli referred to the 23 August 2007 meeting:

> "which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."

267 Pikoli confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*". He added that it is:

> "clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored."

268 Pikoli reminded the Minister that his predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had briefed

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the then Minister of Justice, as well as the President. Pikoli also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the DPP in Pretoria, had been handed over to the SAPS in 2004. Pikoli in his capacity as then Director General of Justice was actually present in the office of the DPP when representatives from the SAPS collected the dockets.

269 Pikoli concluded his letter by requesting an urgent meeting with the Minister. Pikoli also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

270 The Minister did not respond to Pikoli's requests, and the meetings never took place. On 23 September 2007 Pikoli was suspended from office by President Mbeki. Shortly after his suspension he learned that Ackermann had been relieved of his duties in relation to the TRC cases.

271 According to Ackermann, he was summoned to the office of Adv Mokotedi Mpshe, who had been appointed acting NDPP. Mpshe advised Ackermann that he was relieved of his duties in relation to the TRC cases with immediate effect. In his affidavit (**FA8**), Ackermann asserted that he had "*no doubt that Adv. Mpshe received a political instruction to remove me from these cases.*" Ackermann advised Mpshe that removing him from the TRC cases "*would not make the cases go away.*" That statement has also proved to be prescient.

272 Writing in his 2015 affidavit in *Nkadimeng 2* (**FA22**), Pikoli observed the following:

> "I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.

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> The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued. It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored."

273 Ackermann concluded similarly in his 2015 affidavit (**FA8**):

> "There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.
>
> In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes."

274 Now with Pikoli and Ackermann out of the way, government was in a position to appoint compliant officials to lead the NPA and take charge of the TRC cases. Going forward the TRC cases were now firmly frozen and no amount of lobbying and agitating by families and their representatives would move the new leadership of the NPA to act.

Ginwala Enquiry

275 The years following the suspension from office of Pikoli and the removal of Ackermann from the TRC cases were marked by an almost total absence of activity on the TRC cases.

276 On the same day that Pikoli was suspended on 23 September 2007, the President announced the creation of the Ginwala Enquiry into the fitness of Pikoli to hold the office of the NDPP in terms of section 12(6)(a) of the NPA Act. Dr Frene Ginwala was appointed on 28 September 2007 to head the inquiry.

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277 According to Dr Ramaite, then the Acting NDPP, when the President established the Ginwala Commission, "*the SAPS declined to further investigate the matters, pending the conclusion of the Commission*." This was disclosed in his 31 January 2013 letter to Thembi Nkadimeng (**FA26**). The reference to a decision to refuse to "*further investigate*" is a misnomer since the SAPS had already refused to investigate the TRC cases as far back as 2003. There was no legal or other basis for the SAPS to continue refusing to investigate the TRC cases pending the outcome of the Ginwala Enquiry.

278 In the Ginwala Enquiry, the government made a number of complaints against Pikoli, one of them being that Pikoli's handling of the post–TRC cases did not show "*sensitivity to the victims*" and "*an appreciation of the public interest issues that were mandated by the Prosecution Policy*."

279 It was alleged that the NPA concluded plea bargains with Van der Merwe and others (the Chikane case) without discussing them with the ITT or informing the Minister, *"notwithstanding the potential impact on national security"*. The nub of the matter was of course Pikoli's decision to move ahead with the prosecution of Vlok and the others in the face of opposition from the political level.

280 In the evidence tendered by the government, an add-on complaint was the "outrage" expressed by Chikane about the lack of truth revealed by the plea bargain in relation to the apartheid state's clandestine programme of killing through nefarious means, such as poisoning. It is likely that this concern was included to dress up the main complaint with some moral indignation, since the lack of truth of apartheid-era violations was hardly a concern of those behind the removal of Pikoli.

281 Dr Ginwala was moved to say in her finding that:

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> This complaint also touches very closely on the **constitutional guarantee of independence of the NPA** to prosecute or not to prosecute, and to do so without fear, favour or prejudice. (Bold added).

282 Nonetheless Dr Ginwala did not take this burning issue further as the government abandoned its complaint against Pikoli in respect of the TRC cases. The likely reason was to curtail closer examination of the role of government in relation to the cases. A copy of the Ginwala Commission Report dated 4 November 2008 can be made available on request. The extracts of her findings on the TRC cases complaint are annexed hereto marked **FA40**.

283 Dr Ginwala concluded that the government had not made out a case that Pikoli was not fit for office by reason of his handling of the TRC cases. Indeed, she concluded more generally in her final report that the balance of grounds advanced by government for his suspension had not been established.

284 Dr Ginwala reserved her harshest criticism for Adv Menzi Simelane, who at the time had been Director General of the DOJ since June 2005. She found that he had given contradictory evidence and had deliberately withheld important information from the Commission, thereby attempting to mislead it. She also impugned his conduct as Director General of the DOJ on various grounds.

Striking down of the Guidelines

285 On 12 December 2008, Judge Legodi in the Pretoria High Court issued his judgment in *Nkadimeng 1* which set aside the amendments to the Prosecution Policy as unconstitutional. The judge found that the amendments amounted to an impermissible rerun of the TRC amnesty process and that most of the Part C criteria

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NGI

should never feature in prosecutorial decisions. He ruled that the amended policy amounted to "*a recipe for conflict and absurdity*."

286 The NPA Annual Report 2008/09 made the following disturbing report that because the NPA intended to appeal the judgment a further delay in the TRC cases was "*inevitable*" :

> "The TRC Guidelines were declared unconstitutional and invalid by the North Gauteng Provincial Division of the High Court. A decision to appeal the judgment will be made early in 2009. **A further delay in the prosecution of cases emanating from the TRC process is therefore inevitable**." (Bold added)

287 Copies of the relevant pages of this annual report are annexed hereto marked **FA41**. A copy of the full report can be made available on request.

288 The NPA applied for leave to appeal on 7 January 2009, which was opposed by Nkadimeng and the wives of the Cradock Four. The application was dismissed by Legodi J. The NPA did not bother petitioning the Supreme Court of Appeal or approaching the Constitutional Court, presumably because it concluded that there were no prospects of success, or that the objectives of the prosecution policy amendments could be achieved through other ends. As it transpired, the final nail in the coffin of the ill-fated Guidelines did not result in the pursuit of the TRC cases.

Special Dispensation on Political Pardons

289 At a joint sitting of Parliament on 21 November 2007, President Thabo Mbeki announced a special process for the handling of pardon requests made by "*people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC*." According to President Mbeki the aim was to assist the nation in resolving the "*unfinished business*" of the TRC. He said:

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> "As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business.'"

290 Mbeki assured members of Parliament that the new process would be consistent with "*what the nation sought to achieve through the TRC*," and would support the discharge of the President's "*constitutional obligation to consider the requests for pardon from people who have already been convicted for offences they claim belong among the category of offences that were considered by the TRC Amnesty Committee*." The use of the pardon power to accommodate perpetrators who had spurned the TRC amnesty process was in line with the recommendations of the ATT that were made in 2004.

291 Mbeki asked each political party represented in Parliament to appoint a representative, not necessarily an MP, to serve on a Pardons Reference Group (**RG**) charged with considering pardon requests and submitting recommendations to the President. Mbeki pledged that his pardoning decisions would be guided by the values and principles enshrined in the Constitution, as well as the "*principles, criteria, and spirit*" of the TRC.

292 Mbeki announced a window of opportunity for new pardon requests that would open on 15 January 2008 and close on 15 April 2008. Requests would be considered from applicants convicted of offences "*of the nature considered by the TRC during the period up to 16 June 1999*." A copy of Mbeki's address to Parliament is annexed marked **FA42**.

293 On 16 January 2008, the Presidency released a press statement announcing the beginning of the period of applications for political pardons. A copy of this press

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statement is annexed marked **FA43**. The deadline for applications was subsequently extended to the end of May. The press statement belied the real reason of the process, as it spoke of applicants being "considered for amnesty" rather than pardon.

294 The RG was formally constituted on 18 January 2008 at its first meeting with President Mbeki, during which the Terms of Reference for the RG were adopted. Dr Tertius Delport was elected Chairperson (**Delport**). On 24 January 2008, the DOJ announced that the twelve-page pardon application forms were available at all courts, prisons, DOJ regional offices and websites.

295 Shortly after the creation of the RG, various civil society organisations such as the Centre for the Study of Violence and Reconciliation (**CSVR**) sought to engage with RG. However, Delport declined to meet with the organisations and refused to disclose the RG's terms of reference (which was only published months after the launch of the process) or the list of persons who had applied for a political pardon. The 2300 strong list was only secured through a PAIA application towards the end of 2008. However, leaks to the media disclosed that the applicants included, amongst others:

295.1 Ferdi Barnard, former CCB operative who murdered Wits academic David Webster;

295.2 Letlapa Mphahlele, the Pan Africanist Congress president who ordered the St James's Church massacre;

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295.3 Former apartheid police minister Adriaan Vlok, former police chief General Johann van der Merwe and the three co-accused in the attempted murder of Chikane;

295.4 AWB members who had killed one black person and violently assaulted black people in Kuruman in 1995.

296 The RG ultimately recommended to President Motlanthe, who was Mbeki's successor, that 150 persons be granted a political pardon, including the accused in the Chikane matter and the AWB members referred to above.

297 The civil society organisations were eventually granted a meeting with Delport and some RG members in July 2008 where they complained about the opaqueness of the process and the fact that victims had been entirely excluded from the programme. In a letter dated 7 August 2008, Delport informed the civil society organisations of the RG's conclusion that neither the Terms of Reference nor any law compelled the RG to "call for inputs by the public (in particular the victims)" and the RG accordingly would not accede to requests to incorporate victim input into the process.

298 The civil society organisations made multiple attempts to persuade the RG and the President to change course and incorporate victims into the pardons process without success. The full history of these attempts is set out in the founding papers filed in the matter of *CSVR & Others vs The President*, before the Pretoria High Court in case no. 15320/09, which can be made available on request.

299 In March 2009 several civil society organisations brought an urgent application in the Pretoria High Court seeking to interdict the President from issuing any pardons

LC NGI

until victims and other interested parties were able to participate in the process and make their representations on each pardon application.

300 The civil society organisations submitted in its court papers that the special dispensation on political pardons amounted to an impermissible rerun of the TRC's amnesty process; unlawfully excluded the participation of victims; violated the rule of law; and infringed the rights of victims to dignity, equal treatment and freedom of expression. On 28 April 2009, Seriti J handed down judgment in which he granted an interim interdict restraining the President from handing down any pardons under the special dispensation for political pardons.

301 On 2 June 2009, Ryan Albutt, one of the AWB members convicted for carrying out a campaign of violent terror against black people in Kuruman approached the Constitutional Court to overturn the interim interdict stopping the political pardon process from proceeding. He was joined in this endeavour by President Jacob Zuma. In February 2010, the Constitutional Court ruled that no political pardon could be issued without first affording the victims a hearing. Attempts were made thereafter by the DOJ to resurrect the Special Dispensation on Political Pardons by allowing victims and interested parties to make representations, but the process was eventually abandoned with no political pardons being granted.

TRC cases remain stuck

302 In the PCLU's presentation of its performance for the financial year of 2007 – 2008 to Parliament's Justice and Constitutional Development Portfolio Committee in March 2007, the following was noted by Ackermann in slide 8 on TRC prosecutions:

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- "Only partial success was achieved **due to intervening factors beyond the control of the unit."**
- "Sixteen cases have been identified for investigation and possible prosecution." (Bold added).

303 The cryptic reference to "*intervening factors beyond the control of the unit*" could only have been the political interference alluded to above and to be described in detail below. The sixteen cases were not identified and none of these cases were taken forward. A copy of the presentation is annexed hereto marked **FA44**.

304 With the political suppression of the TRC cases now in full swing, there was a hiatus of activity for several years, notwithstanding the agitation of families for action. The only notable development in this period was the disappearance of the investigation dockets in the Nokuthula Simelane and Cradock Four cases.

305 It can be safely assumed that little or no work was carried out by the NPA, SAPS or DSO on the TRC cases during 2008. Acting NDPP Mpshe had already relieved Ackermann of his responsibilities in respect of the TRC cases. He could hardly be expected to champion the TRC cases going forward, and indeed he did not. Although Ackermann was still the head of the PCLU he was no longer permitted to work on the TRC cases, and the files were left largely unattended. He retired from the NPA in 2013. In any event, at that stage, no investigator within state structures would touch the cases.

306 Macadam records in his affidavit filed in *Rodrigues* (**FA5**), that in early 2009, Mpshe summoned him to his office and showed him a letter written by SAPS indicating that it was withdrawing from the ITT.

LC
NGI

306.1 Presumably the SAPS took the view that the TRC cases were dead in the water and there was no point in serving on the task team which in practice was doing no work. In addition, following the judgment of Legodi J, the ITT no longer enjoyed a legal basis with the setting aside of the amendments to the Prosecution Policy in December 2008.

306.2 Since the SAPS had not been investigating the TRC cases their withdrawal did not mean much. However, according to Macadam it would mean that going forward, the TRC matters would again not be investigated because a decision had already been taken to disband the DSO.

306.3 Mpshe asked Macadam to negotiate with SAPS and try to get them to agree to investigate the cases. Mpshe also told Macadam to take over the TRC cases.

307 It is hardly surprising that Macadam concluded his 2018 affidavit with this blunt statement: "*[t]hese documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated*."

308 Macadam approached Ackermann for advice, and he disclosed that he had previously closed some matters which had not required investigation and handed over a list of some ten cases. Macadam attached to his affidavit as annex RCM6 (at p821) a trail of emails between himself and various role-players in his attempts to get the remaining TRC cases investigated. He initially met with Rayman Lalla, then Divisional Head of the Detective Service of SAPS, who informed him that the National Commissioner had decided that the cases must be handled by the DPCI.

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NGI

309 On 18 May 2009, Macadam sent the following email to Deputy NDPP, Adv Willie Hofmeyr (RCM6 at p821), at a time when there was an expectation that Hofmeyr was about to be appointed the new head of the DPCI:

> "I met this morning with Commissioner Lalla concerning the appointment of SAPS investigators to investigate the TRC cases where victims have asked the NPA to look at prosecutions. **We have been taking quite a beating due to the fact that nothing has been done on these matters for a number of years and in fact, in certain cases, the victims are threatening us with *mandamus* applications**. In this regard, Commissioner Lalla asked me to provide him with the names of three/four investigators who had the necessary experience. **We are only looking at a small number of cases, plus minus nine**. Obviously, no progress at all will be made if the investigators do not have previous knowledge of the relevant Apartheid security structures and role players therein.
>
> The only persons I could think of off-hand, were CSI Marion and three/four of his KZN DSO investigators, who were previously involved with the Goldstone Commission and ITU. All these persons have indicated their willingness to transfer to SAPS. **Commissioner Lalla indicated that the TRC investigations would constitute a special tasking and the investigators would be permitted to finalise these cases before taking on other commitments**. He also indicated that he would pay the costs of the investigations from his budget. This would ensure that they could deal with these matters irrespective of whether they are located in DPCI or any other police structure. He asked me to communicate directly with you on this issue." (Bold added).

310 However, Hofmeyr was not appointed to head up the DPCI, so Macadam had to approach the SAPS Commissioner again. On 1 July 2009 he wrote an email (RCM6 (at p822) to Superintendent Colla Bezuidenhout at the SAPS headquarters seeking a meeting with the Commissioner to discuss the TRC cases. He advised in the email:

> "We are under intense pressure and have been called upon to report on progress to the Minister and the Justice Portfolio Committee. **The one matter which requires investigation prescribes on 12 September 2009 and this case must be fully investigated and the family afforded an opportunity to exercise their right to a private prosecution before the crime prescribes**." (Bold added)

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311 Macadam was told to meet with Commissioner Anwar Dramat, the newly appointed Head of the DPCI. He then made a number of unsuccessful attempts to secure a meeting with Dramat. During this period, the unidentified case that was due to prescribe on 12 September 2009, prescribed without being taken further. It can be safely assumed that a large number of other crimes associated with the TRC cases prescribed during this period.

312 I am advised that at this time the family of the late Nokuthula Simelane and their representatives were working behind the scenes to persuade the Minister of Police to appoint investigators to take on the TRC cases.

313 Ultimately Macadam met with Assistant Commissioner Godfrey Lebeya on 26 November 2009 where the issue of conducting investigations was discussed resulting in Macadam addressing a letter to Lebeya on 18 January 2010, which is attached to Macadam's affidavit (**FA5**) as annex RCM7 (at p826). The letter is reproduced below:

> "My letter dated 13 July 2009, addressed to Deputy National Commissioner Dramat and Divisional Commissioner Lalla, and our meeting of 26 November 2009 have reference.
>
> The issue related to the appointment of investigators to investigate the 11 matters identified by the NPA, which were itemised in my letter of 13 July 2009. Subsequently, the Acting National Director of Public Prosecutions declined to prosecute in the Lubowski matter and consequently, only the remaining 10 cases on the list required attention.
>
> **Senior Superintendent Bester of your office attended our meeting and informed you that he was in possession of a number of further dockets which he felt also required investigation. On 6 December 2009, I had a meeting with Senior Superintendent Bester and established that these dockets related to cases against the Liberation Movements in respect of which a decision was taken in 2004 by the then National Director not to prosecute. It should be noted that in the main, all the suspects implicated in the dockets had applied for and received amnesty. I therefore informed Senior Superintendent Bester that there was no basis upon which these cases could be reopened.**

LC
NGI

> Consequently, only the remaining 10 cases on the list require attention. Since you raised the sensitivity of the matters with me, the National Director of Public Prosecutions was given a full written briefing on the matters. I had a meeting with him today and he indicated that SAPS should in fact investigate all the matters which required investigation. The matters should be referred to my office once the investigations have been concluded. Should you require any guidance as to how the matters should be investigated, you are at liberty to approach me for any such assistance which you might require.
>
> Given the nature of the cases, it may be desirable that we meet to discuss the issues in person and in this regard, I would be grateful if you could indicate when you would be available to meet with me." (Bold added).

314 Senior Superintendent Louis Bester was appointed to oversee the investigations of the ten remaining TRC cases. It appeared that Bester was particularly interested in pursuing cases against members of the former liberation movements. As it transpired, he made no progress in the cases against former apartheid security officers and operatives.

315 On 1 December 2009, President Jacob Zuma appointed Adv Menzi Simelane as NDPP. This was announced in a government press release dated 30 November 2009, ironically titled "*Simelane fit to hold office*." The appointment was made notwithstanding the damning findings made against him by the Ginwala Enquiry.

316 While he was DOJ Director General, Simelane had pressed Pikoli to remove Ackermann from the TRC cases. I can only speculate, but I believe that the probabilities are high that it was also Simelane who asked Acting NDPP Mpshe to remove Ackermann from the TRC cases, following the suspension of Pikoli. The arrival of Adv Simelane at the helm of the NPA was to doom the TRC cases to further neglect.

317 According to Macadam, one of the first steps taken by Adv Simelane was to instruct him to oversee various investigations of corruption cases being conducted by the

LC NGI

DPCI in the Northern Cape. He thereafter appointed Macadam to represent the NPA in two civil matters where decisions of the NPA not to prosecute international crimes (known as the Zimbabwe Torture Docket case) were challenged. Macadam was also deflected with cases in which complaints had been made against the NPA for failing to prosecute current and former heads of state for crimes against humanity. This workload effectively prevented Macadam from returning to the TRC cases, but he nonetheless opened more cases "*due to representations being received in new matters.*"

318 An example of the neglect was the failure of both the DOJ and the NPA to orchestrate the reconvening of an Amnesty Committee to rehear the amnesty applications of Martin van Zyl and Johannes Koole in the PEBCO 3 matter, as had been ordered by the High Court in 2009. The NPA and DOJ jointly arranged the withdrawal of charges against Van Zyl and Koole, pending the outcome of the reconvened Amnesty Committee, which they never established, thereby guaranteeing impunity for the two suspects who went to their graves without facing justice.

319 The NPA Annual Report 2009/10 noted that the TRC cases had to be investigated before prosecutorial decisions could be made but that "*since 2003*" it had "*struggled to secure the necessary cooperation in this regard*":

> "TRC cases: The PCLU is required to advise the NDPP in making decisions whether or not to prosecute in cases arising from the TRC process. Matters need to be fully investigated before any final prosecution decision can be made. **Since 2003, the NPA has struggled to secure the necessary cooperation in this regard.** With the establishment of the DPCI, the responsibility for such investigations was transferred to this unit. **The PCLU had to recommence its negotiations de novo**. Currently, **the DPCI has indicated that it will conduct the necessary investigations, but only after the conclusion of the 2010 FIFA World Cup**, due to the fact that it

LC NGI

> has a number of special responsibilities in connection with this event." (Bold added).

320 The relevant pages from this annual report are annexed hereto marked **FA45**. The full report can be provided on request. It is noted that the DPCI indicated that it would not look at the TRC cases until after the 2010 FIFA World Cup, which only concluded on 11 July 2010. However, even after the World Cup there is little evidence that the TRC cases were taken forward.

321 It is significant that this was the last mention of the TRC cases in the NPA's annual reports until 2016, which reflects the general neglect of these cases during those years. There were only references to the work of the NPA's Missing Persons Task Team (**MPTT**), which had done pioneering work locating the graves of persons killed during apartheid, exhuming and identifying the remains, and facilitating their reburial. The MPTT is not involved in the prosecution of cases.

322 Adv Menzi Simelane appeared before the Justice Portfolio Committee on 12 April 2010 where he confirmed that the NPA was not prosecuting any TRC cases. The minutes, a copy of which is annexed hereto marked **FA46** reflect the following:

> "Adv Simelane said that there were no cases that the NPA was currently prosecuting regarding post TRC matters. The reason being that the dockets were still with the police for investigation."

323 The following year, Adv Simelane appeared before the Justice Portfolio Committee on 20 March 2011 to discuss the NPA's Strategic Plan for 2011. The minutes reflect the following discussion in which Simelane claimed that the issue of the DPCI not assisting the PCLU was now solved:

> "Ms Smuts asked if the NDPP could confirm if the DPCI was not indeed assisting the PCLU in post Truth and Reconciliation (TRC) Unit matters.

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Adv Simelane replied that the DPCI not assisting the PCLU was an old matter as there were no problems now."

324 This was the last time the TRC cases appeared in the minutes of the Justice Portfolio Committee until 2017. This was remarkable given that there was zero progress on the TRC cases in this 6-year period.

325 Following the Supreme Court of Appeal ruling on 1 December 2011 setting aside Adv Menzi's Simelane appointment as NDPP, Adv Nomgcobo Jiba was appointed Acting National Director of Public Prosecutions and held the position until 4 August 2013. It appeared that for certain times during this period, Dr Silas Ramaite also acted in this post.

326 In October 2012, the Constitutional Court confirmed that President Jacob Zuma's appointment of Adv Simelane as NDPP was invalid. In a unanimous judgment the Court held that "*dishonesty is inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of the NDPP.*"

327 In August 2013, President Zuma appointed Mr. Mxolisi Sandile Oliver Nxasana as NDPP, and he assumed the post on 1 October 2013.

327.1 When Nxasana was appointed as the NDPP, he removed Macadam from his duties at the PCLU in order to act as a dedicated prosecutor in foreign bribery cases.

327.2 Adv Shaun Abrahams, then a Senior State Advocate, was appointed to take the TRC matters over from Macadam. It is evident that Abrahams made little or no progress in the TRC cases while he was leading the PCLU.

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327.3 After a protracted enquiry into his fitness to hold office, Nxasana stepped down as NDPP on 1 June 2015 and thereafter Abrahams was appointed NDPP.

The missing Cradock Four docket

328 Macadam filed an affidavit dated 24 May 2021 as part of the NPA's Rule 53 record in the matter of *Calata and Others v NDPP and Others*, Case No. 35447/ 2021 Gauteng Division, a copy of which is annexed hereto marked **FA47** (**Macadam's Rule 53 affidavit**). In this affidavit he indicated that during April 2013, while he was deputy director of the PCLU and Abrahams was the acting head, they received a request for information about the Cradock Four case from a Ms Lepinka who was the personal assistant to Acting NDPP, Adv Nomgcobo Jiba. Abrahams responded to the request. Shortly thereafter, Macadam was asked to hand over the investigation docket, Swartskop CR 13/07/1985, to the Office of the Acting NDPP, which he did.

329 Macadam then avers that at a "*certain stage*", without disclosing a date, that Adv TP Pretorius SC, then Acting Head of the PCLU, asked him for the Cradock Four docket, and he advised Pretorius that "*it had been uplifted from our office*" and was missing. Macadam did not disclose why Pretorius was seeking the docket. This exchange must have happened between 2016, when Macadam returned to his normal duties after working on foreign bribery cases, and April 2019 when he assumed the position of Acting Head of the PCLU.

330 What is evident from the Macadam affidavit is that, at the very least, no investigations on the Cradock Four docket occurred between 2013 and 2019, when

LC NGI

he took steps to assist the investigating officer to reconstruct the docket. This was a period of some six years.

331 It is also evident that in this six-year period, the PCLU leadership took no steps to recover the docket, let alone carry out any work on the case. If no work was happening on one of the most well-known and emblematic cases from our history, it can be safely assumed little or no work was being done on most, if not all of the TRC cases. This suggests that the suppression of the TRC cases was still in place through much of the second decade of this century, alternatively its impact had denuded the will and capacity of the authorities to act.

332 Equally revealing from Macadam's Rule 53 affidavit is the claim that the missing docket only comprised of an enquiry into unfounded rumours around one General Hankel and the inquest and TRC records, which were "*easily re-obtainable*".

332.1 This confirms that prior to 2013, little or no substantive work was conducted in the decades between the Zietsman inquest and the TRC in the early to mid-90s, and the reconstruction of the docket that commenced in 2019. This means there was a suspension of substantive work on the case for more than 20 years.

332.2 The reconstruction of the docket in 2019 only occurred because me and my family instructed the FHR and my attorneys to engage with the NPA and DPCI to get this case off the ground. Indeed, the FHR's private investigator assisted with the reconstruction of the docket.

LC NGI

Simelane family takes legal action

333 Thembi Nkadimeng, sister of the slain Nokuthula Simelane, in her founding affidavit in *Nkadimeng 2*, noted the following:

> "We thought that the striking down of the amendments to the Prosecution Policy meant that the path was eventually cleared for justice to take its course. Again, we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. Again, they said their hands were tied. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010; but the docket had apparently gone 'missing'."

334 Towards the end of 2012, the family of Nokuthula Simelane realised that the authorities had no intention of pursuing justice in their case, and they now pressed for an inquest:

> "By the end of 2012, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, the 30th year of Nokuthula's disappearance, and 18 years since the opening of the police docket, I gave up on a prosecution and demanded the holding of a judicial inquest into her death."

335 Nkadimeng looked into the possibility of launching a private prosecution, but although she was supported by pro bono lawyers, she was advised that she would have to raise a considerable sum of money to lodge as security of costs for the legal costs of the accused, which she would have to pay if the accused were acquitted. These costs were unaffordable, and she accordingly wrote a letter to the Acting NDPP on 29 January 2013 requesting that her sister's case be referred to a formal inquest before the High Court (TN20 at p289). A copy of the letter is annexed hereto marked **FA48**. Nkadimeng wrote:

LC NGT

> "If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution."

336 The Simelane family reported the inaction of the South African authorities to the United Nations Special Rapporteur on Enforced Disappearances who in turn corresponded with the government. A copy of the letter received from the Chairperson of the Working Group on Enforced or Involuntary Disappearances dated 24 July 2013 is annexed hereto marked **FA49**.

337 Nkadimeng's request for the holding of an inquest was refused. Remarkably, the NPA claimed that their investigations were still not yet complete. She wrote in her affidavit:

> "My family and I do not believe that the NPA is acting in good faith. Indeed, we have lost all confidence in the prosecutors and police. They have betrayed our trust. Given their past idleness such investigations could drag on indefinitely while witnesses and suspects grow old and die. Since January 2013 my lawyers and I have engaged in extensive communications with the offices of the first and second respondents [the NDPP and the National Commissioner of the SAPS] in an effort to persuade them to finalize their apparent investigations or at least refer the case to a judicial inquest. More than 20 months later these efforts have come to naught.
>
> The historic compromise which gave birth to the new South Africa demanded that those perpetrators denied amnesty, or who did not apply for amnesty, would face follow-up. This has not happened. The state has systematically and deliberately dragged its feet or blocked justice in this case and many others. We know who abducted, tortured and murdered Nokuthula. They were meant to face justice or appear before a judicial inquest. More than 30 years have passed since Nokuthula's disappearance, but neither has happened. We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete."

LC NGT

338 On 20 May 2015, Nkadimeng brought an application before the High Court in *Nkadimeng 2*. Since these papers are voluminous, they can be supplied on request. Nkadimeng sought an order compelling the NPA and SAPS to finalise their investigations and an order compelling the NPA to take a prosecutorial decision, or to take steps to hold an inquest in the High Court. She also sought an order declaring that her fundamental rights had been violated by the prolonged delay of the authorities to finalise the case.

339 The papers exposed the real reason for the long delay, namely the political interference that resulted in the suppression of the TRC cases. In this regard, supporting affidavits were provided by Pikoli and Ackermann, which are the same affidavits attached to this founding affidavit as **FA22** and **FA8**.

340 The response of the authorities was remarkable to say the least. No answering affidavit was filed disputing the assertions of Nkadimeng, Pikoli or Ackermann. No public statement was made denying that the TRC cases had been suppressed through political interference. Instead, Abrahams contacted Nkadimeng's counsel to commence settlement discussions, which took place. Once the NPA undertook to act, the litigation was placed in abeyance.

341 On 14 March 2016, the NPA charged former SB officers Willem Helm Johannes Coetzee, Anton Pretorius, Frederick Barnard Mong and Msebenzi Timothy Radebe with the murder of Nokuthula Simelane. More than eight years later they have still not stood trial. Mong and Radebe have died and Coetzee claims that he is mentally unfit to stand trial.

LC NGI

NPA under pressure

342 Following the launch of the aforesaid application which generated attention in the media, other families began to agitate for action on their cases, such as the families of detainees who had died in apartheid security detention, including the families of Ahmed Timol and Neil Aggett. They were supported by the FHR who arranged pro bono lawyers to take their cases forward.

343 Macadam states in his affidavit that following the appointment in June 2015 of Abrahams as NDPP, he met with Abrahams and indicated his willingness to return to the TRC cases if he was relieved of his responsibilities with the foreign bribery cases. Abrahams advised that he was thinking of taking all the TRC cases away from the PCLU but did not terminate Macadam's appointment as the foreign bribery prosecutor.

344 According to Macadam the bribery cases were subsequently transferred to another business unit in the NPA, freeing him up to return to the TRC cases. It is apparent that Macadam was beginning to feel the heat. He wrote in his affidavit:

> "**The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters.** One of the matters which I had decided should be investigated was the Aggett-matter which also related to a death in detention. At that stage the Timol-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that Mr Timol had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case." (Bold added).

345 However, Adv Andrea Johnson who was then the acting Head of the PCLU, instructed Macadam and a colleague to halt work on the TRC cases as they were

LC NGI

going to be removed from the PCLU. Macadam was concerned about this development:

> "I was however concerned that **this would result again in the cases being neglected** resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof." (Bold added).

Historic reopening of the Timol inquest

346 On 19 January 2016, the late Frank Dutton and representatives of the Timol and Aggett families, including Advocates Howard Varney and the late George Bizos SC, made a presentation to the NDPP, senior head office members and the PCLU urging the reopening of the inquests in these two cases. Dutton presented considerable evidence, including important witness testimony, that was not led before the original inquests. A copy of Dutton's presentation can be provided on request.

347 On 21 June, 8 July, 11 and 23 August 2016; Webber Wentzel, representing the Timol family, threatened legal action against the NPA if a decision was not taken timeously to reopen the inquest. In these letters the attorneys pointed out that witnesses were elderly and sickly and could pass away at any moment. On 25 October 2016, the PCLU confirmed in a letter that the NDPP had written to the Minister of Justice requesting him to approach the Judge President of the Gauteng High Court to appoint a Judge to reopen the inquest in the interest of justice. Copies of the aforesaid letters can be supplied on request.

348 Between June and August 2017, the historic reopened inquest (IQ01/2017) into the death in detention of Ahmed Timol was held in the High Courts of Johannesburg and Pretoria. Judge Mothle handed down his judgment on 12 October 2017 ([2017]

HC NGI

ZAGPPHC 652). He found that prior to his death Timol was grievously injured following more than four days of unrelenting torture at the hands of the SB. The reopened inquest found that Timol did not jump or dive, as alleged by the police, but was pushed by members of the SB, and that such act amounted to murder. Prior to this finding the Timol family had to live with the fraudulent finding of the first inquest that Timol had taken his own life – a pain that they had to endure for 46 years.

349 In his judgment Judge Mothle supported the call by the Timol family for:

> "**The energetic and vigorous investigation of outstanding apartheid-era cases before it is too late, which may involve the creation of a dedicated team of carefully selected investigators and prosecutors.** All State entities should be required to supply all information at their disposal to this team.
>
> All files pertaining to political detainees of the apartheid-era must be made easily accessible to the families seeking answers." (Bold added).

350 Judge Mothle found that former police officer Joao Rodrigues "*participated in the cover up to conceal the crime of murder as an accessary after the fact and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution.*"

351 On 30 July 2018 the NPA charged Rodrigues with the murder of Timol as well as with obstructing the course of justice by providing false evidence to the reopened inquest in order to mislead that court. A copy of the indictment can be supplied on request.

Rodrigues permanent stay application

352 On 18 October 2018, Rodrigues filed an application in the Gauteng Division of the High Court (Case No. 76755/2018) seeking a permanent stay of his prosecution on

LC NGI

the claimed grounds that the long delay in prosecuting him violated his rights to a fair trial. Since Rodrigues had not cited the Timol family as an interested party they were forced to intervene in the proceedings and were admitted as the Fourth Respondent. A full set of the papers in the permanent stay proceedings can be provided on request.

353 In the Timol family's answering papers, Imtiaz Cajee, Timol's nephew, explained the lapse of time between the murder of Timol in 1971 and the bringing of criminal charges in 2018. He explained that during apartheid the police and organs of the apartheid State colluded in covering up the crimes committed against Timol. During the TRC's amnesty process no action was taken as the authorities were probably waiting to see if perpetrators of apartheid-era crimes would seek amnesty in exchange for full disclosure. It was the inaction in the post-TRC period that needed to be explained. However, the NDPP and the Ministers of Justice and Police offered no explanation in their answering affidavits.

354 Cajee in his answering affidavit explained that the delay in the post-TRC period was attributable to the political interference in the TRC cases. He relied on the documents disclosed in *Nkadimeng 2* and attached these to his affidavit including the secret ATT report and the affidavits of Pikoli and Ackermann and their annexes.

355 Despite the severity of the averments of gross political interference, the state respondents chose to remain silent and did not file further affidavits. Then, on 16 January 2019, the NPA's spokesperson, Luvuyo Mfaku and a spokesperson for the Minister of Police, Hangwani Mulaudzi, were interviewed by Joanne Josephs on Radio 702. A copy of the transcript of this interview was attached to Cajee's

LC NGI

supplementary affidavit and can be made available on request. During this interview, the NPA spokesperson indicated that:

355.1 Macadam had "*actually filed and deposed an affidavit outlining all the delays*" in prosecuting apartheid era crimes.

355.2 The NPA would "*never contest*" the allegations of political interference contained in the aforementioned affidavits of Pikoli and Ackermann and that "*[i]f they are saying that there was that interference then they have exclusive knowledge of what was happening. I would never contest that*".

356 Indeed, in the affidavit filed by Adv Pretorius SC on behalf of the NPA on 8 December 2018, he referred to annexing Macadam's affidavit, but it was not attached. The Radio 702 interview prompted Cajee to file a supplementary affidavit on 25 January 2019 pointing out that the NPA had withheld the affidavit of Macadam. Cajee called on the NPA to file Macadam's affidavit and asserted that withholding it amounted to obstructing the administration of justice.

357 On 4 February 2019, Adv Torie Pretorius SC, on behalf of the NPA, filed a supplementary answering affidavit, along with the Macadam affidavit and annexes. It turned out that Macadam had signed his affidavit on 1 November 2018, and it was available from that date. As pointed out above, the Macadam affidavit admitted that the Timol case and the other TRC cases were suppressed, and he provided details and evidence to illustrate the obstruction.

358 No attempt was made by Pretorius SC to explain why the Macadam affidavit was not filed with his answering affidavit on 8 December 2018, even though it was available from 1 November 2018. Cajee assumed that the Macadam affidavit was

LC NGI

held back in order not to reveal the disclosures made therein. It is apparent that even as late 2018 the NPA was attempting to withhold information about its role in the suppression of the TRC cases. In its judgment, the Court saw fit to censure the NPA for its attempt to withhold the affidavit of Macadam, noting that:

> "The suggestion that it was deliberately withheld from this Court is difficult to refute especially given its seriousness and the detailed allegations contained therein of political interference."

The NPA admits to the political interference

359 By early 2019 it appeared that the NPA had come to the view that the game was up, and it was time to admit that the organisation had succumbed to political pressure. Adv Pretorius SC in his supplementary affidavit of 4 February 2019 admitted, on behalf of the NPA, for the first time, the political interference and its unlawfulness. A copy of this affidavit (at p752 of the Rodrigues record) is annexed hereto marked **FA50** (excluding the annexed Macadam affidavit, which is already attached to this affidavit).

360 Significantly, Pretorius SC, in his supplementary affidavit, specifically states that he does not deny the contents of the Pikoli and Ackermann affidavits. The NPA admitted to the political interference in the following extracts from the Pretorius SC affidavit:

> "I strongly deny that the first respondent [NPA] is responsible for the delays upon which the fourth respondent [Cajee] seeks to rely. **Even on the evidence upon which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others**. (Bold added) (para 2.3)
>
> When regard is had to the nature of the crime, **it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government.** It is irrelevant as to what one calls such steps.

LC NGI

The fourth respondent calls them political interference with the National Prosecuting Authority. (Bold added) (para 2.10).

The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol. When regard is had to what advocates Pikoli, Ackermann and Macadam say in their affidavits confirming political interference with the first respondent's prosecutorial decision-making processes, it is clear that it is in fact not the first respondent who stalled the investigations and prosecution of cases such as the present. For this reason, no purpose would be served by throwing stones at the first respondent. (Bold added) (para 2.11).

When regard is had to what the fourth respondent says in paragraph 84, **the only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's own doing or its malice – it was as a result of the political interference and the "*severe political constraints*"** to which the first respondent was subjected. (Bold added) (para 2.12).

[Cajee] relies on certain incidents which he says constitute evidence of political interference. **None of these incidents were created by the first respondent**. On fourth respondent's own version, "*the NPA and its officials dealing with my uncle's case ... became subjected to severe political constraints ...*" There is no doubt that the National Prosecuting Authority and its officials could not have subjected themselves to the "*severe political constraints*" referred to by the fourth respondent. (Bold added) (para 2.13).

It is important that I highlight some of the contents of Pikoli's affidavit **which clearly indicate that the [NDPP] and its officials were indeed, as alleged by fourth respondent, subjected to severe political constraints** as a result of which, on [Cajee's] version, it was "*extremely difficult, if not impossible, for them to carry out their responsibilities under law.*" (Emphasis added) (para 2.21).

The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and **send a clear message that political office bearers should stop interfering with prosecutorial decisions** unless otherwise authorized to do so by law. (Bold added) (para 2.28).

What one sees in Pikoli and Ackermann's affidavits is that **the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority was far from being authorized by law.** This being the case, there can be no rational basis to use such unlawful political interference and political pressure to justify the permanent stay of criminal prosecution which the applicant seeks in this application. (Bold added) (para 2.29).

LC NGI

> I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application. (para 2.30).
>
> When regard is had to the contents of Chris MacAdam's affidavit, **it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases** such as the present. For this reason, the insinuation against Chris MacAdam is wholly misplaced. (Bold added) (para 2.38).

361 Pretorius SC painted the NPA as an unfortunate victim of circumstance. He stressed that the NPA was not the source of the interference; and asked the Timol family not to "*throw stones at the NPA*" when it was simply on the receiving end of the political interference. Pretorius implied that the NPA was powerless to stand up to the interference and assert its independence.

362 Pretorius SC even suggested that the NPA had little choice in the matter because the NPA "*prosecutes on behalf of the State*".

362.1 However, I am advised that he erroneously conflates the concept of the '*State*' with that of the '*government*'. The NPA does not represent the government as the State Attorney does. It should never take instructions from government in relation to prosecutorial decisions.

362.2 The State represents higher societal interests. Public prosecutors act on behalf of society and must act in the public interest. They must apply the law without fear, favour or prejudice particularly when serious breaches of the law carry a criminal sanction.

LC NGI

362.3 In this case, with the exception of Pikoli and Ackermann, the NPA as a whole were happy to take instructions from government in exercising prosecutorial discretion. They acted timidly and shamefully in the face of a government seeking to impose its will on them.

363 Pretorius SC asserts that the halting of investigations and prosecutions of the TRC cases was not the result of its "*own doing or its malice*". It was the "*result of the political interference and the 'severe political constraints' to which the first respondent* [the NPA] *was subjected*". This attitude explains how the NPA was so easily 'captured' in relation to the TRC cases, and then subsequently in respect of the cases dealing with systemic political corruption.

364 Effectively, the NPA leadership states that once the politicians leaned on them, they were obliged to comply with their demands and accordingly cannot be held accountable. However, this claim flew in the face of the prevailing law, as was pointed out by the Timol family's submissions in the Rodrigues stay of prosecution case. While the pressure brought to bear on the NPA was exerted by outside forces, the institution and its officials were under a clear legal duty to reject such improper interference and obstruction. The various constitutional and statutory lapses committed by the NPA and those behind the interference will be dealt with later in this affidavit.

365 While the NPA has admitted that it succumbed to political interference, those organs of state who actually applied the pressure remain conspicuously silent. To their discredit, to date, neither the President nor any member of cabinet, past or present, have expressed any regret or remorse, or offered an apology for the deep betrayal of victims of past atrocities.

HC NGI

366 In its judgment, the full court in *Rodrigues v NDPP & Ors* [2019] 3 All SA 962 (GJ) dismissed the application for a stay of prosecution and concluded that:

> "[21] What occurred in the period from about 2003 and 2017 was that all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the National Prosecuting Authority's prosecutorial decision making."

367 The Court expressed its dismay at the political interference and dismissed the NPA's attempt to portray itself as a victim and directed that those complicit should be brought to the NDPP's attention for action. It also directed that the Executive and NPA provide a public assurance that such interference will never occur again and called on them to specifically indicate what measures will be put in place to prevent such recurrence. The full bench rejected the attempt of the NPA to paint itself as a victim and called for an investigation:

> "[64] Of course, it may well be asked, what was the NPA required to do in the face of high-level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. **Society as a whole had an ongoing interest in the work of the TRC and the follow-up that the government had committed itself to**. Parliament, which ultimately represents the legislative authority of the state, had a right to know when the letter and spirit of legislation that it had passed was being deliberately undermined. None of this occurred and **the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part**.
>
> [65] It is also for these reasons that **the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted**." (Bold added)

368 Rodrigues approached the Supreme Court of Appeal, which in *Rodrigues v The National Director of Public Prosecutions and Others* [2021] 3 All SA 775 (SCA)

LC NGI

dismissed his appeal stating that it was "*perplexing and inexplicable*" why the TRC cases were suppressed:

> "It was during this 14-year period [2003 – 2017] that the Executive adopted a policy position conceded by the State parties that TRC cases would not be prosecuted. It is perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes.
>
> All these considerations, either viewed individually or collectively, should have stood in the way of any such a moratorium on the prosecution of TRC era cases. That it happened despite the constitutional, legal and other considerations suggests disdain for those important considerations and interests. The Full Court rightly recommended a proper investigation into these issues by the NDPP and a determination whether any action in terms of section 41(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was necessary".

369 Rodrigues filed an appeal to the Constitutional Court, but he died on 7 September 2021 bringing an end to the efforts to hold him to account.

WAS THERE A POLITICAL AGREEMENT NOT TO PROSECUTE?

370 While the evidence uncovered points to a desire on the part of the government to close down the TRC cases in order to protect ANC members from prosecution, there have also been public statements raising the possibility of an agreement or 'informal agreement' between political stakeholders not to prosecute apartheid-era crimes.

371 In a parliamentary question (NW2290) put to the Minister of Justice on 10 November 2020, Mr G Hendricks of the Al Jamah-Ah party asked for the reasons why no perpetrators of Apartheid-era killings of leaders such as Imam Haron, Steve Biko, Suliman 'Babla' Saloogee and hundreds of others had been prosecuted. He asked in particular, if the reason was the result of any "*agreement, secret or otherwise*"

LC NGT

and "if so, was the agreement legal or political?" The Minister replied as follows: "*The NPA is unaware of such an agreement.*"

372 On 5 July 2021, the FW de Klerk Foundation released an editorial titled "The NPA's Decision to Prosecute 'Apartheid Era' Crimes", a copy of which is annexed hereto as **FA51**. The editorial referred to an 'informal agreement' not to prosecute apartheid era crimes:

> "Because of an informal agreement between the ANC leadership and former operatives of the pre-1994 government, the NPA suspended its prosecutions of apartheid era crimes."

373 In response to this editorial, Good Party secretary general Brett Herron said in a media article (Tymon Smith, A Renewed Commitment to the TRC Cases, Mail & Guardian, 26 July 2021) that De Klerk's reference to the agreement "*confirms one of South Africa's most disgraceful secrets*" and that it:

> "further confirms that the NPA was captured long before the term 'state capture' rose to the prominence it has, and that the ANC had accomplices in the genesis of our current capture pandemic, the party of apartheid led by De Klerk".

374 Herron described the editorial as "*a thinly veiled threat to the NPA to stay in its lane or the ANC will face consequences*". He added that "*what the De Klerk Foundation really wants is for the terms of its informal amnesty deal with the ANC to be upheld by the NPA*". A copy of this article is annexed hereto marked **FA52**.

375 The meeting report of the Justice Portfolio Committee meeting of 8 December 2021, disclosed that Hendricks asked Minster Ronald Lamola whether the government "*had been hampered by decisions taken at the Convention for a Democratic South Africa (CODESA) not to prosecute the TRC cases.*" He said, "*Minister Lamola had*

LC NGI

to be honest with South Africa." The Minister said he "*was not aware of any agreements which provided that there would be no prosecutions of TRC matters*." The relevant extracts of this meeting report are annexed hereto marked **FA53**.

Deliberations on a further immunity

376 During July 1998, former SADF Generals called for a blanket amnesty for all sides. See the SAPA press release dated 14 July 1998 annexed hereto marked **FA54**.

377 In March 1999, the TRC denied the amnesty application of 37 ANC leaders, which included then Deputy President Mbeki.

377.1 The application was denied since it did not disclose any individual offences. See the SAPA press release dated 4 March 1999 annexed hereto marked **FA55**.

377.2 Shortly thereafter, Mbeki informed Parliament that government was considering further amnesty proposals that had been put forward by SADF generals. See the article titled '*Generals, ANC members talk about amnesty*' dated 1 January 2002, annexed hereto marked **FA56**.

377.3 Mbeki also sought to adjust the TRC legislation to allow for the grant of amnesty for collective responsibility, without the need for individual disclosure. An ANC spokesperson suggested that the SADF generals had promised to "come clean" but only if they were guaranteed amnesty. See the SAPA press release titled "*Mbeki wants changes to TRC rules on amnesty*" dated 22 May 1999 annexed hereto marked **FA57**.

LC NGT

378 Bubenzer in his book in a chapter titled "*Bargaining Over the TRC's Legacy*" detailed secret consultations between the ANC government and representatives of the SADF and the security police from 1998 until early 2004. The main aim appeared to be to reach agreement on a legislative solution on how to avoid prosecutions in the wake of the TRC. A copy of the relevant extracts from Bubenzer's book are annexed hereto marked **FA58**.

379 According to an interview conducted by Bubenzer with former police commissioner and head of the Foundation for Equality Before the Law (**FEL**), Johann van der Merwe, in Pretoria on 5 May 2006, former President F.W. de Klerk assumed a central role in the consultations. According to Bubenzer:

379.1 De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government.

379.2 The FEL's aim was to find a solution to avoid the prosecution of former members of the SAP who had not received amnesty.

379.3 Since a general amnesty was not politically or constitutionally feasible, the FEL proposed an indemnity procedure based on admission of the crime committed, but without the need to make full disclosure.

379.4 The talks continued until 2004, without an agreement being reached.

380 However, the approach proposed by FEL in relation to the '*admission of crimes but no full disclosure*' was adopted by the Pardons Reference Group established by President Mbeki under the Special Dispensation for Political Pardons in 2007.

LC NGI

381 According to an interview conducted by Bubenzer with former SADF General Jan Geldenhuys (**Geldenhuys**) in Pretoria on 10 May 2006, consultations between government and a group of high-ranking former generals of the SADF commenced during 1998.

381.1 Former Chief of the SADF, General Constand Viljoen was approached by Jacob Zuma, then Deputy President of the ANC with the aim of discussing questions of criminal accountability arising from the past. Viljoen referred Zuma to Geldenhuys and the Contact Bureau (known in Afrikaans as the Kontak Buro).

381.2 As with the police negotiations, these talks were aimed at finding a mutual arrangement to avoid post TRC trials through a new indemnity mechanism. The government was represented by Jacob Zuma, who became Deputy President of South Africa in June 1999 (**Zuma**).

381.3 The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who was closely connected to leading ANC members. Apart from Zuma, other high-ranking members of the ANC, such as Penuell Maduna (then Justice Minister), Mathews Phosa, Sidney Mufamadi and Charles Nqakula also participated from time to time. On various occasions Thabo Mbeki was also present, initially in his capacity as Deputy President, and later as President.

381.4 The SADF was represented by Geldenhuys and other generals. Both sides had legal advisers present. The talks continued until early 2003, with a few follow-up meetings held in 2004.

LC NGT

381.5 Bubenzer explored the motivation of the government in reaching out to the SADF generals in two interviews conducted with Jürgen Kögl on 12 May 2006 and 14 June 2006. Apparently, the government was, for amongst other reasons, interested in persuading the generals to come clean on its past third force operations in KwaZulu Natal and in particular to disclose the sites of arms caches, which could be used in future political violence.

382 On 21 December 2019, investigative journalist and author, Michael Schmidt, conducted an interview in Hartbeespoort with Major-General Dirk Marais (**Marais**), former Deputy Chief of the Army and the Convenor of the SADF Contact Bureau. Schmidt's confirmatory affidavit is annexed hereto marked **FA59**. Schmidt writes in his book 'Death Flight' that, according to Marais, the government was seeking a *quid pro quo*. Copies of the relevant extracts from 'Death Flight' are annexed hereto marked **FA60**. Marais claimed that Mbeki indicated in their discussions that:

> "They don't want us to be charged – and they don't want them to be charged"

383 Marais said in the interview that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals such as former Surgeon-General Niël Knobel, or one of the former Chiefs of the Air Force, as required.

384 Marais told Schmidt that on the ANC/Government side, Mbeki's team usually consisted of the "security cluster", which initially included Minister of Defence Joe Modise, Minister of Safety and Security Sydney Mufamadi and Minister of Justice

LC NGI

Dullah Omar. According to Schmidt, when Mbeki became President, Zuma's "security cluster" team would most likely have included Minister of Defence Mosiuoa Lekota, Minister of Justice Penuell Maduna (replaced by Brigitte Mabandla in Mbeki's second Cabinet), Minister of Intelligence Joe Nhlanhla (replaced by Ronnie Kasrils), and Minister of Safety and Security Steve Tshwete (replaced by Charles Nqakula).

385 On 5 May 2020, former Minister of Intelligence Kasrils emailed Schmidt regarding the ANC-SADF talks advising that he had 'no knowledge of virtually all the meetings and developments arising from such talks.' Schmidt no longer has a copy of this email.

386 Schmidt notes in his book, that during the interview, Marais showed him an unsigned handwritten letter he prepared for the signature of the former Chiefs of the SADF in early 2004. Marais permitted Schmidt to take photographs of the letter. The letter was addressed to Deputy President Zuma, and it recalled the initiation of the series of secret, high-level talks between the government and former SADF Generals, a copy of which is annexed hereto marked **FA61**. The letter stated *inter alia*:

> "A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T. Mbeki when he approached General C.L. Viljoen in 19? (sic). General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC.
>
> A convenor, Mr J. Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M. Phosa, [leader of an ANC lobby arguing that its members be protected from prosecution], and by us the former Chiefs of the SADF.

LC NGI

> There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki, however expressed the opinion that the process of communication, which was mutually agreed to, was so important to him that he preferred to remain the prime representative of the ANC in future deliberations.
>
> Many deliberations followed and mutual agreements were reached. When Mr Mbeki could not attend, he authorised somebody, usually a minister, and later on when he became president in 1999, you [Deputy President Jacob Zuma] represented him.
>
> In execution of mutual decisions, much effort was put in by the Contact Bureau and some of your ministers to prepare papers and submissions for acceptance by the Deputy President and later on the President. .....
>
> In similar fashion, we the former Chiefs of the SADF as members of the forum were flown to Cape Town for discussions with Ministers Maduna and Nqakula and thereafter with you on 17 February 2003."

387 Former Premier of Mpumalanga, Mr Mathews Phosa, in a telephonic call to Schmidt on 2 June 2020, denied the claim of Marais that he had been involved in an ANC lobby pursuing protection from prosecution.

388 Bubenzer writes that Geldenhuys and Kögl advised him that by the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism which amounted to a new amnesty. It envisaged an amendment to the Criminal Procedure Act to allow for a new kind of special plea based on the TRC's amnesty criteria, followed by an inquiry by the presiding judge.

389 By late 2002 the proposal and draft legislation had been finalised by the Justice Department and was ready to be presented to Parliament for enactment. However, it first had be approved by President Mbeki, who ultimately rejected it in early 2003. Nonetheless, as has been set out above, the essential ideas remerged in the subsequent amendments to the Prosecution Policy.

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390 At the ANC's 51st national conference in December 2002 in Stellenbosch, a discussion of guidelines for a broad national amnesty, possibly in the form of presidential pardons, was scheduled. According to the head of the ANC presidency, Smuts Ngonyama, the ANC supported the idea of introducing a new amnesty law. He added that his party was generally against running trials in the style of the Nuremberg trials, since this would occur at the cost of nation-building. I attach hereto a copy of a news article marked **FA62**.

391 Prior to Mbeki's rejection of the amnesty legislation in early 2003, the SADF generals appeared to be on the brink of a breakthrough. Marais advised Schmidt in the aforesaid interview that after 7 years of negotiations, the generals and the Cabinet's security cluster had agreed on a legal framework for a post-TRC amnesty process. According to Marais the government arranged for "*a law writer in Cape Town*" to come up with the new legislation.

392 On 17 February 2003, a delegation of SADF generals led by Geldenhuys met with Justice Minister Penuell Maduna and Police Minister Charles Nqakula in Cape Town. The law drafter (a state official in the Department of Justice) was called in to read out the proposed legislation. Marais indicated to Schmidt:

> "... and when he finished, we said 'But that's got nothing to do with us'... because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed] so General Geldenhuys said 'No, we don't need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people ... don't have to do that, so this means nothing to us .... The whole thing collapsed there .... This whole conversation collapsed..." (At page 146 of Death Flight).

393 According to Schmidt, the differences between the sides were now irreconcilable: the generals wanted a post TRC law granting a new blanket amnesty with no

LC NGJ

disclosure required – but the government appeared only willing to offer an amnesty based on full disclosure to be decided on a case-by-case basis.

394 The talks between the SADF Generals and the government came to a close during 2004, without resolution, as was evident from Marais' 2004 letter to Deputy President Zuma referred to above:

> "In spite of such submissions and apparent acceptances, little notable implementation was effected by the ANC or government. ...
>
> Agreement on outstanding matters was again confirmed, yet more than a year later, no sign of implementation has become apparent, neither was there any effort on your behalf to inform us of any progress which could lead to eventual implementation.
>
> In view of the above, you are requested to inform us of the desirability from your point of view to keep the door open for further co-operation."

395 Deputy President Zuma did not respond to the letter.

Compilation of dockets and threats of private prosecutions

396 At least two organisations largely representing the interests of the former regime, the FEL and AfriForum, have called for prosecutions of ANC and PAC members, and threatened private prosecutions against ANC members and civil litigation if their members are prosecuted. Examples of such public statements are annexed hereto marked **FA63**. It appears that such threats may have played a role in shaping the approach of the government to the TRC cases.

397 In an interview conducted by Bubenzer with Johann van der Merwe in Pretoria on 5 May 2006, the latter claimed that the FEL, represented by attorney Jan Wagener, had compiled dockets for the prosecution of top ANC members, including President Mbeki. Adv Jaap Cilliers SC, who had represented Wouter Basson, apparently

LC NGT

evaluated the dockets and claimed that the dockets contained sufficient evidence to support criminal charges. The PCLU requested the FEL to hand over the dockets for their consideration, but FEL refused to do so, claiming that would only be used if apartheid era officials were targeted for prosecution. The claimed dockets have never been handed over to the authorities.

398 Wagener, during his interview with Bubenzer in Pretoria on 8 May 2006, claimed that the threat of the FEL dockets played a role in persuading President Mbeki and the government not to proceed with the arrests in 2004 of the suspects behind the poisoning of Chikane.

399 According to Bubenzer, General Jan Geldenhuys told him at an interview in Pretoria on 15 May 2006, that the former SADF generals were also of the view that the issue of potential criminal liability of ANC members was "*a major consideration for the government*" and the former military would take the same steps as FEL if they were charged.

400 This is one of the key questions that only an independent commission of inquiry can resolve.

Former President Mbeki denies involvement in political interference

401 In an article titled "*Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials*" published by News24 on 21 February 2024, journalist Karyn Maughan pointed to uncontested evidence from various court cases demonstrating that "*powerful Mbeki administration officials blocked the prosecution of apartheid cases*". A copy of this article is annexed hereto marked **FA64**. Former

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President Mbeki was approached for comment, but his foundation, the Thabo Mbeki Foundation (**TMF**), referred enquiries to the current government.

402 However, on 1 March 2024, the TMF released a statement titled "*Statement by former President Thabo Mbeki on allegations of NPA interference by the Executive*", a copy of which is annexed hereto marked **FA65**. In this statement Mbeki strenuously denied any involvement in the suppression of the TRC cases:

> "During the years I was in government, we never interfered in the work of the National Prosecuting Authority (NPA). The executive never prevented the prosecutors from pursuing the cases referred to the NPA by the Truth and Reconciliation Commission.
>
> I insist on this despite a 2021 Supreme Court of Appeal judgment which found, on the strength of uncontested submissions by former National Director of Public Prosecutions (NDPP), Advocate Vusi Pikoli, that the NPA "investigations into the TRC cases were stopped as a result of an executive decision" which amounted to "interference with the NPA."
>
> I repeat, no such interference ever took place. If the investigations Adv Pikoli referred to were stopped, they were stopped by the NPA and not at the behest of the Government as alleged by the Advocate. There is no record of a single instance when the NPA stopped investigating and prosecuting any case on account of the so-called "executive interference" – at least not during the period 1999 - 2008."

403 Former President Mbeki asked why the NPA succumbed to political pressure and challenged the NPA to produce any illegal instruction from his government stopping the TRC cases:

> "There are some questions which the NPA must answer honestly.
>
> Who in the executive instructed the NPA not to do its work? Will the NPA publish this 'instruction' which, presumably, will be in its archives? Why did the NPA accept and respect what would have patently been an illegal instruction?
>
> Instead of propagating falsehoods, the NPA must investigate and prosecute the cases referred to it by the TRC.

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> I also recall that the same Pikoli who allegedly buckled under pressure of "executive interference" concerning the TRC cases, earned a lot of respect by portraying himself as an independent and principled NDPP who defied an "all too powerful" President Mbeki, who was supposedly hell-bent on stopping him from investigating and arresting the late former National Commissioner of Police, Jackie Selebi.
>
> The question arises, what happened to his cherished independence and commitment to principle when he acquiesced to 'members of the executive' on the TRC cases?"

404 Mbeki claimed that he and his administration always acted in accordance with the Constitution, and he called on the NPA to demonstrate integrity by apologising to victims for not prosecuting the TRC cases:

> "Conveniently, some people forget that the ANC was the principal architect of the Constitution of the Republic. During the years when I served as Deputy President and President of the Republic, I, together with my colleagues in Government, always bore this in mind and acted knowing that the Constitutional prescripts we helped to negotiate were binding on us.
>
> There was never any Minister of Justice during those years who was ever authorised to instruct any NDPP to act in one way or another. No NDPP, including Pikoli, ever approached me to complain that he/she had been instructed by a Minister, or any other official, to violate the independence of the NPA as prescribed by the Constitution.
>
> The NPA must demonstrate enough integrity by apologising for not processing the TRC cases, rather than engage in dishonourable behaviour of trying to hide behind a fig leaf which is nothing more than pure fabrication."

405 The denials of former President Mbeki are not consistent with the brazen suppression of the TRC cases that occurred during his administration, and which has been set out above. It is for an independent commission of inquiry to consider and test the veracity of the denials of former President Mbeki.

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DEVELOPMENTS POST THE POLITICAL INTERFERENCE

406 It is difficult to pin a date on when the political interference came to an end. According to the SCA in *Rodrigues* the political interference took place between 2003 and 2017. However, given the ongoing delays in taking the TRC cases forward, suspicions linger that the obstruction and interference of the past have been difficult to shake off.

407 In order not to unduly burden this affidavit, most of the reports, minutes and other documents referred to in this section are not annexed but can be made available on request. In the electronic version of these papers, where available, hyperlinks are provided to these documents.

408 It should be stated that as far as we can ascertain there has been no mention of the TRC cases in the SAPS Annual Reports. (The SAPS Annual Reports prior to 2002, and those between 2004 and 2007 are not available online). There is also no mention of the TRC Cases in the DOJ Annual Reports which only deals with the question of reparations for those on the TRC's closed victims' list.

409 It is perhaps significant that the minutes of the Justice Portfolio Committee in Parliament recorded no mention of the TRC cases between 2011 and 2016. As mentioned above there was also no mention of the TRC cases during this period in the NPA's Annual Reports. There was only reference to the work of the MPTT.

410 For example, the NPA Annual Report of 2012/ 2013 made no mention of the TRC cases, just stating that the:

> "PCLU continued to execute its mandate as outlined in the Proclamation issued by the President and primarily focused on the management and

LC NGT

direction of investigations and prosecutions of crimes which impact on national and international security ..."

411 Between 2016 and 2018, the only TRC case that was mentioned in the NPA Annual Reports was the Timol case, which as mentioned above, materialised though the efforts of the Timol family and their representatives.

412 Oddly enough, there was no mention of the Nokuthula Simelane case. As mentioned previously, in 2015 the Simelane family had filed papers in the High Court, in which the political interference was exposed in detail. This resulted in an indictment being issued in early 2016. None of this appeared in the NPA Annual Reports for those years. I suspect that the NPA maintained its silence on this matter to avoid having to deal with political interference, which was detailed in those papers.

413 Emboldened by the outcome of the reopened Timol inquest in 2017; Webber Wentzel, in a letter dated 18 January 2018, called upon the authorities to pursue 22 emblematic cases from the past (including the murders of the Cradock Four, PEBCO 3, and Richard and Irene Motasi). A copy of this letter is annexed hereto marked **FA66**. In late January 2018, a meeting was held with the NPA and DPCI (also referred to as **the Hawks**) at which the late investigator, Frank Dutton, outlined the available evidence in all these cases and the need to take expeditious action.

414 Both the NPA and DPCI agreed to prioritise these cases.

414.1 Although the Hawks appointed investigating officers, it was subsequently discovered that at least one officer was a former SB member, and another had a prior connection to the Motasi murder case.

LC NGJ

414.2 In that case, Richard Motasi had accused the officer in question of assaulting him and had sued him and others for damages, which according to the family, prompted his murder in 1987. Following complaints, the two officers were removed from the investigations, but it left deep suspicions about the bona fides of the DPCI in respect of their commitment to justice in respect of the TRC cases. Correspondence in this regard can be supplied on request.

414.3 Subsequently, the DPCI, at management level, has refused to engage with the FHR and its lawyers and private investigator in respect of the TRC cases, unless a power of attorney is provided in each case. This is even where there are clear links between such cases and matters where lawyers had received specific instructions from the families of the victims involved.

414.3.1 An example is the 1991 murder of Adriaano Louis Bambo by the SB. Bambo was an informer for the SB. He was killed, allegedly to prevent him from exposing the role of the SB in the murder of Nokuthula Simelane and others.

414.3.2 Bambo had been one of Simelane's guards following her abduction and would have observed the treatment meted out to her. Two of the accused in the Nokuthula Simelane case, Willem Helm Johannes Coetzee and Anton Pretorius, were Bambo's handlers and are implicated in the Bambo murder.

414.3.3 Notwithstanding the clear link between the Bambo and Simelane cases, the DPCI and the NPA have been reluctant to cooperate with

LC NGI

the Simelane family lawyers, Webber Wentzel, since they do not have a power of attorney from the Bambo family.

414.3.4 The conduct on the part of the DPCI and the NPA speaks volumes about their approach and lack of sensitivity to the TRC cases. It also heightens the need for a specialised approach to these cases.

414.4 More than six years after the January 2018 meeting, of the 22 highlighted cases, only the Aggett, Haffejee, Dipale and Haron inquests have been concluded.

415 The meeting report (prepared by the Parliamentary Monitoring Group) of the Portfolio Committee meeting held on 4 October 2017 to consider the NPA's Annual Report for 2016/17 recorded the following:

> "Adv L Mpumlwana (ANC) [condemned] the NPA. There was a feeling in South Africa that justice was for the rich and for white people. It had been like that for a long time. When a white lady's car was hijacked, a helicopter had been sent and the car was found and returned within an hour. He remembered when New Zealander visitors had been raped. Ten helicopters had hunted down the rapists and they had been sentenced within two years. He complained about the association of whites with value and blacks with no value....
>
> **There was the Truth and Reconciliation Commission (TRC) and some people had not gone to the TRC. Where were those cases rotting? TRC was like a staged thing. They had tried to be very kind and let people come but some did not come and others did not make full statements. Was there a way of checking on those who had not got amnesty? Was there no movement towards prosecution?"** (Bold added).

416 In January 2019, the NPA implemented a decentralisation policy in relation to the TRC cases in which the cases were transferred from the PCLU to the provincial offices of the various DPPs. This is reflected in the NPA Annual Report of 2019/20:

LC NGI

"The PCLU underwent fundamental restructuring at the beginning of the period under review, and Adv Chris Macadam was appointed acting head of the unit. After an audit of the PCLU's workload, the organisation decided to adopt a decentralised model whereby prosecutions are conducted by prosecutors in the areas where the crimes were committed, with the PCLU performing a managerial or support role. The NPA has reaffirmed the original mandate of the PCLU, and all matters falling outside of the mandate were returned to the DPP offices with jurisdiction. The adoption of a decentralised model required that the DPPs appoint nodal points to manage the PCLU matters in their divisions. The nodal points were trained to enable them to properly manage PCLU cases, and a monthly reporting system was installed."

417 The NPA Annual Report of 2019/20 also noted that its hands were tied since the investigation of the TRC cases was the responsibility of the DPCI:

"**In the S v Rodrigues TRC matter, the court found that the NPA had acted in breach of its duty in not resisting political interference by other departments and the executive. The NDPP was directed to investigate these matters further, and this investigation is still ongoing**.

It must be emphasised that the primary issue lies with the investigation of these matters, which is a responsibility of the DPCI. Due to the nature of the cases, it is difficult to access all the relevant information needed to make informed decisions. The PCLU has undertaken a number of initiatives to prioritise cases. This includes commencing with a review of all the death in detention cases from 1963-1990, reviewing certain decisions not to prosecute and grouping cases to establish the existence of a *modus operandi*.

Efforts are being made to establish a research capacity to retrieve all historical information required for the proper investigation of TRC cases. Initiatives to increase efficiency of the nodal points were interrupted by the COVID-19 crisis, which is preventing the holding of workshops, training seminars and other meetings." (Bold added)

418 The first comment by a cabinet minister on the interference that we are aware of was made by the former Minister for Justice, Ronald Lamola during his address to Parliament on the Budget Vote Debate of the DOJ on 16 July 2019 (a copy of which can be supplied on request):

lc NGI

> "Furthermore, we've noted the recent judgment on the Rodrigues matter related to TRC cases. We assure victims with similar cases that interference with prosecutorial independence of the NPA will not be tolerated. We continue towards a durable and sustainable solution to all TRC related cases including consideration of interest of victims."

419 Between April and August 2019, several suspects and witnesses in apartheid-era cases died before the trials or inquests could commence. These included Sergeant Msebenzi 'Vastrap' Radebe, an accused in the Nokuthula Simelane murder case; Lieutenant Stephen Whitehead, lead interrogator of Neil Aggett; Ernest Matthis who saw Timol fall and was expected to testify in the murder trial of Jao Rodrigues; and Colonel James Taylor, who was involved in the arrest and brutal interrogation of Dr Hoosen Haffejee.

420 The minutes of the Justice Portfolio Committee meeting on 9 July 2019 on the NPA's Annual Performance noted:

> "Key service delivery initiatives of the NPA include restoring NPA credibility and public confidence, the successful establishment of the Investigative Directorate, ongoing staff development and training, recruitment of specialised skills, the resuscitation of the Aspirant Prosecutor Programme which will deploy 90 new prosecutors to district courts; **as well as ensuring that the Truth and Reconciliation Commission (TRC) prosecution cases are dealt with adequately.**
>
> Unfortunately, the NPA faces a massive credibility challenge and is seriously divided. There is a lack of confidence in the NPA. It has severe budgetary restrictions and will have to reduce its staff complement by 500 over the Medium-Term Expenditure Framework to remain within budget. It has a shortfall of R1.7 billion over the next three years. A deep-seated skills shortage plagues the NPA and it has an average 20% vacancy rate." (Bold added).

421 The Justice Portfolio Committee Report of 12 July 2019 reflected the following:

> **"In June 2019, the South Gauteng High Court found that the NPA had breached the Constitution by allowing political interference to stall the prosecution of cases in which the TRC either did not grant amnesty or there was no application for amnesty made to the TRC. The NDPP was**

LC NGT

> **asked to consider charging those who had prevented the prosecution of these cases. In addition, the families of victims have also formally requested that a commission of inquiry be established**. For now, the NPA is in the process of establishing a task team to look into all cases of deaths in detention. The Committees regrets [sic] the delays in finalizing these cases and will monitor progress."

422 The minutes of the Justice Portfolio Committee meeting on 11 September 2019 noted the following comment by its chairperson:

> "The Chairperson referred to the TRC Report and said it had been 21 years since the finalisation of the report. There could not be a process that lasts more than 20 years. By the end of this term this had to be completed."

423 The minutes of the Portfolio Committee meeting of 4 March 2020 on the NPA's performance in the second and third quarters of 2019/20 reflected the following intent in relation to the TRC cases:

> "The Truth and Reconciliation Commission (TRC) prosecutions were a new focus area – the Timol case had been finalised lately. There were many cases in process but between 1963 and 1990 there had been 69 deaths in detention. The approaches to the NPA by families were only in respect of a few deaths. The NPA wanted to do a joint inquest of all deaths with common factors, for example, all deaths in a particular police station. That meant that there was a delay in moving cases forward. The Hawks had promised to follow up as rapidly as possible because people were dying. Rodrigues, who had been involved and convicted in the Timol case, had gone to court to apply for a permanent stay of execution. He had lost the case, but the judgement found that the NPA was guilty of preventing certain cases from going forward. The judgement required that the NPA investigate those NPA officials who were involved in delaying the cases.
>
> Adv Batohi said that the judgement referred to broader government officials and not just NPA officials."

Timol inquest follow-up

424 In the reopened Timol inquest, Judge Mothle found in his 2017 judgment that former SB officers, Warrant Officer Neville Els and Colonel Seth Sons, had lied under oath and that they should be investigated on perjury charges. It took Acting DPP

LC NGT

(Gauteng Division, Pretoria) Adv George Baloyi more than 30 months to decide not to charge them.

425 On 22 June 2020 the Timol family took this decision on internal review to the NDPP. In these submissions the following was placed on record:

> "We have to place on record that it has taken the NPA more than 2.5 years to make this decision. **The time taken to reach this decision leaves a sense of shock and dismay**. This matter can hardly be described as complex or unwieldy. ... Moreover, there was a real urgency given the circumstances. Ahmed Timol was murdered in 1971 and the suspects and witnesses in this matter are all elderly. Accordingly, the NPA was acutely aware that time was a pressing factor. Yet the NPA dragged its feet notwithstanding the persistent and frequent enquiries made by Cajee with multiple NPA officials. ... In our respectful submission, such delay in these circumstances is inexcusable. ..." (Bold added).

426 The submissions, a copy of which can be supplied on request, concluded with the following depressing observations:

> We are of the respectful view that none of the reasons put up by the Acting DPP for declining to prosecute in this matter withstand scrutiny. **Regrettably we have come to the view, that even after a 2.5-year delay, no serious investigation was launched into these two cases.**
>
> We repeat our concern, that failing to hold former SB officers accountable for misleading courts and lying under oath, will simply invite others to do the same. It will also extend the total impunity SB officers enjoyed under apartheid to the new democratic order. (Bold added).

427 Notwithstanding the tardiness of Acting DPP Baloyi it took another two and half years for NDPP Batohi to overturn this decision, by which time a key elderly witness had become too ill to testify, effectively bringing an end to the case against Els. Such long delays cast serious doubt on the NPA's commitment to the TRC cases.

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Reopened inquests: Neil Aggett and Dr Hoosen Haffejee

428 In the Aggett case, the family had been pressing the NPA to reopen the inquest into the death in detention of Neil Aggett since January 2016.

428.1 The Aggett family attorneys, threatened the NPA with litigation to compel them to reopen the inquest through correspondence on 21 June 2016, 8 July 2016 and 11 August 2016. On 23 August 2016, the attorneys sent the NPA a letter of demand placing them on terms:

> "In the circumstances we hereby demand that the necessary recommendations to the Minister of Justice in terms of section 17A of the Inquest Act 58 of 1959 to reopen the aforesaid inquests be made by no later than 30 September 2016."

428.2 Lieutenant Stephen Whitehead, lead interrogator and tormentor of Aggett, died on 22 April 2019. He was only 62 years old.

428.3 On 29 July and 15 August 2019 lawyers acting on behalf of the families of the late Neil Aggett and Hoosen Haffejee threatened the Minister of Justice with an urgent High Court application if he did not instruct the judge presidents of the Gauteng and KwaZulu Natal Divisions to reopen the inquests.

428.4 On 16 August 2019, the Minister of Justice released a press statement announcing that the inquests into the deaths of Aggett and Haffejee would be reopened. Copies of the aforesaid correspondence can be made available on request. In the family's closing submissions in the Haffejee reopened inquest, it was stated that "*families should not have to take drastic steps like this.*"

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428.5 SB Colonel James Taylor, who led the brutal interrogation of Dr Hoosen Haffejee died on 19 August 2019, just days after the announcement of the Minister of Justice to reopen the inquest.

428.6 Whitehead could have been held to account if the authorities had acted expeditiously. More than 3 years elapsed between the original request for an inquest in January 2016 and his death in April 2019. The inquest only commenced on 20 January 2020.

428.7 It was noted in the Aggett family closing arguments in the Reopened Inquest that "*perpetrators of apartheid era crimes have taken their lead from the State's inaction. They know they have nothing to fear.*" The submissions noted that SB officers continued with their "*charade of innocence*" as they did before inquests under apartheid:

> "It is as if nothing has changed. They do not have the slightest concern of having to face the music for their lies and deceit. This is the price that we must pay for the readiness of our law enforcement authorities to trash the rule of law at the behest of powerful political forces."

428.8 On 4 March 2022, Judge Makume handed down his judgment which overturned Magistrate P Kotze's decision of nobody to blame and held that Aggett's death was attributable to foul play by the Security Branch. Judge Makume found that former SB officers Nicolaas Johannes Deetlefs, Johannes Nicolaas Visser, Joseph Petrus Woensdregt, Daniel Elhardus Swanepoel, Roelof Jacobus Venter and Magezi Eddie Chauke had persisted with their cover-up in the reopened inquest and committed perjury. He recommended that they be investigated with a view to prosecution.

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428.9 Some 2.5 years later the NPA has still not taken a decision. Deetlefs died in September 2023. In October 2024 the prosecutor assigned to the Aggett case left the NPA before completing her work on the case. To date no new prosecutor has been allocated to the case.

428.10 The Hoosen Haffejee reopened inquest ran between August and September 2021 at the Pietermaritzburg High Court, while closing arguments were heard in October 2022 and judgment was handed down on 13 September 2023. Judge Zaba Nkosi found that Haffejee had been brutally tortured and murdered by the Security Branch and called for a murder investigation against one surviving SB officer.

429 I am advised that the Timol, Aggett and Haffejee families are grateful to State Advocate Shubnum Singh for the dedication to justice she displayed in these cases. Although she did not appear in the Haffejee inquest, her meticulous preparation led to the reopening of that inquest. Tribute must also be paid to former State Advocate, Jabulani J. Mlotshwa, of the NPA's Johannesburg office for his dedication and sterling contribution to the Aggett and Cosas 4 cases.

COSAS 4 families take legal action

430 In September 2019, the families of the COSAS 4 requested the NPA and DPCI to investigate the callous entrapment murders of the four teenagers by the SB in 1982. After a year of perceived inaction, the families decided to take matters into their own hands and on 2 September 2020 they filed an application with the Krugersdorp Magistrates' Court seeking an order for the disinterment and forensic examination of the bodies.

LC NGI

431 In her founding affidavit, Maide Christina Selebi, the sister of Eustice "Bimbo" Madikela, one of the COSAS 4, noted that her legal representatives had three meetings with the NPA and DPCI as well as written multiple communications, several of which were ignored. She noted that several high-ranking suspects had already died and that it had "*fallen on the families to bring this application*." She recalled that "*the COSAS 4 matter was handed over by the TRC to the NPA in 1999*" and that the families "*bring this application to find peace and closure*."

> "We have been forced to take matters into our own hands. We can no longer be expected to wait for the NPA and SAPS, who have already delayed this matter for some 21 years, to act."

432 Once the application had been filed, and to the credit of both the NPA (Gauteng Local Division, Johannesburg), in particular Adv Jabulani Mlotshwa, and the DPCI, expeditious investigations were thereafter launched and the post-mortem reports recovered. On 23 August 2021, former Askari Thlomedi Ephraim Mfalapitsa was charged with kidnapping and murder, and subsequently similar charges were preferred against former SB explosives expert Christiaan Siebert Rorich.

433 On 19 November 2021, historic crimes against humanity charges were added to the indictment, including apartheid as a crime against humanity, which was the first time such charges had been pursued in South Africa. Credit must be given to the Johannesburg office of the NPA for the courage in taking this important step. Crimes against humanity charges correctly characterises the systemic and widespread nature of these brutal crimes. Prosecutors in the Nokuthula Simelane and Caiphus Nyoka cases refused to include crime against humanity charges in those cases.

434 Thereafter the trial was delayed for more than two years, mainly because of the refusal of the SAPS Commissioner to pay the legal fees of former SB officer Rorich,

hc NGI

even though a judgment arising from the Nokuthula Simelane case, compelled him to do so.

435 Lawyers for the families intervened and litigated and ultimately secured a court order issued by Mokgoatlheng J on 4 May 2022 compelling the SAPS to pay Rorich's legal costs. The SAPS belatedly took this order on appeal, which was opposed by the families. On 5 December 2022 the FHR sent an open letter to the Minister of Police asking him to change course on the question of legal costs. Leave to appeal was dismissed on 12 January 2023. The SAPS then petitioned the SCA but abandoned its appeal in April 2023. The 'Stalingrad' tactics adopted by the defence teams have, to date, prevented the trial from proceeding.

436 As mentioned above, the application by accused no. 1, to overturn the refusal to grant him amnesty was dismissed by the High Court in November 2024, and in the same month the trial court heard the objection of the accused to the crimes against humanity charges, with judgment reserved and the criminal trial postponed to April 2025.

Cradock Four families take legal action

437 In July 2019, my attorneys at Cliffe Decker Hofmeyr (**CDH**) and FHR's private investigator retired Brigadier Clifford Marion (**Marion**) began liaising with both the NPA and DPCI to get the Cradock Four case off the ground.

438 This included helping to reconstruct the investigation docket that had gone missing from the head office of the NPA. Between July 2019 and June 2021 there were more than 140 interactions between Marion, my attorneys and the NPA and DPCI. The vast bulk of these interactions consisted of communications aimed at providing

LC NGI

information, documents and leads to support and enable the investigation. These are outlined in a chronology attached to my application in Case No. 35447/2021, which can be supplied on request.

439 I was particularly concerned about the missing investigation docket, given that it was well known that under apartheid the disappearance of an investigation docket generally pointed to a cover-up. After receiving no satisfactory response as to what happened with the missing docket, I decided to open a criminal complaint of theft in relation to the disappearance of the Cradock Four docket. My attorneys addressed several letters in this regard in September 2019, April and August 2020 to the NPA, which can be made available on request.

440 On 11 September 2020, I attended at the Cape Town Central police station to open a criminal complaint, but the officers there refused to accept my complaint saying that I had to report the case in Silverton, Pretoria. On 1 October 2020, one of my attorneys from CDH attended at the Silverton Police Station, but they also refused to accept the complaint saying that she had to go to the Independent Police Investigative Directorate of South Africa to investigate a docket that went missing from the NPA.

441 Out of sheer frustration, on 4 October 2020, my attorneys addressed a letter to the Minister of Police and National Commissioner of the Police seeking their intervention. A copy of this letter can be supplied on request. This eventually resulted in the DPCI confirming in a communication on 23 October 2020 that a criminal case had been opened for defeating the ends of justice and theft of a docket as per Silverton CAS 88/10/2020.

LC NGT

441.1 My attorneys followed up several communications to the DPCI in March and May 2021 asking for progress reports in the investigation. On 19 May 2021, my attorneys were copied on an email which Brigadier Louw of the DPCI addressed to Colonel Hennie De Jager requesting him to give the investigation attention. It became apparent to us that our complaint was not being taken seriously.

441.2 Some two years after liaising with the NPA and DPCI and twice placing them on terms during 2020 to finalise their investigations, it became clear that the NPA and DPCI were making little headway. Copies of this correspondence can be made available on request. The Cradock Four families instructed our lawyers to launch an application to court for an order compelling the authorities to finalise the missing docket investigation and take a decision on the murder case. This application was launched on 20 July 2021, the 36th anniversary of the burial of the Cradock Four.

441.3 On 5 October 2021, Colonel Hennie de Jager of the DPCI advised my attorneys that all possible locations had been searched, and the docket could not be found and that accordingly the investigation into the missing docket had been closed. The communication was silent as to who might have been responsible for the docket going missing.

442 The review process disclosed the dire state of the investigations. It did, however, force the prosecution and investigation teams to engage closely with my representatives to ascertain what case could be salvaged at that late stage. The aforesaid application and correspondence can be supplied on request.

LC NGT

443 Even before launching the aforesaid application in July 2021, more than ten suspects in the Cradock Four case had died, including all members of the SB hit squad, and since launching the application another five persons of interest passed away. With the death in May 2023 of the last remaining suspect, Hermanus Barend du Plessis, against whom there was a *prima facie* case, we had to accept that a prosecution was no longer possible.

444 In August 2023 we agreed to the holding of a third inquest, which was announced on 5 January 2024, and which was meant to start on 2 September 2024, but collapsed as result of the Eastern Cape NPA notifying the witnesses too late and failing to make timely arrangements for the legal costs of the legal teams of the persons of interest, thereby forcing a long adjournment to 2 June 2025. We fear that the last remaining witnesses will die before the inquest can proceed.

445 In early December 2024 we learned that the SANDF and SAPS had declined the applications of the former army and police officers for legal support at the inquest. All attempts to secure the expeditious intervention at ministerial level to resolve the impasse have failed. Unless resolved, this is likely to lead the indefinite postponement or permanent collapse of this inquest and all future reopened inquests involving apartheid era officials.

Imam Abdullah Haron reopened inquest

446 On 4 December 2019, the Haron family's lawyers made detailed written representations to the NDPP providing new evidence and setting out the grounds for the re-opening of the 1970 inquest into the death in detention of Imam Abdullah Haron in terms of section 17A of the Inquests Act.

LC NGT

447 After more than two years had elapsed without a decision, Webber Wentzel placed the NPA and the Minister of Justice on terms in September 2021 and again in April 2022 demanding that a decision be taken. In the family's closing arguments, it was stated that "*such steps should not have been necessary*."

448 On 31 May 2022, some two and a half years after the family's representations to the NDPP, the Minister of Justice requested the Judge President of the Western Cape Division of the High Court to designate a Judge to re-open the inquest, which was held in November 2022. On 9 October 2023 the inquest court handed down judgment which found that Imam Haron had been tortured to death by members of the SB.

CALL FOR CHANGE IN APPROACH TO APARTHEID-ERA PROSECUTIONS

449 Since the decentralisation policy introduced by the NPA in January 2019, in terms of which the TRC cases were transferred from the PCLU to the provincial DPPs, had failed to deliver any tangible results in 18 months, the FHR called for an urgent change of direction.

450 In September 2020 it provided a memorandum to the President, NPA, SAPS and various Ministers titled '*Proposed New Approach to Apartheid Era Prosecutions*', which can be made available on request. This memorandum provided comparative research into the approaches adopted by several countries dealing with crimes committed in past conflicts. The FHR found that those countries which created dedicated capacities to investigate and prosecute such crimes were the most successful, whereas those that did not, invariably failed to deliver adequate justice.

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451 The minutes of the Portfolio Committee meeting of 7 October 2020 on the NPA's quarterly performance recognised considerable challenges with the TRC cases, most notably a disjunct between the investigative and prosecution functions:

> "TRC cases
> This is a huge priority for the NPA and an aspect which is seriously concerning. **The NPA is not an investigative agency. The DPCI is an investigative agency but without the requisite investigative and prosecutorial capacity in order to do this**. More people are needed to do this work, and where an investment is made, there should be a showing that it has in fact translated to results. **The NPA is struggling as potential witnesses, loved ones and suspects are dying without justice being served. The NPA is engaging with the DPCI, however there needs to be a push from a higher level**." (Bold added).

452 The FHR followed up with a legal opinion dated 13 January 2021 titled "*Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes*" which was supplied to the NPA and the Minister of Justice. A copy of the legal opinion can be made available on request.

452.1 This opinion considered the experiences of the multi-disciplinary approaches of the Specialised Commercial Crimes Unit and the Sexual Offences and Community Affairs Unit as well as various Investigating Directorates. These units, which brought prosecutors, investigators and analysts together in teams, had proved reasonably successful in tackling serious crime.

452.2 The opinion proposed establishing an Investigating Directorate or a specialised unit under a Special Director to deal with the TRC cases. This proposal did not find favour with the NPA, the Minister of Justice or SAPS.

453 The minutes of the DPCI briefing presentation to the Police Portfolio Committee meeting on 5 May 2021, reflected a decision to recruit more officers to deal with the TRC cases:

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"The following recruitment process will be finalised during the 2021/22 financial year.

- 104 Contract workers were appointed with effect from 2021/04/01 to deal with the backlog of cases such as Truth and Reconciliation Commission and Steinhoff cases."

454 In June 2021, the NPA and the DPCI issued a joint press statement. They announced a new approach to the investigations and prosecutions of the TRC cases, namely the establishment of a dedicated capacity:

> "... a TRC investigation strategy has been adopted by the NPA and DPCI to create dedicated and sustainable capacity to investigate and prosecute apartheid era atrocity crimes. The NPA is in the process of setting up a specialist unit to deal exclusively with these matters and will be appointing former experienced prosecutors in offices which require additional capacity. A dedicated national office capacity will provide specialised advice, coordination, and monitoring and support.
>
> The Directorate for Priority Crime Investigation also embarked on the process to establish a dedicated team by a recruitment drive to re-enlist a number of competent and highly skilled former police officials with wealth of knowledge in the detective environment. Thirty-four (34) of these members who were appointed from the 01 April 2021 for a contractual period of three years, are assigned to these cases."

The NDPP, Adv Batohi, added to the statement saying that:

> "Time is not in our side. We have a small window to address this; loved ones need to see justice being done; and justice will not be served until we act decisively against those that the NPA was once powerless to hold to account".

455 While the joint press statement spoke of establishing "a dedicated capacity" and or "a specialist unit" we are not aware of a specialist unit ever being established.

455.1 We are aware of an entity which has been referred to as the "TRC Component" (**the Component**). However, it remains opaque. It remained nameless for several months. We are only aware of one full time state

LC NGI

advocate serving in the Component. It does not appear anywhere on the NPA's website, and no contact details are offered to the general public.

455.2 While the Component reports to the Deputy NDPP and head of the National Prosecution Service, Adv Rodney de Kock, it has no full-time dedicated head. Given De Kock's onerous responsibilities for the entire prosecution service, he cannot be expected to devote adequate time to these cases.

455.3 From what we can see, in respect of the TRC cases, the buck does not stop with anyone. Queries in relation to cases are bounced around between the Component and the DPPs. Nobody seems to be able to take full and final responsibility for the cases. Prosecutor turnover on cases also seems to be high.

455.4 While we are familiar with the TRC Component coordinator, Adv Shubnum Singh, we are not aware of the staff compliment or the nature of the work they do.

455.5 While "dedicated" prosecutors have been appointed in the provinces, they do not report to the Component but to the DPP in question, who may have other priorities. The TRC Component maintains an arm's length from the cases. It enjoys no authority over provincial prosecutors and seems to be a largely toothless and ineffectual body.

456 According to a press statement dated 8 December 2021, issued by the Justice Portfolio Committee, the committee requested the NPA to provide quarterly progress reports on TRC cases, reflecting a desire on their part to play a greater supervisory role, given the lack of delivery:

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> "The Portfolio Committee on Justice and Correctional today resolved to meet on a quarterly basis with the National Prosecuting Authority (NPA) in order to receive regular updates on progress regarding Truth and Reconciliation Commission (TRC) matters.
>
> The undertaking comes after the committee noted last week that the NPA missed the deadline to provide information on whether to prosecute in the matter of the so-called "Craddock Four". The families of some of the Craddock Four have taken the NPA to court in order to get a firm commitment with timeframes for a resolution to the matter.
>
> The committee today received a briefing from the Ministry of Justice and Correctional Services and the NPA on why the 2 December 2021 deadline was missed for issuing a prosecutorial decision for apartheid-era officials and ministers implicated in the 1985 murder of the Cradock Four. Committee members across the political spectrum expressed concern that these matters have been delayed for so long. More than two decades into democracy, families like those of the Craddock Four still do not have closure. The committee further expressed its disappointment at how the matter was handled, as families were not informed prior to the deadline that it would not be met, as further investigations are required."

457 The NPA Annual Report of 2021/22 reported the following about the TRC cases:

> "Bringing justice to the victims of crimes committed during the apartheid era is a priority for the new leadership of the NPA. These heinous crimes remain a scar on our country and the NPA owes it to victims to ensure that justice is delivered, despite the long passage of time. To move forward on these complex cases, the NPA has created dedicated capacity and additional posts to deal with TRC cases. Thirteen additional prosecutors were appointed to assist with these cases. In total, the NPA has 23 dedicated prosecutors working on these matters in collaboration with the 34 dedicated DPCI investigators who were recently appointed. From 53 cases at the beginning of April 2021, the component had 115 cases at the end of March 2022, almost doubling the number of matters for investigation in one year. The cases have been identified from sources such as the TRC report, evidence presented at the TRC, reports received from family members of deceased persons and from all deaths in detention."

458 The minutes of the Justice Portfolio Committee meeting held on 25 October 2022 noted a decision by the NPA to appoint counsel to assess its work on the TRC cases:

> "Regarding section 32(1)(b), the NPA was in accordance with the Rodrigues judgement. **The NPA had informed the Minister that it would be**

LC NGI

> **appointing counsel to look at all of the initiatives and efforts that the NPA was making to deal with the Truth and Reconciliation (TRC) matters, and any possible interference in the work of the NPA.**" (Bold added).

459 On 24 October 2022, the NPA and DPCI announced in a joint statement the opening of four inquests into the apartheid-era crimes involving murders and disappearances of ANC activists and MK operatives committed in Kwa-Zulu Natal: Ntombikayise "Ntombi" Kubheka, Musawakhe "Sbho" Phewa, Zamukwenzani Bright Mlobeli/Sokhulu and Jameson Ngoloyi Mngomezulu.

459.1 Representatives of some family members suggested that the NPA may have been too quick to refer these cases to inquests as prosecutions may have been viable in some cases. Some families expressed a concern that referrals to inquests had become a default position of the NPA in respect of the TRC cases. Correspondence in this regard can be supplied on request.

459.2 I am advised that recently a decision has been taken to proceed with a prosecution in the Kubheka and Phewa matters.

460 In his report to the Justice Portfolio Committee on 25 November 2022, the Deputy NDPP, Adv De Kock announced that the NPA had hired 25 prosecutors to work on the TRC cases, while the DPCI had hired 40 investigators to work on the 129 apartheid-era cases that were under active investigation. In a media statement on the outcome of this meeting the Portfolio Committee noted that the failure to act in the past meant that the NPA was under pressure because witnesses were old and dying:

> "Mr Magwanishe said the committee will continue to monitor the progress and meet regularly with the NPA on the matter. "The nation needs closure on these matters. One of the lessons we must learn, **when you don't act on time, is that you are bound to act under unreasonable pressure. In**

LC NGT

> **this case, some witnesses have died and some now claim they can't follow proceedings. We should have acted earlier and this should serve as a lesson to all of us**." (Bold added)

461 The NPA Annual Report of 2022/23 highlighted various challenges with the TRC cases:

> "**These are very old matters – dockets and inquest records are largely either destroyed or missing, and witnesses/suspects/persons of interest are often deceased or untraceable**. Another major challenge is that evidence and records remain in the control or possession of stakeholders and government organisations. A concerted effort has been made to trace and make available all records and evidence to enable investigators to properly conduct investigations."

462 The minutes of the Portfolio Committee meeting on the NPA and SIU Annual Performance Plans on 12 May 2023 claimed progress in the TRC cases:

> "It is the first time that the NPA is making progress in terms of accountability for the TRC cases. The entity has also brought in a lot of new capacity, with over 700 young professionals through the Aspirant Prosecutor Programme and this was the biggest intake through the programme since it was relaunched."

463 However, in the minutes of the Justice Portfolio Committee meeting on 11 October 2023 the NPA admits that it has been slow in finalising TRC cases:

> "Despite these successes, the NPA admitted that it has been slow in finalising TRC-related cases and **had only finalised 10 matters since September 2021. A further 135 matters were under investigation."**

464 It is noticeable that the NPA chose not to disclose the names of the 10 cases apparently finalised in the preceding year, nor did it identify the 135 cases that were apparently under investigation.

465 In the same meeting the following was reflected in the minutes:

> "Mr Dyantyi also appreciated the progress made by the NPA in the year under review, and he encouraged it to improve its performance going

hc NGT

forward. Afterwards, he mentioned that he had a few questions to pose and comments to make to the Authority.

One, **he suggested that the Committee be briefed on a separate occasion by the NPA on the work it has done on TRC cases, as he was not pleased that the entity had struggled to finalise these matters after nearly 30 years."** (Bold added)

NPA presentation to Justice Portfolio Committee in November 2023

466 On 21 November 2023, DNDPP Adv De Kock made a presentation to the Justice Portfolio Committee and disclosed that amongst other challenges were the turnover in prosecutors and destruction of documents:

> "Highlighting the matters that were reopened and under investigation, he said in October 2023, the NPA had 137 matters under investigation and 18 matters were finalised with either the decisions to prosecute, conduct an inquest or not to proceed with the matter due to the lack of evidence. Additionally, there were 13 matters on the court roll. Many families were requesting for a formal inquest to be held with evidence being presented before the court.
>
> Highlighting the challenges on the TRC matters, he said there was a capacity constraint, and prosecutors were employed on a contract basis. A deviation was obtained from the Department of Public Service and Administration (DPSA) for the creation of posts. There was a drastic exodus to the private sector. Within a year, the NPA lost ten dedicated prosecutors. New prosecutors meant the loss of [rapport] with families because the new prosecutors had to start from scratch to familiarise themselves with the investigator, families and investigations.
>
> The other challenges included the lack of dockets and inquest records as records were destroyed after ten years, meaning the evidence was lost. Documents were also destroyed post-1994. There was also a lack of access to TRC records and other documents which other government departments controlled. Additionally, the witnesses, accused, suspects and persons of interest were deceased or old. The witnesses were unwilling or afraid to cooperate with the Investigating Officers and the NPA. The government departments in possession of documents responded slowly in handing over the documents. The investigators had some challenges with the vehicles.
>
> Some areas were inaccessible and required appropriate vehicles to access victims and families. Obtaining experts and building a database of reputable service providers was also challenging, and utilising private experts was expensive. Additionally, the accused persons used delay tactics and last-

LC NGT

> minute applications were made by legal counsels, resulting in matters languishing on court rolls...."

467 Under the list of challenges facing the NPA outlined by De Kock was a slide that stated:

> "Interference by private investigators, persistence by some to access list of matters under investigation to client hunt / name dropping / legal representation."

468. No detail was provided on the nature of the alleged interference, nor was it explained how seeking names of past crimes under investigation constituted a challenge for the NPA. As only the FHR has employed a private investigator to look into the TRC cases, and the FHR provides pro bono legal support to families, and it has requested the names of the murder cases being investigated, the accusations can only have been directed at the FHR.

469 It is quite apparent that De Kock and the NPA view the work of the FHR, its private investigator and its pro bono lawyers as unwelcome. It is likely that this antipathy is driven by the past litigation brought by the families to compel action in the Nokuthula Simelane, COSAS 4 and Cradock Four cases which exposed disturbing inaction on the part of the NPA and SAPS.

470 In our view the real reason why the NPA refuses to disclose the names of the closed cases and the 137 cases under investigation is because it does not wish to be held to account for its performance in these matters.

471 De Kock claimed that the NPA could not disclose the names of the deceased in the 137 cold cases under investigation because of security concerns in all cases. We doubt that there can be pressing security concerns in all cases. We suspect that

LC NGT

the NPA wishes to avoid legal and investigative support being offered to those families, in order to avoid scrutiny in relation to those cases.

472 There is considerable irony in the NPA's approach, given that it was the work of family lawyers and private investigators that led to the reopening of the inquests of Timol, Aggett, Haffejee and Haron, and which contributed significantly to the prosecutions in the cases of Nokuthula Simelane, COSAS 4 and Caiphus Nyoka that are pending before the criminal courts.

473 In most societies serious about resolving old murder cases concerted efforts are made to reach out to the public for help and leads. This is standard practice, particularly in relation to cold cases and is often how such cases are solved. Yet the NPA chooses not to take this basic step in relation to the TRC cases. Reaching out to the public would also enable the families to secure pro bono legal help from organisations such as the FHR, but it seems that the NPA wishes to avoid this at all costs. It seems that the NPA would rather forego the leads that the general public might provide, even if it means eroding the prospects of solving the cases in the short time that is left.

474 In line with the NPA's preference to exclude private lawyers from the process, De Kock mentioned in his presentation that in the upcoming inquests, family members will be primarily represented by the NPA. Adv De Kock appeared to overlook the fact that the NPA represents the State not individuals.

475 The NPA may not take instructions from any party in any criminal proceeding. The interests of individuals do not always coincide with those of the State. Indeed, the NPA has ignored or turned down or ignored the bulk of the requests and proposals put to them by family members over the years.

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476 Notwithstanding this limitation, the NPA publicly states that it will be the lawyers of the families in the TRC cases. In so doing, the NPA acts unethically, as it misleads the families into believing they will be getting the same type of legal support as that offered by private attorneys and counsel.

477 The report of the NPA was roundly criticized by members of the Justice Portfolio Committee (**JPC**). DA MP Glynnis Breytenbach insisted that the next meeting should be held in person and that family members should be present. ANC MP Nomathemba Maseko-Jele asked why there was not a special unit dealing with the TRC cases, just like the Investigating Directorate that investigates corruption.

478 Notwithstanding the call for family members to be present at the next JPC meeting on the TRC cases, a meeting was held on 17 September 2024 without extending an invitation to families or the organisations representing them. In this regard, I point out that on 23 June 2023, following the last minute and abrupt cancellation by the NPA of a long-awaited meeting with the Cradock 4 families, I wrote a letter to the JPC, a copy of which is annexed hereto marked **FA67**, asking that families be permitted to participate in future meetings. In this letter I noted:

> "So far only the NPA has been invited to provide briefings. We believe it is high time for the Portfolio Committee to hear the side of the victims and the families."

479 My letter was ignored. At the 17 September 2024 meeting, the NPA stated that 104 unnamed new investigations had been opened since late 2021 and that a total of 126 unnamed cases were under investigation, down from the 137 cases mentioned at the JPC meeting in November 2023. The presentation was replete with operational graphs, flow charts, best practices, SWOT analyses and pointed to multiple 'accountability sessions' and trainings. It disclosed that the NPA had

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deployed 16 dedicated prosecutors to the TRC cases, while the DPCI had 24 dedicated investigators (down from 25 prosecutors and 40 investigators in November 2022). A copy of the NPA's full PowerPoint presentation, dated 17 September 2024, can be supplied on request.

480 In concluding this section, I note that while the political interference may have come to an end around 2017, its impact appears to linger. The NPA and the DPCI have been unable to build an effective capacity to pursue these cases. This lack of capacity has its roots in the political interference that took place from 2003, which helped to open the door to the subsequent period of rampant state capture. It seems that law enforcement organisations have not fully recovered from these devastating periods.

481 Regardless, it has been a frustrating and uphill battle for families to make progress in the TRC cases. Every small step forward has been hard fought.

482 Given the dire limitations in capacity, it is indeed regrettable that both the NPA and DPCI, and the State in general, choose not to take the bull by the horns and set up a truly specialised TRC unit or investigating directorate with both investigative and prosecutorial capacity. Instead, we are left with the disjointed and ineffectual decentralised approach with a TRC Component that has little or no impact on the cases.

THE CALL FOR AN INDEPENDENT COMMISSION OF INQUIRY

483 On 5 February 2019, ten former commissioners of the TRC addressed a letter to the President calling upon him to appoint a commission of inquiry into the political interference that has stopped the investigation and prosecution of virtually all the

hc NGI

cases referred by the TRC to the NPA. They also called on the President to apologise to victims of apartheid-era atrocities who were denied justice and continue to suffer trauma. A copy of this letter is annexed hereto marked **FA68**.

484 The Commissioners wrote that the "families feel justifiably betrayed by South Africa's post-apartheid state which, to date, has turned its back on them. We owe them answers and we owe them an apology." They pointed out that instead of a standalone commission, and since the political interference has taken the form of state capture the President could instruct the then Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (also referred to as the **Zondo Commission**) to carry out the inquiry. Further alternatively the Commissioners suggested that the President could expand the mandate of the Mokgoro Commission of Inquiry – which was already seized with a probe into the NPA, to handle this inquiry. Aside from an acknowledgment, the President did not respond to the substance of this letter.

485 Since the President was not moved to act, I decided to make a direct approach to the Zondo Commission. I asked my lawyers to prepare comprehensive representations to that Commission to demonstrate that the NPA and SAPS had been captured in relation to the TRC cases, warranting the attention of the Commission.

Approach to the Zondo Commission

486 On 17 April 2019 my lawyers handed over my representations to the Commission, which were addressed to the Chairperson, Deputy Chief Justice Zondo; the Acting Secretary of the Commission, Peter Pedlar; the Head of Investigation, Terence

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Nombembe; and the Head of the Legal Team, Paul Pretorius SC. A copy of the cover letter is annexed hereto marked **FA69**. I have not attached the representations as they largely repeat what is contained in this affidavit, but they can be supplied on request.

487 I made these representations on behalf of the Cradock Four families as well as the following families, who supplied supporting affidavits:

487.1 Thembi Nkadimeng, the sister of Nokuthula Simelane who was abducted, tortured and murdered by the SB in 1983.

487.2 Imtiaz Cajee, the nephew of Ahmed Timol who was tortured and murdered by the SB at John Vorster Square in 1971.

487.3 Lasch Mabelane, the brother of Mathews Mabelane who was tortured and killed while in SB detention at JVS in 1977. Lasch has since passed away, without closure. The reopened inquest into the death of his brother has still not been held.

487.4 Jill Burger, the sister of Neil Aggett, who was tortured and killed while in SB custody in JVS in 1982.

487.5 Fatima Haron-Masoet and Muhammed Haron, the daughter and son of Imam Abdullah Haron who was tortured and killed while in SB detention in Cape Town in 1969.

487.6 Sarah Lall, the sister of Dr Hoosen Haffajee, who was tortured and killed by the SB at the Brighton Police Station in Durban in 1977.

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488 On 28 May 2019 the Acting Secretary of the Zondo Commission addressed a letter to me, a copy of which is annexed hereto marked **FA70**, in which he indicated that the Chairperson was of the view that the matter might fall outside the terms of reference of the Commission, but that the Commission would only decide that issue after we had delivered our comments or representations. On 12 June 2019, my attorney responded with our representations, a copy of which is annexed hereto marked **FA71**. These representations pointed out that:

488.1 The subject matters of state capture, corruption and fraud were "not confined purely to conduct, or abuse of power aimed at financial gain but also for undue or illegal advantage."

488.2 "Any form of inducement or for any gain of whatsoever nature" would include the shielding of suspects from investigation and prosecution through inducing members of the NPA and SAPS to drop the TRC cases.

488.3 The Prevention and Combating of Corrupt Activities Act 12 of 2004 (**PRECCA**) defined 'gratification' as including the avoiding of punishment, while the offence of corruption includes an abuse of a position of authority; or the violation of a legal duty which is designed to achieve an unjustified result.

488.4 PRECCA proscribed any conduct that required public officers to not adequately perform any official function; delay, hinder or prevent the performance of an official act; or exert any improper influence over the decision making of any person performing functions in a public body. It also specifically outlawed conduct aimed at:

LC NGI

488.4.1 interfering with, hindering or obstructing the investigation of an offence.

488.4.2 not adequately performing a function relating to the institution or conducting of criminal proceedings;

488.4.3 delaying, hindering or preventing the performance of a prosecutorial function;

488.4.4 showing any favour or disfavour to any person relating to the institution or conducting of criminal proceedings; or

488.4.5 exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer.

488.5 It was pointed out that the conduct of those who imposed their will on the NPA and SAPS to stop the investigation and prosecution of several hundred murder cases may fall within the scope of corruption as provided for in PRECCA. The same could be said of the prosecutors and police officers who acquiesced in the suppression of these cases.

488.6 It was asserted that an inquiry into the suppression of the TRC cases fell within the scope of the Commission's investigation launched on 11 April 2019 into the capture of the state's law enforcement agencies. It was pointed out that even though there have been leadership changes at the NPA and SAPS these institutions could not be expected to vigorously investigate themselves. In this regard it was noted that State Advocate, Torie Pretorius SC, in the Rodrigues stay of prosecution case admitted that

LC NGI

the NPA had succumbed to outside political interference but claimed that the NPA was an innocent party.

489 The representations concluded with the following:

> "Perhaps more than any other class of cases, the suppression of the TRC cases, has been almost total in its impact. Virtually all the 400 cases were blocked. The impact this has had on the families of those murdered, their communities and on the fabric of society, is incalculable. This in itself demands an expeditious, thorough and credible inquiry into the machinations that resulted in such a massive denial of justice."

490 A call for a commission of inquiry, as well as an apology, were also made in a letter to President Ramaphosa on 23 June 2019 by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Abdullah Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Caiphus Nyoka and several other families. A copy of this letter is annexed hereto marked **FA72**. They expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. The families followed-up again a year later, and on 23 June 2020 they again wrote to President Ramaphosa imploring him to act. Their letters were ignored. A copy of this letter is annexed hereto marked **FA73**.

491 After nearly a year, I learned that the Commission's senior investigator, the late Frank Dutton and his team were taking affidavits from various witness. They also sought an affidavit from me which I supplied during August 2020. I have not attached my affidavit since it largely repeats what I have set out in this founding affidavit, but it can be supplied on request. My attorneys also provided the Commission with a list of persons of interest as well as a chronology of the political interference. That chronology has not been attached as it amounts to a repeat of what has been set out in these papers but can be supplied on request.

hc NGI

492 This was, however, all to no avail as the 30 June 2021 closure of the Commission was looming. During the first quarter of 2021, we were informed informally that the Commission had run out of time and would not be able to complete its investigation into the political interference, which was abandoned.

Placing the President on terms

493 As a result, the former TRC commissioners, together with 18 civil society organisations, again pressed President Ramaphosa for a decision on a standalone commission of inquiry. A copy of this letter dated 25 March 2021 is annexed hereto marked **FA74**. In this letter, the former commissioners abandoned their call for an apology and focussed on the need for a commission of inquiry. They pointed out that the interference cut across multiple government departments and that:

> "It is accordingly not sufficient for there to be separate internal or departmental inquiries by the different institutions. Such inquiries will not be able to deliver the full history of the interference as it unfolded over time [and] over multiple entities. Moreover, such inquiries will not be able to compel the production of testimony and evidence from other departments. In any event, there appears to be considerable resistance to carrying out meaningful investigations at these levels; and it goes without saying that departmental officials should not be investigating themselves or their colleagues."

494 The commissioners set out why the subject matter of the proposed commission was a matter of great public concern, including that:

> "... there is a critically important need to restore public confidence in the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost all trust and confidence in the SAPS and NPA.
>
> A further objective of the proposed commission is to reveal the truth pertaining to the suppression of the TRC cases, which gives it a deeper public purpose. This is necessary given the extent of disquiet and discontent around such serious lapses by public organs meant to uphold the rule of

LC NGI

law. There can be little doubt that such lapses have provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance.

...

The TRC cases have been treated differently from other serious criminal cases for purposes of serving undisclosed political and ulterior ends. Such brazen arbitrariness should have no place in South Africa's constitutional order."

495 The commissioners attached to the letter draft terms of reference for the proposed commission, which are annexed hereto marked **FA75**. The proposed terms of reference included the following suggested issues to be probed:

"1.1 Whether, and to what extent and by whom efforts or attempts were made through any form of persuasion or inducement for any purpose, advantage or gain of whatever nature to influence or pressure members of the NPA and/ or the SAPS to refrain or stop investigating and/ or prosecuting apartheid-era cases referred by the TRC to the NPA, or to abandon or undermine such cases.

1.2 Identify the role played in the alleged interference by any person within or outside government, including any current or former members of the National Executive, office bearers and /or functionaries in any state institution or organ of state, including but not limited to the Department of Justice and Correctional Services, the Presidency, the National Intelligence Agency, the Department of Defence and the former Directorate of Special Operations.

1.3 Whether, and to what extent, any current or former member or functionary of the NPA and SAPS colluded in the alleged interference, or agreed, acquiesced, or succumbed to the alleged interference.

1.4 The nature and extent of the interference, if any, including:

1.4.1 the reasons or motivation behind the interference;

1.4.2 whether any person within or outside government issued formal or informal, written, or unwritten instructions or directions for the interference to proceed;

1.4.3 whether any formal or informal arrangements or agreements were made between persons within and/ or outside government to carry out the interference;

hc NGI

1.4.4 how the interference was imposed on the NPA and the SAPS; and

1.4.5 how members of the SAPS and NPA were persuaded, influenced, or forced to cooperate in the interference.

1.5 Whether any person breached or violated the Constitution, any law, guideline, or ethical code by engaging in or facilitating the interference or failing to stop or expose such interference.

1.6 Whether any conduct committed during the interference, *prima facie*, amounts to the crime of defeating or obstructing the course of justice, or a crime in terms of the National Prosecuting Authority Act 32 of 1998, or the crime of corruption, particularly as framed in sections 9 and 19 of the Prevention and Combating of Corrupt Activities Act, 12 of 2005 or a crime under any other law.

1.7 The impact, if any, on victims, families, communities, the rule of law, the criminal justice system and related institutions, and South Africa as a whole.

1.8 The steps, measures and reforms needed to prevent a recurrence of the interference."

496 The TRC commissioners requested that the proposed commission be imbued with the necessary powers under the Commissions Act 8 of 1947 to compel the production of testimony and evidence. The commissioners concluded their letter with a quote from the late former President of the Constitutional Court and Chief Justice of South Africa, Justice Arthur Chaskalson, who said a few months after South Africa's democratic elections in 1994:

> "We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened."

497 The commissioners advised that if they did not hear from the President by 30 April 2021, they would refer this matter to their attorneys, who would be instructed to vindicate the constitutional rights of families of apartheid-era crimes by bringing an appropriate application to court.

LC NGI

498 On 6 May 2021, Mr Geofrey Mphaphuli, the Acting Head: Legal and Executive Services in the Presidency wrote to former TRC commissioners Yasmin Sooka and Dumisa Ntsebeza SC acknowledging receipt of their letter and advising that the matter had been referred to the DOJ for "*further attention and reply*." A copy of this letter is annexed hereto marked **FA76**. The DOJ never responded to the letter of the former commissioners.

499 On 8 June 2021 my attorneys addressed a letter to President Ramaphosa, copied to the then Minister of Justice, Ronald Lamola, placing him on terms. A copy of this letter is annexed hereto marked **FA77**. The letter noted that no response had been received from the Minister of Justice as per the Presidency's letter of 6 May 2021. The letter indicated the following:

> "We have been furnished with an opinion from eminent senior counsel indicating that the issue in question is one of significant public concern; and that in these specific circumstances, your failure to make a decision, or your refusal to appoint a commission, is susceptible to review under the legality principle as well as a Bill of Rights challenge.
>
> We have now been instructed by several families of apartheid-era victims (including members of the Cradock Four and Biko families) as well as multiple organisations to prepare an application to court for the appropriate relief. Counsel has been duly briefed in this regard.
>
> Our instructions are to place you formally on terms. Should we not hear from you within 10 days of receipt of this letter we will proceed to launch an application to court for an order compelling you to fulfil your obligations under the Constitution and to appoint a commission to inquire into the suppression of the TRC cases."

500 No specific response was received to this letter. Since the Justice Ministry appeared to be taking steps towards an inquiry, the litigation was placed on hold. The steps and their shortcomings are set out below.

hc NGJ

Justice Minister's plan for an internal inquiry

501 On 23 June 2021, Minister Lamola announced that the NPA will pursue an investigation into the alleged political interference and that the investigation will be overseen by a retired judge. Specifically, the investigation will consider whether the conduct of officials and others warrants any action in terms of section 41(1) of the NPA Act. I annex hereto marked **FA78** a News24 article dated 23 June 2021 reflecting the Minister's statement.

502 No details of the proposed inquiry were released. The Minister did not see fit to consult or engage with families and civil society organisations who had uncovered the interference and called for an independent investigation.

503 On 5 November 2021, the Minister, in his address to the Inaugural Fort Calata Foundation Memorial Lecture, indicated that he had appointed an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. He indicated that the investigation would be presided over by a judge.

504 The Minister did not disclose the terms of reference of the inquiry or the identity of the selected judge. No indication was given as to how the Judge would be appointed and under what legal authority. When I asked the Minister at the lecture whether the inquiry would be open or closed, he said he would have to discuss this with the Judge. He declined to give his own view on the matter stating it "*would amount to a policy statement*". A recording of this lecture can be supplied on request.

505 Since the President was not involved in this process and no mention was made of the Commissions Act, it became clear that the envisaged inquiry was intended to be an internal inquiry, which are typically held behind closed doors. In my view, if it was

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NGI

intended to be an open and transparent inquiry, the Minister would have not hesitated to say so. It also raised eyebrows that the Minister wished to involve a judge in an internal enquiry conducted by an executive department.

506 On 9 November 2021, the former TRC commissioners, several family members and 13 civil society organisations, including the Nelson Mandela Foundation and the Desmond and Leah Tutu Legacy Foundation issued a press statement titled "*Call for an Independent Public and Open Commission of Inquiry into the Suppression of the TRC Cases.*" I was also a signatory to this statement. We expressed our concern at the Minister's plans, which appeared aimed at damage control and circumventing a public inquiry. A copy of this statement is annexed hereto marked **FA79**.

507 In our statement, we pointed out that since 2019 the President and Minister had ignored four requests from the TRC commissioners and the Apartheid Era Families' Victim Group (**AFVG**), and it seemed more than evident that government was anxious to avoid holding a public and open commission of inquiry in order to escape public scrutiny:

> "It appears that the State wishes to avoid an open and public inquiry into the suppression of the TRC Cases. This may be for purposes of damage control to ensure that the truth behind the suppression is carefully managed by a closed-door inquiry, away from the glare of public scrutiny. This is unsurprising given the role of senior members of the executive, NPA and SAPS in the suppression of the TRC Cases. Since a closed inquiry will be viewed with great suspicion, the inescapable conclusion to be drawn is that a judge is being asked to oversee an effective secret investigation to give it an air of respectability.
>
> Typically, a commission of inquiry includes public hearings, the power to subpoena witnesses and documents, the calling of witnesses, cross examination and the participation of victims and other stakeholders. While it is possible that attempts will be made to deflect criticism by allowing victims to make submissions and requiring the Judge to issue a report, it will remain a closed inquiry. There will be no public hearings and no

LC NGI

> opportunity for victim representatives to ask tough questions to those who shut down justice. Victims, the media and the public will be effectively shut out of this inquiry.
>
> An inference will almost certainly be drawn that the inquiry has been so designed to protect powerful elements in society and shield them from scrutiny and embarrassment."

508 We expressed our concern that the government wished to stage manage the process and the proposal would amount to the executive investigating the executive:

> "The Minister is appointing an executive inquiry to investigate members of the executive. The suppression of the TRC cases involved multiple entities and individuals across the public sector, including the Department of Justice, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.
>
> An internal inquiry cannot hope to get to the bottom of a problem of this magnitude and sensitivity. An internal investigation will not be able to deliver the full history of the interference as it unfolded over time over multiple departments and within and outside government.
>
> An internal inquiry, unlike a commission of inquiry, will have no power to compel the production of testimony and evidence and will have to rely on requests and cooperation of individuals and different government departments.
>
> The track record of the SAPS and NPA in relation to the TRC Cases speaks for itself. It is well known that there remains considerable resistance to carrying out meaningful investigations of the TRC Cases, let alone investigations into the suppression of the cases. In these circumstances it is disturbing that the Minister has seen fit to reject a public commission of inquiry in favour of an internal investigation. Members of the executive will be expected to investigate their own colleagues. Such an inquiry will have little or no credibility in the eyes of the public, and the gloss of an 'oversight' role of a judge will not change this."

509 We expressed concern that the Minister was abusing the judiciary by requiring a Judge or retired Judge to offer a semblance of gloss to an internal inquiry, which in practice would be firmly in the hands of the executive.

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> "It is particularly disturbing that a Judicial Officer is required to lend judicial legitimacy to an investigation conducted by the executive. Not only is such an expedient function well outside the functions of the judiciary, but it is also harmful to that institution and is a breach of the separation of powers principle, rendering such an appointment unconstitutional, as the Constitutional Court has ruled."

510 In respect of the dire need for a commission of inquiry, we pointed out that there is no longer any dispute that the political interference happened, given that the NPA had admitted that it succumbed to the interference, and that in *Rodrigues* both the High Court and SCA had expressed their dismay at how such interference could take place in the new constitutional order. We noted that:

> "While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on institutions such as the NPA and the SAPS is yet to be exposed. It is not known how institutions with firm constitutional and statutory obligations to uphold justice so easily abandoned their duties in respect of these cases."

511 We pointed out that the subject matter is of great public concern:

> "Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the cases were blocked. Most of the cases cannot be resuscitated as many perpetrators, witnesses and family members have died over the past 20 years. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.
>
> There is a critically important need to restore public confidence in the government as a whole and the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost trust in the government, especially the SAPS and NPA. An investigation held behind closed doors is likely to destroy all confidence and trust in the state.
>
> A closed-door inquiry will undermine the effort to reveal the full truth behind the suppression of the TRC cases. This will add considerable anxiety to

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> the affected families and communities who have been waiting decades for the truth. The suppression of the TRC Cases deeply violated their rights to human dignity, equality and the rule of law. The refusal to hold an open and public commission of inquiry only exacerbates the violation of these rights."

512 Since we were aware that there was some 'commission fatigue' given the experience of the State Capture Commission which had cost R1 billion and which was extended eight times, we pointed out:

> "It will no doubt be argued that the country is suffering 'commission fatigue' and cannot afford yet another commission of inquiry, particularly after the State Capture Commission which cost some R1 billion. Such an argument is deeply insulting to the families who endured apartheid-era crimes. Their loved ones laid down their lives for our democracy and its enshrined freedoms. Not only has the post-apartheid state turned its back on them and suppressed their cases, but in raising such an argument, it says they are not worthy of a rigorous public inquiry. It is also insulting to the families given the readiness of state officials to squander billions on mismanagement, corruption and nepotism.
>
> In any event, the State Capture Commission cannot be compared to an inquiry into the suppression of the TRC Cases. Unlike the State Capture Commission, there is an extremely limited set of witnesses and a very limited set of facts to explore. Whereas the State Capture Commission required years to complete its work, a commission into the suppression of the TRC Cases could be wrapped up in few months."

513 We concluded with a call for a public and open commission of inquiry with the necessary powers of compulsion under the Commissions Act:

> "The post-apartheid state engineered multiple incursions into the rights of victims of apartheid-era crimes over the last 20 years. The holding of a closed-door inquiry will constitute yet another incursion into their rights. This cannot be allowed to happen.
>
> The families of apartheid-era victims deserve nothing less than a fully open, public and transparent inquiry. This must include public hearings, the power to subpoena and compel the production of evidence, and the right of victims to be represented in the commission and to lead evidence and put questions to witnesses. Only a commission of inquiry can allow provide for such accountability.
>
> Accordingly, we the undersigned former TRC Commissioners, families and organisations again call on you to work with the President to speedily

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NGI

> appoint an independent and public commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence."

514 It was hoped that the publicity and lobbying would move the government to do the right thing. It did not. While the Minister of Justice appears to have abandoned his plans for an internal inquiry there was no movement towards establishing a credible inquiry.

The Ntsebeza Inquiry

515 On 13 January 2023, the NPA issued a press statement titled "*NPA Further Enhances Efforts to Ensure Effective Handling and Prosecution of TRC Cases*". A copy of this statement is annexed hereto marked **FA80**. In this statement, the NPA asserted that "over the last couple of years" it had "focused on reopening and pursuing priority cases and enhancing its internal capacity and processes both to ensure effective handling of these cases and to prevent any undue political influence." It then announced an inquiry, which it stated was in line with the requirements set out in *Rodrigues*:

> "As part of this effort, the NPA has appointed Adv D Ntsebeza SC to review the measures that have been adopted to deal with and prosecute TRC matters and to provide recommendations as needed. This is in line with the remarks made by the Full Bench in Rodrigues v National Director of Public Prosecutions of South Africa and Others 76755/2018) (2019) in the South Gauteng High Court in 2019 where the court held:
>
> > "It is also for these reasons that the conduct of the relevant officials and others outside the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted. Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the

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measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution."

The Senior Counsel will conduct a thorough assessment and make recommendations, if necessary, to strengthen the NPA's handling of TRC cases. Further, if Counsel finds evidence or information that could amount to a violation of Section 41(1) of the NPA Act, such issues will be escalated to the National Director of Public Prosecutions (NDPP) to take forward as appropriate. If necessary, the NPA will refer relevant matters for criminal investigation.

Senior Counsel has three months to finalise his report and recommendations. The NPA will provide the necessary support to ensure that this timeline is kept and relevant interventions and improvements are implemented without delay.

The NPA has engaged with the Executive as appropriate on this matter. The Executive is expected to release its own statement in due course, as per the remarks by the Court highlighted above."

516 I am advised that Adv Dumisa Ntsebeza SC indicated to interviewees, such as the FHR representatives, that he interpreted his mandate primarily as reviewing the measures adopted by the NPA to deal with and prosecute TRC matters. He did not anticipate investigating the political interference as that would require an investigation across multiple departments, not just the NPA, and he enjoyed no powers to compel testimony or the production of evidence.

517 Ntsebeza SC submitted his report to the NPA on 30 June 2023, but the NPA did not release it to the public. On 11 October 2023, 29 family members and 13 civil society organisations, including the Southern African Catholic Bishops' Conference and the Centre for Applied Legal Studies, called for the public release of the Ntsebeza Report. A copy of their statement is annexed hereto marked **FA81**.

518 Some 7 and a half months later, on 15 February 2024, the NPA eventually released the Ntsebeza Report, a copy of which can be supplied on request. Some of its key findings and recommendations are set out below.

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518.1 The NPA and the PCLU were swayed from their constitutional and statutory duties in relation to the TRC cases.

518.2 The Ntsebeza Inquiry could not investigate the political interference given the narrow ambit of its terms of reference, and its lack of an investigative arm.

518.3 A commission of inquiry "is the only sensible way forward in order to get to the bottom of why the TRC cases were never investigated or prosecuted with zeal."

518.4 A commission of inquiry must be established to investigate the extent and rationale behind the political interference and should look into the roles of multiple state entities as well implicated individuals.

518.5 It must be a public inquiry and be empowered to hold hearings and conduct a proper investigation, including the exercise of powers of subpoena and search and seizure.

President placed on terms again

519 We hoped that the President would act on the recommendations set out in the Ntsebeza Report, and the litigation was again held back to permit the President and his line departments time to digest the report and take action.

520 We understand from questions that were answered in Parliament in April 2024 that the former Minister of Justice, Ronald Lamola, considered the recommendations of Ntsebeza SC. However, by the expiry of the sixth administration's term at the end of May 2024, the Ntsebeza recommendations had not been implemented.

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NGI

521 Following the general elections in May 2024 and the establishment of the seventh administration, and in light of the appointment of Thembisile Simelane MP, the sister of the late Nokuthula Simelane, as the new Minister of Justice, it was decided to permit the new government more time to change course.

522 Accordingly, on 10 July 2024, we instructed our attorneys to again write to the President demanding the appointment of a commission of inquiry. In this letter we sought an answer from the President by 31 July 2024, failing which would take legal action.

523 We also advised in the letter that we were seeking constitutional damages against the government to vindicate our constitutional rights which had been breached by the suppression of the TRC cases. We proposed that the government meet with us in order to commence negotiations on the nature, extent and quantum of such damages. A copy of this letter is annexed hereto marked **FA82**.

524 On 13 August 2024, Mr. Geofrey Mphaphuli, Acting Head of the Legal and Executive Services in the Presidency sent a letter to my attorneys. He acknowledged receipt of my attorneys' letter dated 10 July 2024 and advised that the Department of Justice and Constitutional Development was requested to consider the matter and advise the Presidency. He indicated that the Presidency would revert to my attorneys once it is in "receipt of the report/advice" of the said department. A copy of this letter is annexed hereto marked **FA83**.

525 Since nothing further was heard from the President or Minister of Justice we were forced to launch these proceedings.

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VIOLATIONS OF THE LAW

526 I am advised that before I set out the basis for the relief we seek, I must set out the statutory and constitutional provisions that have been violated by the political interference that resulted in the suppression of most of the TRC cases.

527 I am advised that the State has a constitutional duty to address crime, which arises *inter alia*, from its duty in section 7 of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". In addition, the State must, in terms of section 237 of the Constitution, perform this duty diligently and without delay.

528 Any agreement or arrangement not to hold to account and punish those who have committed the most heinous of crimes is at direct odds with the most basic feature of South Africa's constitutional order, namely, the rule of law.

529 Those who imposed their will on the NPA and the SAPS to stop or undermine the TRC cases from proceeding, as well as those within those organisations who acquiesced to these demands, violated multiple constitutional and statutory provisions. These are set out below.

529.1 Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the state. In other words, no other person or body may make decisions whether to prosecute or not. This exclusive power is also highlighted in section 20(1) of the NPA Act.

529.2 Section 179(4) of the Constitution enjoins the prosecuting authority to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.

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529.3 Section 205(3) of the Constitution, which states that the "objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".

529.4 Section 32(1)(a) the NPA Act requires that:

> "A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

529.5 Section 32(1)(b) of the NPA Act prohibits interference in the prosecution function:

> "Subject to the Constitution and this Act, **no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority** or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions." (Bold added).

529.6 Section 32(2)(a) of the NPA Act requires prosecutors to take an oath or make an affirmation that they will:

> "...uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law'.

529.7 Section 32(2)(b) of the NPA Act requires that in the case of the NDPP, or a DNDPP or DPP, the oath be taken before the most senior available Judge of the High Court within which area of jurisdiction the officer is situated.

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529.8 Section 41(1) of the NPA Act stipulates that any person who contravenes section 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

529.9 The potential violations of PRECCA have been described above and will not be repeated here.

529.10 The NPA's Prosecution Policy made in terms of s 179(5)(a) and (b) of the Constitution, read with section 21(1) of the NPA Act, requires that the NPA must "*exercise its prosecutorial functions independently*". The preface to the Prosecution Policy asserts:

> "Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.
>
> Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted, and sentenced."

529.11 The NPA's Prosecution Policy stresses that:

> "The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole."

530 Every constitutional and statutory duty and obligation mentioned above was violated by those who imposed their will on the NPA, as well as the NPA leadership and its senior staff members involved in the abandoning of the TRC cases. Although the NPA enjoyed exclusive authority to institute criminal proceedings, on its own version, it allowed others to impose their will on the authority to stop prosecutions that otherwise would have been pursued.

LC NGI

530.1 In so doing, the NPA and its responsible officials violated section 179(2) of the Constitution.

530.2 The Government officials and Executive Members who imposed their will, or attempted to impose their will on the NPA, and the NPA leadership and its senior staff members involved in the abandoning of the TRC cases, violated sections 32(1)(a) and (b) of the NPA Act.

530.3 The responsible officials also violated their oaths of office in terms of section 32(2) of the NPA Act and are potentially liable for criminal sanction in terms of section 41(1) of the Act.

531 In allowing others to effectively take their decisions, the responsible members of the NPA failed to act impartially and perform their powers and duties in good faith and without fear, favour or prejudice.

531.1 Their actions brazenly favoured political elites and perpetrators of apartheid era crimes, and severely prejudiced the interests of victims, their families and communities.

531.2 Accordingly, the NPA and the responsible officials violated section 179(4) of the Constitution and section 32(2) of the NPA Act.

532 The NPA, and its responsible officials, permitted other organs of state, alternatively members or employees of organs of state and/or other persons to improperly interfere or obstruct their authority in carrying out their powers, duties and functions. These violations, in turn, amounted to a violation of the rule of law itself, enshrined as a founding value in section 1(c) of the Constitution, which upholds the supremacy of the Constitution and the rule of law.

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533 The violations also amounted to a betrayal of the constitutional compact of truth, reconciliation and justice that our democracy was predicated upon, and which sought to provide the closure and healing that our nation required to move beyond the past, as enshrined in the preamble of the Constitution.

534 The entire scheme of the TRC Act presupposed that perpetrators of crimes in the apartheid era who did not apply for amnesty or who were denied amnesty would be prosecuted by the NPA. The violations described above accordingly were also violations of the TRC Act.

The NPA was required to resist political pressure

535 While pressure was brought to bear on the NPA, its officials were under a clear legal duty to reject such improper interference and obstruction. With a few exceptions, the leadership of the NPA did the bidding of the politicians and acquiesced with the political meddling in its work. Not only was the NPA required to reject such interference, but it was also required under law to stop such unlawfulness by:

535.1 Investigating, and where necessary, prosecuting those unlawfully interfering with the criminal justice process and obstructing the course of justice;

535.2 Exposing the interference by bringing it to the attention of Parliament's Portfolio Committee on Justice and/or the Public Protector; and

535.3 Taking steps to restrain and stop such interference and, if needs be, through seeking appropriate remedies, such as injunctive relief from the courts.

536 While Pikoli and Ackermann pushed back against the interference, as well as bringing it to the attention of the Justice Portfolio Committee, the balance of the NPA

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leadership over the period of the interference took no such steps and shamefully succumbed to the pressure.

537 The NPA's responsible officials permitted other organs of State, alternatively members or employees of organs of state and/or other persons to improperly interfere, hinder or obstruct the Authority in carrying out its powers and duties and functions. The actions of the responsible persons, both within and outside the NPA and SAPS warrant investigation into whether their conduct:

537.1 violated the aforesaid provisions of the Constitution and the NPA Act, in particular sections 32(1)(a) and (b) and 41(1);

537.2 amounted to the crime of defeating or obstructing the course of justice, in that these officials took active steps to supress the TRC cases in the face of a legal obligation to do otherwise;

537.3 amounted to the crime of corruption, particularly as framed in section 9(2) of PRECCA; and

537.4 where relevant officials are officers of the court, whether such officials are fit to serve as such in light of their conduct.

GROUNDS FOR DECLARATION AND CONSTITUTIONAL DAMAGES

538 The suppression of the TRC cases has been almost total in its impact. Virtually all the approximately 300 cases referred by the TRC to the NPA were blocked from proceeding from around 2003. This suppression lasted for a period of at least 15 years. Its effects are ongoing. The impact on the families of those murdered, their communities and on the fabric of society is incalculable.

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Denial of justice

539 The bulk of the apartheid-era cases have come to an end because suspects and witnesses have died, not to mention family members. The primary reason behind this monumental failure of justice has been the political interference which effectively killed off the TRC cases. Those behind these machinations knew that this would be the outcome. They must be held to account.

540 The vast majority of cases cannot be resurrected at this late stage. In my father's case, my legal team identified some 49 persons who were associated in one form or another with the Cradock Four case. Virtually all of them have died.

540.1 All six members of the police hit squad who murdered the Cradock Four have died. All the masterminds, against whom there was a *prima facie* case have died. Most of the members who sat on the State Security Council between 1984 and 1985 have died.

540.2 Since we launched our application to compel the NPA and SAPS to finalise their investigations in July 2021, the following persons of interest died: Eric Winter (former Cradock SB Commander), FW de Klerk (former State President), Johannes Velde van der Merwe (former SAP Commissioner) and Adriaan Vlok (former Minister of Police).

540.3 Most recently, Hermanus Barend du Plessis, former head of SB Black Affairs in Port Elizabeth died on 16 May 2023. He was the mastermind behind the gruesome murders of the Cradock Four, the PEBCO 3 and Sipiwo Mtimkhulu, Topsy Madaka, and Gcinisizwe Kondile amongst others.

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All were tortured and abused before their deaths. It is unforgiveable that the authorities allowed Du Plessis to go to his grave without facing justice.

540.4 While a third inquest into the Cradock Four case was belatedly announced on 4 January 2024, we have had to accept that after 39 years of waiting, 30 of them in the post-apartheid era, we will not see justice done in this case.

540.5 As mentioned above, the third inquest, which was due to commence in September 2024 collapsed because the NPA failed to give the witnesses sufficient notice of the inquest, who were not able to arrange funding for their legal costs in time. This was a remarkable lapse given that the same issue had emerged in all previous reopened inquests, pointing to the poor management of these cases and the failure to learn from past experience. The inquest was postponed to June 2025. There is a high probability that the remaining key witnesses, who are all in the twilight of their lives, may not testify, either through death or infirmness. They include:

540.5.1 88 years old Gerrit Nicholas Erasmus, former Lt General and head of the Port Elizabeth Security Branch.

540.5.2 84 years old Izak Johannes "Krappies" Engelbrecht, former Major General and head of the SAP's Counter-Intelligence department.

540.5.3 82 years old Christoffel Pierre "Joffel" van der Westhuizen, former Lt General in the SADF and former Officer Commanding Eastern Province Command. His legal representative has disclosed that he is in poor health. An attempt to take his evidence on commission

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has been stymied because the SANDF refuses to pay his legal costs.

540.5.4 75 years old Craig Michael Williamson, former head of Security Branch Intelligence.

540.5.5 75 years old Lukas Daniel "Neil" Barnard, former Director of the National Intelligence Service, who died on 13 January 2025.

540.5.6 75 years old Eugene Alexander de Kock, former head of the Security Branch's Vlakplaas Unit.

541 More than 10 years ago, on the 30th anniversary of Nokuthula Simelane's disappearance, her sister, Thembi Nkadimeng penned an opinion piece in the City Press titled 'My sister's heart' dated 26 December 2013, a copy of which is annexed hereto marked **FA84**. The piece sums up the impact of the suppression of that murder case on the Simelane family. It is a story of deep betrayal. I have included the following extracts below:

> "The story of my sister, Nokuthula Simelane, is about freedom and betrayal. My sister believed in freedom with every fibre of her being. It was her unshakeable dedication to freedom that took her to the Carlton Centre in Johannesburg on the morning of September 8, 1983. ....
>
> Instead of a scheduled rendezvous with a comrade, she was met by members of South Africa's hated security police, who shoved her into the boot of a vehicle. This betrayal was to condemn Nokuthula to a choice between life and death. An informant's life – a betrayal that would crush her spirit – or death with her dignity intact. In reality, there was no real choice for Nokuthula.
>
> Her commitment to what she loved most dearly made the first option unthinkable. My sister's death was not swift, and it was not painless.... Her torturers were convinced that with enough force this young, inexperienced woman would break and become an informant.

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They believed that it was just a question of more violence and more fear: a few more vicious blows to her head, to her face and her body, or perhaps a few more near-drownings in an icy dam. Maybe more days of solitary confinement shackled in handcuffs and leg irons in filthy conditions would push her over the edge.

The black police officers who testified before the Amnesty Committee of the TRC reported that after weeks of torture, my sister was unrecognisable. Her face was an appalling mess of bruises and swelling. She was too weak to walk. The last time they saw her was when she was being pushed into the boot of one of the white officer's vehicles.

My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died and where her body is today. We have spent three decades looking for Nokuthula. We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.

We did not expect the former South African Police to investigate themselves. However, we firmly believed that the new democratic South Africa would take the necessary steps. We were wrong. This was the second betrayal of Nokuthula and everything she stood for.

This betrayal cut the deepest. My father went to his grave without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing – and without burying Nokuthula's remains with the dignity she deserves. ....

The police and the prosecutors could have taken up the matter. However, they chose not to, though a police docket was opened in 1996. When I approached [the NPA], they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. When the new prosecution policy emerged in late 2005, it essentially created a backdoor amnesty.

It gave perpetrators, like my sister's killers, a second opportunity to escape justice. Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy. In 2008 a Pretoria High Court judge struck down the policy, declaring it to be absurd and unconstitutional.

We thought this meant that the path was eventually cleared for justice to take its course. Again, we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010 – but apparently the docket had gone "missing".

Three years later, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those

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police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, I instructed my lawyers to demand the holding of a judicial inquest into her death.

This request was refused. After 17 years of idleness, the prosecutors advised us that their investigations were still not yet complete. We do not believe them.

We have lost all faith in the prosecutors and police. They have betrayed our trust. They now claim that they are occupied with inquiries, which could conceivably drag on indefinitely while witnesses and suspects grow old and die.

We do not know why the authorities in the new South Africa would turn their backs on one of their own. Nokuthula's ultimate sacrifice helped to pave the way for the freedom and democracy we now enjoy.

We cannot bury her, and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete."

542 As mentioned above, Thembi Nkadimeng applied to court in 2015 for an order compelling the NPA and SAPS to take action (in *Nkadimeng 2*). This resulted in an indictment being issued in early 2016. Families should not have to go to court to get the authorities to do their jobs.

543 Eight years since the indictment for the murder of Nokuthula Simelane was issued, the criminal trial has still not started.

543.1 Two of the four accused have died since the issuing of the indictment. Timothy Radebe, died during 2019 and Frederick Mong died during 2021.

543.2 At least eight witnesses and family members have died since 2016.

543.3 On 6 June 2022, the very day that the belated trial was to begin against the two-remaining accused, the legal team representing the commander of the SB squad, Willem Coetzee, produced a flimsy two-page doctor's report claiming that Coetzee was mentally unfit to stand trial, requesting a

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postponement of the trial, which was granted, with no opposition from the NPA. More than 2.5 years later, this issue remains unresolved.

543.4 The presiding Judge in the Simelane case refused to hear or entertain representations from the family on the question of delay.

543.5 A graphical depiction of the delays in the Simelane case prepared by the FHR is annexed hereto marked **FA85**.

543.6 During 2016, the family requested the NPA to include crimes against humanity charges, including the crimes of apartheid and enforced disappearance on the charge sheet. It took some 5 years for the NPA to reach a final decision on this question towards the end of 2021. Ironically, the NDPP refused to include the charges on the grounds that it might delay the trial.

544 But for the political interference, this case could have proceeded in the early 2000s. If it had, it would have spared Nkadimeng, her mother, Ernestina Simelane, and family the agony of the last 20 odd years. Ernestina turns 85 this year.

545 More than 42 years has elapsed since four teenagers, known as the COSAS 4, were lured into a trap by the SB and cruelly blown up on 15 February 1982.

545.1 Three of the senior perpetrators, Jan Carel Coetzee, Abraham Grobbelaar and Willem Schoon (who authorised the operation) died before they could face justice.

545.2 Zandisile Musi, the only surviving member of the COSAS 4 who was severely injured in the 1982 blast, died in June 2021.

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545.3 Maide Christina Selebi is the sister of the late Eustace Madikela, one of the COSAS 4 who died on the scene. Maide is the only surviving member of the Madikela family. Her parents, siblings and husband have all passed on.

545.4 In 2021, the last two living perpetrators, both elderly, were charged with kidnapping and murder, and at the urging of the families, also with crimes against humanity, including apartheid as a crime against humanity. It was the first time that such international crimes had been brought in South Africa.

545.5 As mentioned above, the trial was delayed for years by the refusal of SAPS to pay the legal fees of the second accused, a former SB officer. The families had to intervene in order to force the SAPS to pay, while the NPA and the accused took a back seat in the matter. 'Stalingrad' type tactics employed by the accused's' legal teams in launching parallel civil litigation delayed the trial further and it has been postponed to April 2025.

546 In the PEBCO 3 case, three leading civic activists, Sipho Samuel Charles Hashe, Twasile Champion Galela and Qaqawuli Godolozi, were abducted in May 1985 from the Port Elizabeth airport in a joint Vlakplaas and SB operation. The activists were taken several hundred kilometres away to the remote Post Chalmers farm where they were viciously tortured and murdered.

546.1 Most suspects have died including Vlakplaas commander, Jan Hattingh 'Jack' Cronje, who deployed a hit squad to the Eastern Cape. Vlakplaas unit members, Johannes Koole and Kimani Peter Mogoai, have also passed on.

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546.2 All the Port Elizabeth SB members are deceased, including Gideon Nieuwoudt, Johannes Martin 'Sakkie' Van Zyl, Gerhardus Jacobus Lotz, HB Du Plessis and Harold Snyman.

546.3 Former Vlakplaas Colonel Roelf Venter apparently died of "natural causes" on 28 July 2024.

546.4 Only 2 members of the Vlakplaas unit involved in the PEBCO 3 hit remain alive today. Former Vlakplaas Warrant Officer, Gerhardus Cornelius Beeslaar, is about to turn 87 years old; and Joseph Tshepo 'Joe' Mamasela is in his 70s.

546.5 The sands of time are fast running out. Notwithstanding the urgency, the NPA has still not responded to a detailed 147-page memorandum dated 30 November 2023 submitted by the families which set out the evidence against the last surviving suspects.

546.6 Despite multiple follow up communications by the families' lawyers, they were only able to meet with the NPA on 3 December 2024. To the dismay of the families, the prosecutors said they were not ready to respond to the analysis of the evidence and recommendations of our lawyers, even after being in possession of the document for more than a year. More detail is provided in the supporting affidavit of Nomali Rita Galela filed evenly herewith.

547 According to the police version, Soweto Students Representative Council member, Matthews Mabelane, who was detained at JVS, fell to his death while attempting to escape out the window from a 10th floor interrogation room on 15 February 1977.

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The Mabelane family do not believe the official version that nobody was to blame for his death and have been pushing to reopen the inquest for several years, without success.

547.1 This struggle was spearheaded by Matthews' father, Philip Mabelane and his brother, Lasch Mabelane. Philip died on 9 May 2018, while Lasch died on 6 August 2020, without reaching closure.

547.2 On 1 August 2024, the family's legal team submitted detailed representations to the NPA seeking the reopening of the inquest. The representations included two expert forensic reports which explained why the police version was untenable.

547.3 More than 6 months later the NPA have still not made a decision.

548 In the Highgate Hotel Massacre, a group of balaclava-masked men shot dead five patrons at the hotel bar in East London and injured seven others on 1 May 1993. The families and survivors of the massacre have been seeking the truth for decades. Nobody applied for amnesty and no arrests were made. No inquest was ever held. Neville Harris, father of Deon Harris who was one of the five murdered, died in July 2023. He had been struggling for the truth for decades. Ongoing delays means that he has been deprived the opportunity to participate in the inquest, which is set down for hearing in late January 2025 in the High Court in East London.

549 In May 1987, Sbho Phewa a UDF activist, was abducted by askaris and handed over to the SB at Winklespruit in KwaZulu Natal. He was never seen again, and his body has not been recovered. At least three of the perpetrators, including the notorious Andy Taylor, died before they could face justice. As mentioned above,

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Lawrie Wasserman, who was charged with murder on 12 November 2024, died 4 days later.

550 Anti-apartheid youth activist Mxolisi 'Dicky' Jacobs was arrested by the SB in Upington in June 1986 and spent 129 days in detention until he was found hanging in his cell on 22 October 1986. Some 38 years later his family is no closer to the truth of what happened to him.

551 Richard and Irene Motasi were shot dead by Northern Transvaal SB operatives at Temba on 1 December 1987.

551.1 They were murdered in the presence of their 3-year-old son Tshidiso Motasi. He was callously left unattended throughout the night with the bodies of his parents.

551.2 Nobody has ever been prosecuted for these horrendous crimes even though several of the killers did not apply for amnesty. At least three of the killers have died, including the notorious Jaques Hechter who died on 20 July 2023.

551.3 Hechter was refused amnesty for his role in murdering Irene Motasi. When he appeared before the Amnesty Committee he testified that he had *"strangled, burned, shot, kicked and blew up 35 people."* Hechter was allowed to go to his grave without facing justice for the Motasi murders.

551.4 Gloria Hlabangane, the mother of Irene Motasi, is 92 years old. She is hoping to see justice done in her daughter's case, but time is not on her side. Two of the surviving suspects are well into their 80s.

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552 Dr Rick Turner, an anti-apartheid activist and academic was a leading figure in the 'Durban Moment', in the 1970s. Shortly before his banning order was about to expire, Turner was shot dead in his Durban home. He died in the arms of his daughters, 13-year-old Jann and 8-year-old Kim.

552.1 Evidence emerged in the reopened inquest into the death of Dr Hoosen Haffejee that the Turner house was being monitored round the clock by the SB until the day before the murder. The Turner family has been searching for the truth for decades. Nobody has been held to account.

552.2 Captain James Taylor of the Durban SB, who was implicated in the murder, died in 2019. The Turners have sought to reopen the inquest, without success so far.

553 It is not surprising that apartheid-era perpetrators, witnesses and family members are dying on a frequent basis given that most of the offences took place between the 1960s and 1980s and most of those responsible for these crimes were born between the 1930s and 1950s. They are typically in their 70s and 80s, or older. It is a race against time, but we see little urgency on the part of the authorities.

554 The denial of justice is further depicted in the supporting affidavits of my co-applicants that are attached to this founding affidavit. Each of these supporting affidavits tell the story of victims and survivors of apartheid era crimes, which were abandoned by the post-apartheid authorities. For most of them, justice remains out of reach thirty years into our democracy. Sadly, there are many more stories that have not been told in these papers.

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555 The political interference has been primarily responsible for the almost total denial of justice and closure in the TRC cases. The prejudice visited upon the families and their communities has been irreversible and incalculable. We have suffered considerable pain, suffering and indignity.

Violated Rights

556 I submit that accountable governance and social trust are built upon decision making by public officials that is reasonable and responsive. The political interference which suppressed the TRC cases or severely undermined the prospects of justice in those cases, has denied us our substantive rights and entitlements under the Constitution, which are set out below.

Rule of law

557 The fact that serious crimes committed under apartheid have been deliberately suppressed implicates the rule of law, enshrined in section 1 of the Constitution. As survivors and family members of victims of such crimes we were entitled to have these crimes properly investigated.

558 Crime, particularly serious crime, undermines the fabric of our society and violates, amongst other rights, the right to life, the right to freedom and security and the right to dignity.

559 Serious crime committed by agents of the State should be viewed in a particularly serious light. The perpetrators of such crime are often shielded from justice. During apartheid, the perpetrators of state sponsored crime enjoyed almost total impunity. The failure of the post-apartheid state to timeously investigate such cases,

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particularly those cases which were not amnestied, points to political deal making or tolerance of such crimes for ulterior purposes.

560 The rule of law requires that the laws creating crimes must be obeyed. Prosecution decisions may not be subject to favouritism. The interference in the TRC cases displayed blatant favouritism for the perpetrators of crimes by those in high office, at the expense of victims.

561 This violation of the rule of law is exacerbated by the refusal or failure to get to the bottom of the suppression of these cases, through a credible, independent and open inquiry.

Principle of Legality

562 I am advised that the interference also implicates the principle of legality, which is central to the rule of law. The constitutional principle of legality requires that a decision-maker exercise the powers conferred on him or her lawfully, rationally and in good faith. Such decisions may not be arbitrary and must be rationally related to the purpose for which the power was given.

563 I submit that the past conduct of the Executive, the NPA, SAPS and other organs of state in the shameful colluding or acquiescing in the suppression of the TRC cases is not only arbitrary and irrational but also an act of bad faith.

564 During the period of interference, the TRC cases were not pursued by the SAPS and NPA notwithstanding repeated requests and pleas over many years. Such conduct is not rationally connected to the purpose for which investigative and prosecutorial powers were granted, namely the combating of crime, particularly the

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most serious crimes. There can be little doubt that the decisions behind the interference were irrational.

Human Dignity

565 The interference has violated our right to human dignity. The suppression of the cases and the ongoing delays have denied us, our families and our communities of our intrinsic worth as human beings.

566 The conduct of the responsible officials behind the interference has denied us justice within a reasonable time, or at all. In so doing they have exacerbated and prolonged our pain and trauma. We have been denied the possibility of closure of a most painful past. This conduct has breached our rights to human dignity.

567 The refusal or failure to take expeditious steps to investigate the known suspects behind the crimes against our loved ones has disrespected our rights as victims.

568 Ultimately, the interference infringes upon our rights to dignity in that it:

568.1 protects the perpetrators responsible for the heinous crimes against our family members, and/ or ourselves;

568.2 causes suffering to us and our families by denying us justice;

568.3 prevents us from reaching closure;

568.4 dishonours the respect, dignity, and value of ourselves and our families in the wider community; and

568.5 demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the Interim

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Constitution and by undermining the purpose and spirit behind the TRC's amnesty process.

Right to life

569 The right to life as protected in section 11 of the Constitution is infringed as the interference has closed down justice in most of the cases or has severely undermined the prospects of a successful investigation and prosecution of the perpetrators who murdered our family members.

570 The political interference has also devalued the lives and memory of our loved ones.

Right to freedom and security of the person

571 The interference violates the right to freedom and security of the person enshrined in section 12 of the Constitution by closing down or undermining the investigations of the perpetrators who violated the bodily integrity of our family members by subjecting them to torture, assault, attack and other cruel and inhuman treatment.

Right to equality

572 The interference and the failure to take forward the crimes of the past violates the right to equal protection and benefit of the law enshrined in section 9 of the Constitution by unjustifiably discriminating against the survivors and families of victims of this class of crimes. The victims of the crimes committed in the TRC cases have been effectively treated as second-class citizens. Their cases were specifically selected for abandonment and neglect.

573 Once the TRC's amnesty process was concluded there should have been no reason to treat apartheid era crimes any differently from other serious crimes. Perpetrators

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of apartheid-era crimes have been treated more favourably than perpetrators of far less serious crimes. The effect of such differentiation is discriminatory, and because of its deleterious impact on victims of apartheid era crimes, it is also unfair.

Violation of South Africa's international law obligations

574 I am advised that the interference is substantively unconstitutional and invalid in that it constitutes an infringement of South Africa's international law obligations as set out in sections 231 to 233, read with section 39(b), of the Constitution, to uphold the right to justice and to investigate, prosecute and punish violations of human rights under the following treaties ratified by South Africa:

574.1 Article 2(3), read with article 2(1), of the International Covenant for Civil and Political Rights (**ICCPR**) by denying victims and their families an effective criminal justice remedy.

574.2 Article 6(1), of the ICCPR by permitting those who have violated the right to life to escape justice and punishment.

574.3 Article 7 of the ICCPR by contravening the duty to hold the perpetrators of torture or cruel, inhuman or degrading treatment or punishment responsible for their actions.

574.4 Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties.

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574.5 Article 7 of CAT by failing to give effect to the requirement that all acts of torture must be submitted to the competent authorities for the purposes of prosecution.

574.6 Article 12 of CAT by failing to ensure that competent authorities promptly investigate, wherever there are reasonable grounds to believe that an act of torture has been committed.

575 The conduct of the authorities described above is also inconsistent with:

575.1 Article 3(g) of the Constitutive Act of the African Union (**Constitutive Act**) by failing to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights.

575.2 Articles 4(m) and (o) of the Constitutive Act by failing to reject impunity and uphold the rule of law.

575.3 Article 11 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (**Right to a Remedy Guidelines**) by not affording us "equal and effective access to justice".

575.4 Article 4 of the Right to a Remedy Guidelines by suppressing and undermining the TRC cases instead of investigating and prosecuting violations caused by crimes committed during apartheid.

576 I have set out earlier in this affidavit the principles, values and obligations arising from the TRC process, as well as the duties and obligations enshrined in the

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Constitution and various statutes not to interfere in the work of prosecutors and the police. I rely on these assertions for our grounds of relief but will not repeat them here.

577 In the circumstances I have set out sufficient grounds to warrant the declaration sought in the notice of motion that the interference:

577.1 violated the rule of law as well as our fundamental rights as set out above;

577.2 was in breach of the duties and obligations contained in the Constitution and the NPA Act and SAPS Acts to investigate and prosecute serious crime, and not to interfere with the legal duties of prosecutors and law enforcement officers;

577.3 was inconsistent with the principles, values and obligations arising from the TRC process read with the postscript to the Interim Constitution; and

577.4 was inconsistent with South Africa's international law obligations.

578 I submit further that I have demonstrated sufficient grounds for the granting of constitutional damages in the amounts, which are set out below.

CONSTITUTIONAL DAMAGES AND QUANTUM

579 Before setting out the amounts we seek by way of constitutional damages, I am advised that I need to describe the nature and character of the damages we claim.

580 Firstly, declaratory relief on its own will not suffice having regard to the long history of neglect visited upon the TRC cases.

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580.1 The interference was not transitory, it was systemic and particularly egregious.

580.2 The abandonment of the cases was not by mere negligence but as a result of deliberate decision and planning. Even when the so-called 'moratorium' period was over, state organs maintained their obstructionist approach and ensured that the cases would not proceed.

580.3 To this day, families are still struggling to see justice done in their cases. Accordingly, something more effective than the mere clarification of our rights is needed.

581 To be clear, we are not seeking delictual damages. An action in delict or any other private or public law remedy will not serve to vindicate the deep violation of our rights over decades.

581.1 Where our cases have collapsed, or have been severely undermined because of such neglect, no delictual remedy will ever resurrect or salvage those cases at this late stage.

581.2 The damage has been done. There is no way to turn back the clock. We have to look forward.

581.3 Accordingly, we do not seek compensation to redress the wrongs endured. The amounts sought are not for the personal use of anyone.

581.4 In saying this, we note that government bears the responsibility of providing reparations to victims of apartheid-era crimes. The reparations provided so far have been wholly inadequate, and many thousands of victims of gross

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human rights violations have been excluded by virtue of the government's cruel and unjustifiable closed list policy. In this regard we note with dismay that more than R2 billion remains unspent in the President's Fund, more than 20 years after the winding up of the TRC.

581.5 However, the question of reparations is beyond the scope of this application and no such relief is sought in these proceedings.

582 We are also not seeking an award of punitive damages. We see no point in punishing government. While we seek truth, accountability and justice there is nothing to be gained from penalising the state.

582.1 Any awards are ultimately borne by the taxpayer and the public at large, rather than by those actually responsible. For the same reason, a punitive damages award will do little to deter future bad conduct.

582.2 Since there is great demand for scarce public resources, we seek rather to employ any damages awarded in a forward-looking, community-orientated and constructive manner, to be described below.

583 Accordingly, we seek damages for the purposes of formal acknowledgement of what we have endured, meaning the vindication of our violated rights and to enforce constitutional values going forward. Ultimately, we aim to use any funds awarded to directly address the issues that caused the problems, and which may give rise to future wrongs. This would, in our view, constitute the only meaningful and effective vindication of the violation of our rights.

584 In the circumstances we seek constitutional damages for the following purposes, which is to enable families to:

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584.1 Advance truth, justice and closure by assisting them to pursue investigations, inquests, private prosecutions and related litigation in those cases that can still be taken forward.

584.2 Play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases.

584.3 Pursue commemoration, memorialisation and public education activities around the TRC cases.

585 Each head of damage will be dealt with in turn.

Advancing truth, justice and closure

586 Under this head of damage, we aim to pursue the few remaining cases where there is still a prospect of justice by way of public or private prosecutions, or inquests. This would be done through private investigations, legal work, research and analysis and supporting the work of detectives and prosecutors.

587 We note that the vast majority of cases can no longer be pursued by way of a prosecution, and in these cases, we aim to establish inquests or pursue other truth-seeking endeavours.

588 In particular, we would like to pioneer the use of structural investigations in South Africa, which involves interdisciplinary research into the organizational structures behind apartheid crimes. This includes investigating context, the *modus operandi* of the perpetrators, chains of command and links between cases in order to identify suspects and provides leads and technical assistance to the SAPS and NPA.

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589 We have demonstrated that where families, together with their legal representatives and private investigators, get involved in the investigation of cases, those are typically the matters that result in prosecutions or the reopening of inquests. This has been the case in respect of the reopened inquests into the deaths of Ahmed Timol, Neil Aggett, Hoosen Haffejee and Imam Haron; as well as the prosecution of the Nokuthula Simelane, COSAS 4 and Caiphus Nyoka murder cases.

590 The bulk of this work has been done by a small number of lawyers, investigators and experts working either pro bono or on considerably reduced human rights rates. By way of example, the lead counsel on the TRC cases has spent more than 100 days in court acting pro bono, not counting time in preparation. Just one of the law firms, the Pro Bono department at Webber Wentzel has devoted 9 654.53 hours to the TRC cases, which would have amounted to R23 233 247.00 in attorneys' fees, if the firm had been charging for its time. In this regard, see the supporting affidavit of Odette Helena Geldenhuys, the head of the Webber Wentzel pro bono team, is filed evenly herewith.

591 This is not sustainable going forward. Nonetheless, given the results, the experience has demonstrated that this was time well spent. It can be expected that more sustained support for such work will produce greater results. Such outcomes serve the ends of truth seeking, accountability and closure in the most tangible way, which has great meaning and value to the affected families and communities.

592 In estimating the amounts under this head of constitutional damages, we have relied on the records of time spent on the TRC cases by the law firm Webber Wentzel (see the supporting affidavit of Odette Helena Geldenhuys) as well as the support provided to the TRC cases over many years by the Foundation for Human Rights.

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In this regard see the supporting affidavit of Dr Zaheed Kimmie. See in particular annex **ZK** to Dr Kimmie's affidavit, as well as **table 2** to that annex, which sets out the specific costs associated with the provision of investigative, legal and other support to families pursuing inquests and prosecutions.

593 Accordingly, under this head of damage we seek a total amount of **R115,261,625.00**, calculated in accordance with Uniform Rules of Court 67A(3) and 69 (Scale A), and based on the anticipated support required to advance the TRC cases over the next 5 years, comprising the following amounts:

593.1 We anticipate that some 20 inquests will take place over the next 5 years and that each inquest will on average cost R3,843,875.00 which includes investigative, legal, expert and general support to the families of the deceased. This amounts to a total of R76,877,500.00

593.2 We estimate that some 10 cases will proceed to trial, incurring a total cost of R15,122,500.00. On average, the support provided to families of the deceased victims is expected to cost approximately R1,512,250.00 per case, including investigative and legal support, possible civil litigation or *amicus curiae* intervention, as well as disbursements.

593.3 We project that 15 cases will require comprehensive investigations but will not necessarily progress to inquests or prosecutions. The total estimated cost for these activities is R14,188,125.00 with each case costing an average of R945,875.00 including investigative, expert and attorneys' fees, possible civil litigation and disbursements.

LC
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593.4 We estimate 3 cases may necessitate private prosecutions, with an anticipated total cost of R9,073,500.00 with each case costing approximately R3,024,500.00. We have assumed that private prosecutions require twice the funding of typical prosecutions to account for the need to provide security for costs.

594 As the window of opportunity for the finalisation of TRC cases is fast closing, we seek such amounts over a 5-year period, although the inquests and private prosecutions will likely be stretched over a considerably longer period. This amounts to R23,052,325.00 per year over the next 5 years.

Monitoring

595 This head of damages is aimed at enabling families and organisations to monitor the performance of the policing and justice authorities charged with investigating and prosecuting the TRC cases. They will also be required to monitor the role of those carrying out political and parliamentary oversight. Their tasks will include highlighting any shortcomings and proposing solutions, particularly in relation to any perceived interference.

596 The following amounts are sought:

596.1 One researcher and one communications/advocacy specialist at an average cost of R700,000.00 per person over 5 years [R7 million].

596.2 Logistical and administrative support [R1 million].

597 A total amount of **R8 million** is sought in respect of this function. This amounts to R1.6 million per year over the 5-year period.

LC
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Memorialisation, commemoration and public education

598 This head of damages is aimed at enabling families and organisations to honour those who made the ultimate sacrifice for South Africa. It is aimed at assisting families and communities preserve the memories of their loved ones through commemoration, memorialisation and public education activities.

599 Such activities could include the holding of public events, publishing of books, making of documentaries and films, conducting seminars, trainings, intercommunity dialogue, social and cultural projects and exchange programs.

600 The ultimate aim of these functions would be to:

600.1 facilitate greater understanding of our past, promote the diminished voices of victims, transcend fault lines in society and promote the goal of "never again".

600.2 Involve participation of communities, in particular the youth.

600.3 Promote inter-generational dialogue about our past and encourage social exchange between communities.

600.4 Assist families to reclaim and affirm their violated rights; and to dignify the memories of victims.

601 The following amounts are sought for the proposed activities:

601.1 Fifteen memorialisation/ commemoration activities per year at R100,000.00 per activity for 10 years [R15 million].

601.2 Ten films/ documentaries at R1,000,000.00 per film [R10 million].

LC
NGI

601.3 Twenty books or publications at R200,000.00 per publication [R4 million].

601.4 Ten public education programmes at R1,500,000.00 per programme [R15 million].

602 These amounts are consistent with the amounts that the FHR has granted for similar projects over past years. In this regard I refer to the supporting affidavit of Dr Zaheed Kimmie.

603 A total amount of **R44 million** is sought in respect of these functions. This amounts to R4.4 million per year over the 10-year period.

604 The grand total sought for all the activities under the three heads of constitutional damages is R167,261,625.00 over a ten-year period.

605 It should be made clear, that should any constitutional damages be awarded, it will be open to all victims, families and organisations to apply to the proposed trust for funds for projects and cases that fall within the ambit described above, regardless of whether they were applicants in this case or not.

Proposed Trust

606 Should constitutional damages be awarded we propose that the court direct the creation of an independent trust to hold and disburse such funds, in accordance with the provisions of the Trust Property Control Act 57 of 1998.

607 It is proposed that the trustees be comprised of:

607.1 Two representatives from the families of victims in the TRC cases.

LC
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607.2 One representative from the South African Coalition for Transitional Justice (**SACTJ**).

607.3 One former commissioner or committee member of the TRC.

607.4 An attorney or advocate who has specialised in human rights law with at least 15 years' experience.

607.5 A recognised academic specialising in transitional justice or history from a South African university.

607.6 A chartered accountant with at least 15 years' experience and registered with the South African Institute of Chartered Accountants (**SAICA**).

608 It is further proposed that the trustees be:

608.1 granted the necessary powers and discretions to effectively manage the trust and to decide on the location and administration of the trust,

608.2 empowered to make all operational decisions about the disbursement of funds,

608.3 audited annually and be required to publicly report on its activities once a year.

GROUNDS FOR COMMISSION OF INQUIRY RELIEF

609 In this part of the application, we set out our grounds for the relief declaring the failure or refusal of the President to establish a commission of inquiry into the suppression of the TRC cases to be:

LC
NGI

609.1 inconsistent with his constitutional responsibilities, and

609.2 a violation of the families of victims of apartheid-era crimes' rights to equality and human dignity.

610 In addition, we seek an order setting aside the President's decision and directing him to:

610.1 Promulgate the establishment of a commission of inquiry within thirty days of the grant of such an order; and

610.2 Make the provisions of the Commissions Act 8 of 1947 applicable to the aforesaid commission.

610.3 Request the Chief Justice to designate a sitting or retired judge to head the inquiry.

Commissions and the search for truth

611 I am advised that the highest court in our land has stipulated that the work of a commission is to "*search for truth*", which "*also serves indispensable accountability and transparency purposes.*" The Court held that *"not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too.*"

612 As victims and family members we are entitled to the truth behind the closing down of the cases of our loved ones. The country is also entitled to know.

613 The Constitutional Court has also observed that commissions investigating matters of public concern, in addition to the function of advising the President, have "*a*

LC
NGI

deeper public purpose" particularly during times of "disquiet and discontent". The Court noted that public hearings are held "*in order to restore public confidence*" in the relevant institutions, where the focus is to "*reveal the truth to the public pertaining to the matter that gave rise to public concern*."

614 We ask for a public accounting for the deep miscarriage of justice that we have endured since the advent of our democracy.

Duty on the President to establish a commission of inquiry

615 I am advised that while section 84(2)(f) of the Constitution, which grants the President the power to appoint commissions of inquiry, is an original and discretionary power, there are circumstances in which the President is obliged to exercise the power. Indeed, presidential powers are never entirely unfettered, and typically such powers are coupled with duties.

616 Accordingly presidential powers must be exercised within the constraints that the Constitution imposes. In deciding whether or not to appoint a commission of inquiry the President must:

616.1 act in good faith;

616.2 not misconstrue his powers;

616.3 not infringe any provision of the Bill of Rights; and

616.4 not act arbitrarily and his decision must be rationally related to the purpose for which the power was given.

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NGI

617 We do not have evidence suggesting that the President has acted *mala fide* or for an ulterior purpose in not appointing a commission. However, we are concerned that since such an inquiry will have to probe the role of the government, and quite likely personalities who played leading roles in government, that political considerations may have crept into his decision. It is exceedingly difficult to shake this perception, which only grows with the ongoing refusal to get to the bottom of the suppression of the TRC cases.

618 We are the of the firm view that in declining to appoint a commission of inquiry into this question, the President has exercised his power under the Constitution improperly and misconstrued the nature of his powers. In doing so, he has also violated several of our rights protected in the Bill of Rights, as set out above.

619 While the Constitution does not constrain the subject matter of any commission of inquiry that the President may appoint, the Commissions Act limits commissions of inquiries to matters of "*public concern*". A central inquiry as to whether the President's decision was irrational or arbitrary is whether the interference is a significant matter of public concern demanding the appointing of a commission to get to the truth. I submit that it is.

Irrational or arbitrary decision

620 In the letters addressed to the President on 5 February 2019 (**FA68**) and 25 March 2021 (**FA74**) the former TRC commissioners pointed out that the approximately 400 cases suppressed by political interference comprised some of the most serious crimes in South Africa's history, including murder, kidnapping, torture and various crimes against humanity.

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NGI

621 An aggravating factor is that most of the TRC cases will not be able to be revived as suspects and witnesses have died. This means that the damage to the associated families and their communities is permanent and irreversible. An additional aggravating factor is that, to date, negligible progress has been made on the few cases that can be taken forward.

622 The former TRC commissioners pointed out that:

622.1 there was considerable evidence of the suppression of the TRC cases in court papers;

622.2 senior NPA officials had admitted under oath in *Rodrigues* that the NPA had succumbed to political pressure;

622.3 the full court in *Rodrigues* called for the NPA and the Executive to take steps to enquire into the suppression, which to date has not happened;

622.4 appropriate action to prevent recurrence can only be based on a full and thorough inquiry;

622.5 an inquiry is needed to uncover:

622.5.1 the reasons behind the suppression of the cases;

622.5.2 the sources of the interference;

622.5.3 the arrangements and agreements struck between individuals and entities within and outside government; and

622.5.4 how the will of outsiders was imposed on the NPA and the SAPS;

622.6 the available evidence pointed to the involvement of:

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622.6.1 multiple entities and individuals across the public sector, including the Department of Justice, the National Intelligence Agency, the NPA, the SAPS, the Department of Defence and the Presidency; and

622.6.2 persons possibly implicated included politicians, cabinet ministers, senior civil servants, senior police officers and prosecutors;

622.7 potentially serious common law and statutory crimes may have been committed;

622.8 families of victims of apartheid-era crimes and their communities have lost all trust and confidence in the SAPS and NPA;

622.9 the suppression has provoked much anxiety amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance;

622.10 the suppression of the TRC cases has deeply offended the human spirit and dignity of the families and their communities; and

622.11 the rights of the families to equality before the law has been grossly disrespected in that their cases were treated differently from other serious criminal cases for purposes of serving undisclosed ends.

623 The former TRC commissioners also pointed out the historical significance of pursuing the TRC cases, as well as the legal and moral obligations arising from South Africa's transition from apartheid to democracy.

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624 The letters dated 23 June 2019 and 23 June 2020 (**FA72** and **FA73**) addressed to the President by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Abdullah Haron and 14 other families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa.

625 The subject matter clearly constitutes a matter of deep public concern at different levels:

625.1 The suppression of hundreds of serious criminal cases, mostly murders, constitutes a massive subversion of the rule of law.

625.2 Families have been impacted from across the country in all provinces.

625.3 The anguish they have experienced is evident from their letters to the President.

625.4 Several organisations have expressed their public concern at the failure to investigate and prosecute the TRC cases, and in this regard:

625.4.1 family members have established the Apartheid-Era Victims' Families Group to fight for justice.

625.4.2 Eleven organisations have formed the SACTJ to secure the rights of victims of apartheid-era violations.

625.4.3 The Foundation for Human Rights has established a specific programme called 'The Unfinished Business of the TRC', to focus on justice and accountability.

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626 The subject matter is without question an important one, and one that has provoked considerable anxiety amongst many people across the country, qualifying it as a matter of significant public concern. The President's refusal or failure to appoint a commission of inquiry:

626.1 Shuts down the search for the truth behind the massive denial of justice to hundreds of families.

626.2 Further undermines confidence in the implicated institutions and raises deep suspicions that these institutions have much to hide.

626.3 Gives rise to the impression that the implicated persons and institutions are above the law and are being shielded from scrutiny and protected from embarrassment.

626.4 Serves to heighten and exacerbate the already existing widespread disquiet and discontent.

627 Accordingly, there can be little doubt that the suppression of the TRC cases provokes considerable anxiety amongst many South Africans and is a matter of both historical and national importance. This warrants a properly empowered inquiry to uncover the truth to alleviate victim and public discontent, formulate corrective measures and restore confidence in the implicated institutions.

628 The President's failure or refusal to appoint a commission is irrational since the refusal or failure to appoint a commission is not rationally related to the purposes for which the power was given. His decision falls to be set aside.

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Irrational process or means

629 There is an additional ground of irrationality, which is related to process. The failure of the President and the former Minister of Justice to:

629.1 respond in substance to the four letters from the TRC commissioners and the victims' families' letters;

629.2 provide reasons for his refusal, which *prima facie* makes his decision an arbitrary one; and

629.3 make and communicate a formal decision.

630 This conduct has served to obstruct, delay and undermine an investigation into the interference. It has also served to prolong and exacerbate the harm visited upon the families and their communities.

631 The refusal or failure to make and communicate a formal decision also offends section 237 of the Constitution which provides that "*all constitutional obligations must be performed diligently and without delay*". It is also a violation of:

631.1 one of the founding values of the democratic South Africa as enshrined in section 1(d) of the Constitution which requires the state to "*ensure accountability, responsiveness and openness*"; and

631.2 section 195 of the Constitution, which requires the President to act in accordance with various basic values governing public administration, including the need to be transparent and respond to people's needs.

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632 Since South Africa is a constitutional state in which the principles of fairness and accountability are fundamental, the President is under a duty to act fairly. Indeed, a heightened duty to act fairly arises from the context which I have described. The President's conduct has fallen well short of this standard.

633 In addition, the attempt by the former Minister of Justice to set up an internal inquiry, as described above, would have amounted to asking one of the impugned departments to investigate itself.

634 Accordingly, the process or means adopted by the President and the former Minister to date has also been irrational.

Violation of the rule of law and Bill of Rights

635 I have set out the violations of the rule of law and the Bill of Rights endured by the families arising from the interference in the section dealing with our claim for constitutional damages. Those submissions apply equally in respect of our grounds for an order compelling the President to appoint a commission of inquiry. That detail will not be repeated here. It suffices to say:

635.1 The President's decision and/or the failure to take a decision is an affront to the human dignity of the families. In affording those behind the suppression of the TRC cases further opportunities to escape scrutiny, the intrinsic worth of the victims and families is degraded.

635.2 The President's decision violates the rights of survivors, victims and their families to life, human dignity and freedom and security of the person by:

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NGI

635.2.1 declining or failing to authorise an inquiry into the suppression of the investigations of perpetrators who infringed our rights by committing acts of murder, enforced disappearance, torture, assault and other cruel and inhuman treatment, and

635.2.2 failing to give value to the lives of victims of apartheid-era crimes.

Sufficient grounds

636 I respectfully submit that sufficient grounds have been set out for the relief declaring the failure of the President to appoint a commission of inquiry to be inconsistent with his constitutional responsibilities, and a violation of our rights; and for an order setting aside his decision and directing him to appoint a commission.

637 We specifically ask that the Court require that the provisions of the Commissions Act be made applicable to the aforesaid commission.

637.1 This is because a commission without the powers imbued by the Act could turn into a farcical exercise. It would not have the necessary powers to investigate effectively, and it could conduct its affairs behind closed doors.

637.2 An inquiry under the Act comes with extensive powers, equivalent to those of the High Court, including the power to lead evidence under oath, to summon witnesses, to require the production of documents and to criminalise conduct which may obstruct or prevent a proper investigation.

637.3 The Act also requires the hearings of the commission to be public unless the chairperson decides otherwise.

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638 We also ask this Court to require the President to request the Chief Justice to designate a sitting or retired Judge to head the inquiry.

638.1 This is necessary in order to protect the proprietary and integrity of the commission. The Office of the President, as well as the Ministry of Justice and other government departments are implicated in the interference. It would accordingly be undesirable for such parties to be directly involved in the selection of the commissioners.

638.2 While the power to appoint the head of the commission is vested exclusively with the President, and he could decline to accept the designation of the Chief Justice, we believe he would be most ill-advised to do so.

GROUNDS FOR A MANDAMUS

639 I set out below our grounds for an order compelling the establishment of a commission of inquiry to investigate the suppression of the TRC cases.

Clear right

640 I submit that I have demonstrated the unlawfulness of the President's refusal or failure to appoint a commission of inquiry into the interference with the TRC cases. I have also demonstrated the serious impact that the interference has had on our lives, in addition to this issue being a matter of national public concern with huge implications for the rule of law in our country.

641 I have demonstrated further that an independent commission of inquiry is the only effective way in which we may learn the full extent of the interference, how it was

LC
NGI

imposed, the source of the interference, the identities of those responsible for it; and how to prevent it from occurring again.

642 In the circumstances, I have established a clear right for an order compelling the President to establish a commission of inquiry into the interference.

Injury actually committed or reasonably apprehended

643 I submit that I have demonstrated that the President's refusal or failure to establish a commission of inquiry infringed our constitutional rights and that further delay will seriously prejudice my rights and that of the families.

644 The stress and trauma that we have endured for decades will be considerably magnified by the failure to establish an open and transparent inquiry with the proper powers.

645 In the absence of a commission of an inquiry, the persons behind the interference will not be held to account. The nature and extent of their involvement will continue to remain unknown. Those responsible may remain in positions of influence where they can continue to perpetrate interference on the TRC Cases.

646 These factors further prejudice my rights and that of the families. It further prevents us from reaching closure. I have accordingly established a reasonable apprehension of injury.

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No alternative remedy

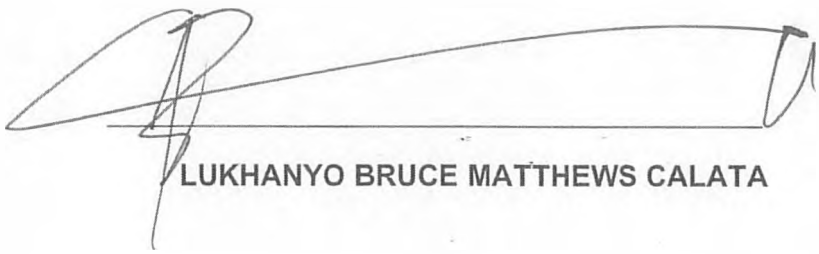
647 I submit that that we have no other viable or alternative remedy. We have exhausted all avenues of persuasion. Many years of knocking on doors and pleading for action to establish the truth behind the interference have fallen on deaf ears.

648 The relevant departments and functionaries cannot be expected to investigate themselves. The only way to address the interference is through an independent, open and thorough investigative process in the form of a commission of inquiry. No other remedy can deliver the truth, accountability and closure that we and many South Africans seek.

CONCLUSION

649 I am advised that on the basis of the '*Biowatch*' principle, should we be unsuccessful in our application against the state, we ought not to be mulcted with a costs order, as this is an application in which we seek to enforce and vindicate our constitutional rights. We humbly ask this Court to apply this principle if some or all of the relief sought is refused.

650 In the circumstances, I submit that a proper case has been made for the relief sought and I pray for the orders as set out in the Notice of Motion.



LUKHANYO BRUCE MATTHEWS CALATA

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Signed and sworn to before me at SANDTON on this the 17 day of JANUARY **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

Nicola Irving

COMMISSIONER OF OATHS

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INDEX TO ANNEXURES

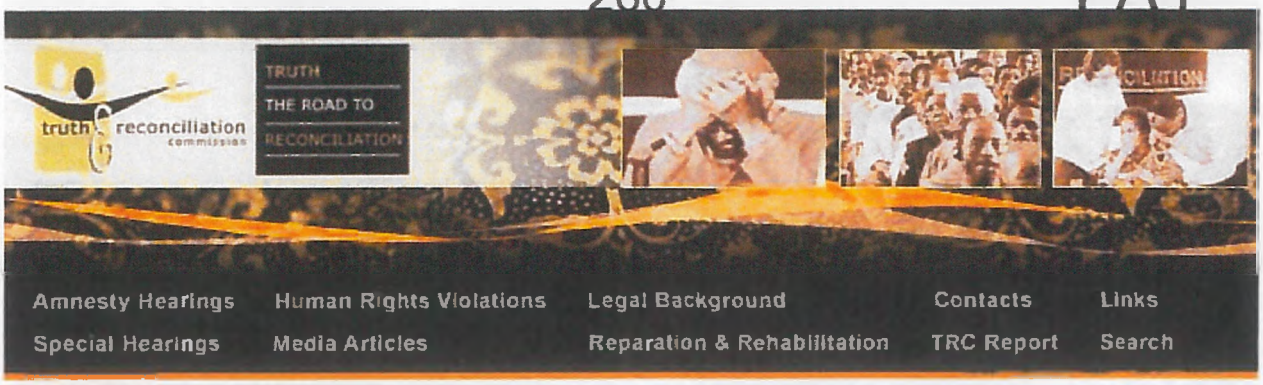
NO	DESCRIPTION OF ANNEXURES	PAGES
1.	**FA1** para 24 - TRC website amnesty hearings and decisions	260
2.	**FA2** para 25 – List of amnesty decisions refused	261-269
3.	**FA3** para 55 - Foundation for Human Rights Memorandum of Incorporation	270-279
4.	**FA4** para 55 – Extract of Foundation for Human Rights board meeting minutes	280
5.	**FA5** para 82 – Adv RC Macadam supporting affidavit dated 1 November 2018	281-364
6.	**FA6** para 95 – Adv DB Ntsebeza SC confirmatory affidavit dated 8 November 2024	365-372
7.	**FA7** para 95 – YL Sooka confirmatory affidavit 18 November 2024	373-380
8.	**FA8** para 96.2 - Ackermann's affidavit dated 7 May 2015	381-398
9.	**FA9** para 99 – TRC Report titled "Report for the Office of the National Director of Public Prosecutions" dated 7 March 1999	399-403
10.	**FA10** para 99.3 – List of cases identified in KwaZulu Natal	404-408
11.	**FA11** para 99.3 – List of cases identified in Eastern Cape	409-417
12.	**FA12** para 99.3 – List of cases identified in Western Cape	418-419
13.	**FA13** para 100 – Letter from Y Sooka to Adv Saldanha dated 11 March 1999	420
14.	**FA14** para 102 - Adv PC Prior letter and list of 226 TRC cases in table format, undated	421-522
15.	**FA15** para 103 - Parliamentary Monitoring Group summary of 'TRC matters update meeting'	523-526
16.	**FA16** para 104 – O Bubenzer's confirmatory affidavit	527-530
17.	**FA17** para 105 – SAPS response to access to information request	538-540

18.	**FA18** para 110 – NDPP's document titled "About PCLU" dated 23 March 2003	541-547
19.	**FA19** para 117.2 - Slides 27 to 32 of presentation made by the NPA dated 17 September 2024	548-554
20.	**FA20** para 118.4 - Cath Collins, *Chile's 'Pinochet Cases' at 25: an ongoing sea change*, dated 16 October 2023	555-557
21.	**FA21** para 124 - President Mbeki statement dated 15 April 2003	558-563
22.	**FA22** para 125 – Adv V Pikoli's affidavit	564-610
23.	**FA23** para 146 – Letter from Macadam to Imtiaz Cajee dated 25 February 2004	611
24.	**FA24** para 154 - 2004 secret report, titled "*Report: Amnesty Task Team*"	612-623
25.	**FA25** para 168.6 - Archbishop Desmond Tutu's supporting affidavit	624-628
26.	**FA26** para 175 - Letter from Acting NDPP, Dr MS Ramaite SC, to Nkadimeng dated 31 January 2013	629-633
27.	**FA27** para 193 - Appendix A to the Prosecution Policy	634-639
28.	**FA28** para 204 - NPA Annual Report of 2005/06	640-641
29.	**FA29** para 211 - NPA presentation to Justice Portfolio Committee dated 8 March 2006	642-645
30.	**FA30** para 239 - Justice Minister Mabandla press statement dated 5 January 2007	646
31.	**FA31** para 243 - Letter from Mabandla to Pikoli dated 8 February 2007	647
32.	**FA32** para 244 - Beeld newspaper article titled "*Cops up for apartheid crimes*" dated 7 February 2007	648-649
33.	**FA33** para 246 – Pikoli memorandum dated 15 February 2007	650-660
34.	**FA34** para 250 – Minutes of Justice Portfolio Committee in Parliament dated 3 May 2007	661-665
35.	**FA35** para 255 - Plea and sentence agreement	666-678
36.	**FA36** para 260 - Newspaper article in the Rapport newspaper dated 19 August 2007	679-680
37.	**FA37** para 260 – Press statement dated 21 August 2007	681

38.	**FA38** para 265 – Faxed letter from Minister to Pikoli dated 28 August 2007	682
39.	**FA39** para 266 – Letter from Pikoli to Minister dated 29 August 2007	683-684
40.	**FA40** para 282 - Extracts of Dr Ginwala's findings on the TRC cases complaint dated 4 November 2008	685-688
41.	**FA41** para 287 - Relevant pages of NPA Annual Report 2008/09	689-690
42.	**FA42** para 292 - Mbeki's address to Parliament dated 21 November 2007	691-701
43.	**FA43** para 293 - Presidency press statement dated 16 January 2008	702
44.	**FA44** para 303 - PCLU's presentation for year 2007 – 2008 to Parliament's Justice and Constitutional Development Portfolio Committee	703-704
45.	**FA45** para 320 - Relevant pages of NPA Annual Report 2009/10	705-706
46.	**FA46** para 322 – Minutes of Justice Portfolio Committee dated 12 April 2010	707-709
47.	**FA47** para 328 – Macadam's affidavit 24 May 2021	710-712
48.	**FA48** para 335 – Letter from Nkadimeng to Acting NDPP dated 29 January 2013	713-718
49.	**FA49** para 336 - Letter from Chairperson of the Working Group on Enforced or Involuntary Disappearances dated 24 July 2013	719-720
50.	**FA50** para 359 - Adv Pretorius SC's supplementary affidavit dated 4 February 2019	721-764
51.	**FA51** para 372 - FW de Klerk Foundation editorial titled "The NPA's Decision to Prosecute 'Apartheid Era' Crimes" dated 5 July 2021	765-766
52.	**FA52** para 374 – Tymon Smith, *A Renewed Commitment to the TRC Cases*, Mail & Guardian, dated 26 July 2021	767-770
53.	**FA53** para 375 - Meeting report of Justice Portfolio Committee meeting dated 8 December 2021	771-773
54.	**FA54** para 376 - SAPA press release dated 14 July 1998	774-775
55.	**FA55** para 377.1 - SAPA press release dated 4 March 1999	776

56.	**FA56** para 377.2 - Article titled 'Generals, ANC members talk about amnesty' dated 1 January 2002	777-779
57.	**FA57** para 377.3 - SAPA press release titled "Mbeki wants changes to TRC rules on amnesty" dated 22 May 1999	780
58.	**FA58** para 378 - Relevant extracts from Bubenzer's book "The Politics of Prosecutions"	781-794
59.	**FA59** para 382 – M Schmidt's confirmatory affidavit	795-797
60.	**FA60** para 382 – Relevant extracts from Schmidt's 'Death Flight'	798-808
61.	**FA61** para 386 – Unsigned letter to Deputy President Zuma dated early 2004	809-811
62.	**FA62** para 390 – Article titled "ANC to seek broad national amnesty" dated 11 December 2002	812-813
63.	**FA63** para 396 - Examples of public statements from FEL and AfriForum	814-828
64.	**FA64** para 401 - Article titled "*Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials*" dated 21 February 2024	829-835
65.	**FA65** para 402 - Statement titled "*Statement by former President Thabo Mbeki on allegations of NPA interference by the Executive*" dated 1 March 2024	836-837
66.	**FA66** para 413 – Letter from Webber Wentzel to Advocates Abrahams and Pretorius dated 18 January 2018	838-842
67.	**FA67** para 478 – Letter from Lukhanyo Calata to Portfolio Committee on Justice and Constitutional Services dated 27 June 2023	843-845
68.	**FA68** para 483 – Letter from former TRC commissioners to the President dated 5 February 2019	846-852
69.	**FA69** para 486 – Letter from Webber Wentzel to Chairperson, Deputy Chief Justice Zondo, dated 17 April 2019	853-856
70.	**FA70** para 488 – Letter from Acting Secretary of the Zondo Commission to Lukhanyo Calata dated 28 May 2019	857-863
71.	**FA71** para 488 - Letter from Webber Wentzel to Acting Secretary of the Zondo Commission dated 12 June 2019	864-868
72.	**FA72** para 490 – Letter from families to President Ramaphosa dated 23 June 2019	869-874

73.	**FA73** para 490 - Letter from families to President Ramaphosa dated 23 June 2020	875-882
74.	**FA74** para 493 - Letter from families to President Ramaphosa dated 25 March 2021	883-887
75.	**FA75** para 495 – Proposed terms of reference	888-890
76.	**FA76** para 498 – Letter from Acting Head: Legal and Executive Services in the Presidency to former commissioners dated 6 May 2021	891
77.	**FA77** para 499 – Letter from Webber Wentzel to President Ramaphosa dated 8 June 2021	892-899
78.	**FA78** para 501 - News24 article dated 23 June 2021	900-905
79.	**FA79** para 506 - Press statement titled "*Call for an Independent Public and Open Commission of Inquiry into the Suppression of the TRC Cases*" dated 9 November 2021	906-912
80.	**FA80** para 515 - Press statement from NPA titled "*NPA Further Enhances Efforts to Ensure Effective Handling and Prosecution of TRC Cases*" dated 13 January 2023	913
81.	**FA81** para 517 - Letter to request release of Advocate Ntsebeza's report dated 11 October 2023	914-917
82.	**FA82** para 523 – Letter from Webber Wentzel to President Ramaphosa dated 10 July 2024	918-931
83.	**FA83** para 524 - Letter from Acting Head: Legal and Executive Services in the Presidency to Webber Wentzel dated 13 August 2024	932
84.	**FA84** para 541 - Nkadimeng opinion piece in the City Press titled '*My sister's heart*' dated 26 December 2013	933-925
85.	**FA85** para 543.5 - Graphical depiction of the delays in the Simelane case	936



AMNESTY HEARINGS & DECISIONS

AMNESTY HEARING TRANSCRIPTS: 1996 - 1997 - 1998 - 1999 - 2000

AMNESTY DECISION TRANSCRIPTS*: 1996 - 1997 - 1998 - 1999 - 1999b - 2000a - 2000b - 2001

*On the Amnesty Decision Transcript pages, you can click on GRANTED/REFUSED under the 'result' field to open the file and read the transcripts. Please note that the 'result' field should not be used for statistical purposes. In many instances, there are several judgments in a case, where only one is indicated in the 'result' field. Read the transcripts for an accurate record.

Summary of Amnesty Decisions, 1.11.2000

STATUS	01.03.2000	01.07.2000	01.11.2000
Granted/Refused	29	35	54
No status	26	24	NIL
Duplication	32	32	37
Scheduled	136	144	88
Withdrawn	167	210	248
Decision o/s	243	292	302
Chamber	263	194	142
Hearable	284	94	NIL
Granted	643	766	849
Refused	5289	5321	5392
Grand Total	**7112**	**7112**	**7112**

NB: Witnesses at TRC hearings were able to give testimony in their home language. Translators and transcribers worked in most of South Africa's 11 official languages plus Polish. As a result, spelling errors (particularly of names) occur. There may also be incorrect transcription or translation in places. There are also many instances where a response was inaudible and gaps appear in the transcription. Differences in text formatting mean some of the documents contain embedded footers, headers and incorrect page numbers. Transcripts are arranged chronologically.

338
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Year	Name	Decision	Offence	Prior Conviction	Reason
1990		Refused	Murder of Samuel Kondagbe on 11 May 1990.	Connected	Applicants did not show that their act was associated with a political objective and committed in the course of the conflicts of the past
1990		Refused	Murder of policeman Chief Petrus Dehabe in Ventersdorp on the 23rd of April 1991	Connected	Act not associated with a political objective
1990		Refused	Illegal possession of firearms		Applicant indicated that whilst member shot in support of a "publicly known political organisation or liberation movement." The relationship between the act in question and the proclaimed political objective was also deemed too remote to hold
1990		Refused	Murder of Hendrik Grobelaar on the 30th of October 1990 in Meadowlands, Soweto	Connected	No evidence to suggest that the killing of the deceased was committed to a political objective
1990		Refused	Murder of Mabhamba Ntuka in Mpilo Section and Maria Claudine Rose on or about 14 October 1991, district Lines Tshaneni, Motor vehicle theft, attempted robbery with aggravating circumstances, robbery, housebreaking, and the illegal possession of firearms	Connected	Applicant could not show membership or support of a "publicly known political organization or liberation movement" and the acts could neither be associated with a political objective
1990		Refused			Could not find that acts to be associated with a political objective
1990		Refused	Malicious injury to property to the Normandy Hotel Store at Bethlehem/Bohlokong	Connected	
1990		Refused	(a) The murder of one David Mayeza in Khutsong on 28 December 1990 for which he was convicted in the Supreme Court, and sentenced to 12 years' imprisonment (b) Attempted murder on one Sgezisi, committed at the same place, date and time as the previous offence. The applicant was sentenced to six years' imprisonment (c) Attempted murder on one David Mosoko, committed at the same place, date and time as the two preceding offences. The applicant was sentenced to six years' imprisonment	Connected	Application distance himself from the offences and does not admit to any acts on the basis on which the Committee could make a finding that he had advised, planned, etc, any of those offences. Also found from the facts that the applicant had not made full disclosure
1990		Refused/	(a) The murder of Nomvezi Abednego Mazwi in Rhumi Township, Sibomvana, on 31 October 1990 (b) Attempted murder on Charles Mhlabisa at the same place and date	Connected	Regarding the murder, application refused as a result of applicant not making full disclosure and because the demarcation rhythm to do with it in terms of Section 20(2) of the Act, an applicant can only be considered for amnesty in respect of an offence "which was advised, planned, directed, commanded, ordered or committed"]
1990		Refused	[a] The murder of Nomvezi Abednego Mazwi in Rhumi Town Ship, Sibomvana, on 31 October 1990 (b) Attempted murder on Charles Mhlabisa at the same place and date		Murder, applicant did not make full disclosure and applicant has own evidence had not advised, planned, directed, commanded, ordered or committed"
1990		Refused	4 counts of murder and 1 count of malicious damage to property committed on the evening of the 29th of November 1990 at Mdutyana/Nkwenkwezi in the district of Bendzalahost	Connected	Acts not found to be associated with a political objective (committed in an indiscriminate manner against people of individuals with no evidence of prior purpose on the part of the participants, disproportionate to any supposed political objective)
1990		Refused	Murder of Sibongile Sebatane on the 25th of December 1991 at Ermelo/Sol	Connected	Rejected the evidence of the applicant that his act related to his association with a political organisation
1990		Refused		Connected	
1990		Refused	Unknown	Connected	Unknown
1990		Refused	Unknown	Connected	Unknown
1990		Refused	Murder of an unidentified individual on 10 May 1990 in Isiah Hendrik Nkomazana	Connected	Offence not associated with a political act
1990		Refused	Four counts of murder and 4 counts of malicious damage to property	Connected	Applicants gave divergent evidence and could not show their acts to be associated with a political objective
1990		Refused	Murder of Mrs Nomvula Hanabe, illegal possession of firearms and ammunition, committed on the 14th of February 1991 at Uitenhage	Connected	No connection between the offence and the alleged political objective the applicant claimed sought to be achieved
1990		Refused	Attempted murder of Bongani Andersen Mgojane, the murder of a child Lindiwe Ngxumza and of unlawful possession of a firearm	Connected	Acts not associated with a political objective or committed in the course of the conflicts of the past
1990		Refused	Murder of Miss Anne Fusser and Mr John Geyser on 15 April 1991 on Wakkieland farm, Ingwelberg, eg and theft	Connected	
1990		Refused	1. The attempted murder of Susan Thomson (the deceased) on 3rd July 1991 at Malvern Immunes at Landfort. 2. The attempted murder of Patrick Phehlane on the same da e and at the same place. 3. Malicious damage to the property of Khotjan Phehlane on the aforementioned date. 4. Assault with the intension to inflict grievous bodily harm to Edward Phehlane on the same occasion. 5. Malicious damage to the motor car of Edward Phehlane on the same day and at the aforementioned place	Connected	
1990		Re used	Three counts of murder and two counts of attempted murder arising about 23 March 1992 at or near Bomhole Reserve in the district Magumeke		Failure to make full disclosure
1990		Refused	Murder of Mbongeni Jama on the 24th of February 1991 at the near Standshop	Connected	Act not associated with political objective
1990		Refused	Four offences of murder and five of attempted murder, all allegedly committed on the 21st of February 1992	Connected	Acts not accepted as committed for political purpose or on behalf of any liberation movement
1990		Refused	Seven counts of murder, 27 of attempted murder and unlawful possession of firearms	Connected	
1990		Refused	- The murder of Makhaleni Mdhanya for which he was sentenced to imprisonment for ten (10) years. - The murder of Bek Patrick Jwane for which he was sentenced to three (3) years which sentence ran concurrently with the previous one for ten (10) years. - The attempted murder of Sanso Mlotti, for which he was sentenced to imprisonment for five (5) years. - Pointing a firearm for which he was sentenced to imprisonment to six (6) months. - For being in unlawful possession of a firearm and ammunition for which he was sentenced to an imprisonment for two (2) years.	Connected	Political objective shown
1990		Refused	Assault upon Mr Mbhuse Hack at Count to Grange Square, Security Branch, Port Elizabeth on 13 August 1985		Failure to make full disclosure and committee not convinced that the act was associated with a political objective
1990		Refused	Abduction and murder of Gerrie du Toit	Convicted	Amnesty granted for the abduction, but refused for the murder because although the former related to a political objective on the part of a resigned political organisation's adopted policy, the murder flowing from it
1990		Refused	[a] The possession of hand grenade in contravention of Section 2(1)(a) of Act 56 of 1970 on or about 27 October 1989 at Mamelodi Administration Area in the district of Pretoria	Conviction (Committee noted "not 3 years of appeal")	Amnesty granted for the first two offences, but refused for the final offence because there was an element of personal revenge and did not fall within the ambit of the Act
1990		Refused	Motor vehicle theft		Applicant denies that stole vehicle or had any knowledge that the vehicle was stolen. May have used vehicle for political purpose, but continued denial is a problem
1990		Refused	Theft of two motor vehicles] 1993	Died	Died
1990		Re used	Alleged struggle theft role of Inkatha in political realm		Referred to no act, omission or offence committed under section 20(2) of the Act
1990		Refused	Murder - shot at empted murder		Act disclosed as a clear political opponent not for furtherance of a political organisation and struggle - not acts associated with a political objective as contemplated in the Act

Year	Name	Decision	Offence	Prior Conviction	Reason
1990		Refused	Murder - 6 counts of attempted murder - 5 counts of	Yes	Application and hearing concerns incarceration - refused / postponements as he is young, not yet 30 yrs, has work skills that had made full disclosure although that act may have been politically motivated
1990		Refused	Murdering Mbongeni P Ngwenyae (MP) committed when members of the Defence Unit and members of the APLA	Not specified	Amnesty refused as it is those members of APLA who were involved in the killing of the deceased and not the applicants themselves. The applicants claimed them "criminals" and based reasons of protecting life and community to justify their murder. Committee found applicants did not disclose full disclosure as required by the Act, in that they did not disclose the motive behind the killing - apart from the conflict. Found that acts were committed for personal gain and hence could have committed the act if not for the conflict. Amnesty refused as it was found that the acts were not associated with a political objective
1990		Refused		Connected	Amnesty refused as it was found that the acts were not associated with a political objective
1990		Refused	Malicious damage to property, Possession of Arms and Ammunition Act	Connected	Amnesty refused as it was found that the acts were not associated with a political objective
1990		Refused and Withdrawn	Murder (Mr [illegible]) - stabbing from behind multiple times, under circumstances that the applicant remembers	Connected	There was insufficient information from Chairperson's file / applicant to make a finding that the acts committed were associated with a political objective. The Committee found that an internal conflict issue that could not be connected to a political objective of the organisation against the state or any political organisation or liberation movement. Additionally failed to answer questions which pointed to personal motives. Additionally failed to answer questions which pointed to personal motives. Additionally failed to answer questions which pointed to personal motives

Year	Name	Decision	Offence	Prior Conviction	Reason
1999a		Refused	2. The burning of the house and the burning of the clinic of Winnie Mandela. 3. The petrol bombing of the house of Bobby Sebotsa. 4. The petrol bombing of the house of Nkosi. 5. The burning of the motor vehicle of Jani Mohapi. 6. The petrol bombing of the parental house of City Mouzwana. 7. The organising of an attack on Zwelinyama Khuzwana. 8. The petrol bombing of the house of City Mouzwana's house. 9. The petrol bombing of the motor vehicle of the teacher, Thabang. 10. The petrol bombing of the house of the teacher, Bolusha. 11. The petrol bombing of the houses of Khuze and Selegoji Maleba. 12. The petrol bombing of the parish house in Botshabelo. 13. The assault and torturing of detainees at the Security Police in Fountain Street, Bloemfontein. 14. The attempted murder of Dupa Makhabela.		
1999a		Refused/	1. The murder of a certain Mr Venter 2. The murder of a man known as "JJ" or Papie 3. The torture of comrades at Botshabelo. 4. The murder of Papi Steyn. 5. The planning to kill a certain Mr Kotoyi. 6. The unlawful use of gangsters. 7. Amnesty refused for the attack on the house of Mr Max Makhubalo – committee not satisfied that a full disclosure of all material facts made. 8. The burning of a Cortina of ms Janie Mohapi. 9. Attempted murder on an unknown Fidelity guard:	Convicted	Amnesty refused for the murder and robbery of Venter because the applicant's version did not satisfy the Committee that the offence falls within the ambit of the Act. Amnesty refused for murder of man known as JJ or Papie due to vague and inconsistent testimony that contradicted with other evidence led before the committee, not a satisfactory and reliable witness. Refused for the torturing of comrades at Botshabelo. Not satisfied that made truthful disclosure as his testimony was contradicted by every other witness who testified before the Committee. Amnesty could not be granted for the unlawful use of gangsters because the evidence did not involve the applicant in any specific act and general amnesty cannot be given. Amnesty could not be given for the murder of Papi Steyn because the applicant did not testify that he was in any way implicated therein. Amnesty could not be granted for the planning to kill Kotoyi because the applicant did not testify that he was in any way involved in this incident. Amnesty refused for the attack on the house of Mr Max Makhubalo – committee not satisfied that a full disclosure of all material facts made. Applicant withdrew application in respect of burning Sandra Mathabatha's house. Petrol bombing Louisa Mbongo's house, bombing the house of "the Nana girl", and burning the house of Rebecca Mothukane: amnesty refused because applicant himself did not aver any political motive. Attempted murder on an unknown Fidelity guard: refused – not satisfied the shooting was associated with a political objective.
1999a		Refused	Assaults, crimen injuria, intimidation during interrogations during 1972 to 1985 of ANC, PAC and SACP activists.		
1999a		Refused/	The murders of Abram Makolane, Samuel Maseleta, Sepo Sibanyoni, Jeremia Mtudi, Thomas Phiri, Jeremia Mkabula, Morris Nkabinde, Matthew Kekutle, Stephen Makenna and Elliot Sasage during 1986 near Nietverdiend and the offences connected therewith.		Amnesty granted for all detailed under 'offences'.
1999a		Granted/ Refused.	Murders of Zwelt Nyanda and Kieth McFadden during 1988 near Manzini, Swaziland. The conspiracy to kill and the murder or attempted murder of several people on the East Rand during or about June 1985, their death having been caused by the explosions of hand grenades and a limpet mine. murders of Abram Makelane; Samuel Maseleta, Sepo Sibanyoni, Jeremia Mtudi, Thomas Phiri, Jeremia Mkabula, Morris Nkabinde, Matthew Kekutle, Stephen Makenna and Elliot Sasage during 1986 near Nietverdiend and the offences connected therewith. The murder of Joe Tsele in Bophuthatswana during or about 1986. The murder of Piet Ntuli, committed in kwaMhlanga, kwaNdebele during or about July 1986.		Amnesty refused for the assault of supporter of the liberation movement during interrogations, lack of particulars means impossible to identify a specific incident for which amnesty could be granted.
1999a		Refused			
1999a		Refused			
1999a		Refused	a) The kidnapping of Dirandra Makanjee; b) The kidnapping of Arulla Padayachee; c) The assault with intent to do grievous bodily harm in respect of Dirandra Makanjee; d) The assault with intent to do grievous bodily harm in respect of	Convicted	Not convinced acted with a political motive; rather convinced that the acts were criminally committed for personal gain.
1999a		Refused/		Convicted	Refused for the attempted robbery because Committee not convinced the firearm was in fact removed by the applicant or his comrades.
1999a		Refused	Accessory with regard to the murder of Monica Philemon Skonyana at Thokoza, on 23 January 1993	Convicted	Testimony fraught with inconsistencies and contradictions. Reasons given for involvement in the incident also deemed so improbable that found to be false. Decided the applicant had not made full disclosure.
1999a		Refused/	Attempted murder of 6 (six) people as well as the assault, in a separate incident, of one Abel Sehobedi at the so-called "Radora crossing" on the Bruyerstorp - Ventersdorp Road on 12 December 1993		Amnesty refused to Martin because Committee found that he knew he was exceeding his mandate in taking the decision to fire shots at a roadblock set up for AWB policy purposes.
1999a		Refused	Attempt to take full responsibility for and apply for amnesty activities of MK and the SDU under the authority of the ANC.		"Insofar as the applicants seek to apply for amnesty for acts committed by their members in the various institutions and structures on the basis of collective political and moral responsibility, their applications fall outside the ambit of the act and accordingly they do not require to apply for amnesty "Insofar as the applications read with the amplification are concerned, we find that NO AMNESTY CAN BE GRANTED to the applicants because: 1. On their own version they have committed no offence or delict in terms of the Act. 2. Their applications do not relate to any specific act, omission or offence in terms of Section 20(1) and therefore do not fall within the ambit of the Act." Insofar as the applications read with the amplification are concerned, we find that NO AMNESTY CAN BE GRANTED to the applicants because: 1. On their own version they have committed no offence or delict in terms of the Act. 2. Their applications do not relate to any specific act, omission or offence in terms of Section 20(1) and therefore do not fall within the ambit of the Act."

1999a		Refused/	1. The illegal possession of a machine gun and ammunition 2. The illegal possession of a hand grenade; 3. Murder and; 4. Attempted murder	Convicted	Granted on the possession of firearms and ammunition due to the political circumstances at the time
1999a		Refused	(i) Unlawful possession of 1 Stripe gun (ii) Unlawful possession of 18 Special revolver (iii) Unlawful possession of 54 rounds of 38 special ammunition On or about the 8th June 1994 at Umbilo, Durban and Lamontville		The offence having occurred on a date after the cut off date
1999a		Refused	Members and leaders of The ANC who collectively took responsibility for policy decisions that led to delicts committing human rights violations		No specific acts, omissions or offences had been disclosed therefore the applicant could not comply with the Act.
1999a		Refused	As above		As above
1999a		Refused	As above		As above
1999a		Refused	As above		As above

Year	Name	Decision	Offence	Prior Conviction	Reason
1999a	[redacted]		defeating the ends of justice or the attempt thereof: Andries Gerhardus Erwee; Frederick Christiaan Stephanus Swarts; Pietee Andries Dreyer and Johannes Hendrik van Dyk.		
1999a	[redacted]	Granted/ Refused	(a) The murder of Albert Ntema on the 11th February 1991 at Geluksvaarts, Kroonstad. (b) The illegal pointing of a firearm at a person. (c) The illegal possession of a firearm.	Convicted	Amnesty refused for (b) The murder of Evorm Hapane on the 1st December 1990 at Daveyton. (c) The attempted murder of Casium David Gwele on the 1st December 1990 at Daveyton. As the committee found that these offences were not associated with a political objective.
1999a	[redacted]	Refused	Murder of Tebo Molele on 2 MAY 1992 at Geluksvaarts Kroonstad		Went beyond orders and attack not found to be associated with a political objective
1999a	[redacted]	Granted/ Refused	VUSI MBATHA: This applicant applies for amnesty in respect of the crimes of murder of Eheki Khanyile. Granted. VICTOR WANDA MABALO: murder or murders of Steven Radebe, Eheki Khanyile and for the unlawful possession of firearms used in such murders together with the ammunition. Granted. SIDNEY VINCENT NKOSI: Granted to him in respect of the murder of Jabulani Dube, also known as Jabulani Yengwani together with offences incidental to the killing of the deceased; attempted murder on an unknown number of occupants of the Khumalo homestead and also all offences incidental to that attac; in respect of arson and malicious injury to property, to the property committed during the attack on the Khumalo homestead. SOLOMON BLAMINI, MOSES KUBERA, CHRISTOPHER BIETE NGCOBO: Granted in respect of the armed robbery of Klipriver Police Station, the theft of six pistols, one R5 rifle, six pump guns and three R1 rifles; the theft of the ammunition in respect of those firearms; the unlawful supply and distribution of firearms and ammunition; the assault on those police at the police station and the malicious damage to property in respect of the telephone wires. Insofar as it is necessary, AMNESTY IS ALSO GRANTED in terms of the Posts and Telegraphs Act for the cutting of those wires. AUBREY STIMBERO RADEBE: GRANTED AMNESTY as follows: For the murder of an unidentified policeman during the attack of the Casspir motor vehicle; for attempted murder on an undetermined number of unidentified policemen injured during the attack on the said Casspir motor vehicle; Furthermore he is GRANTED AMNESTY for the theft of the Casspir; He is also GRANTED AMNESTY for the undetermined number of murders of unidentified person shot at and killed at Katuza hostel; He is also GRANTED AMNESTY in respect of undetermined number of attempted murders on identified people shot at Katuza Hostel; He is also GRANTED AMNESTY in respect of malicious injury to property to the building known as Katuza Hostel; He is also GRANTED AMNESTY in respect of an undetermined number of unidentified persons shot at and killed at an unnamed hostel adjacent to Tokoza; He is also GRANTED AMNESTY in respect of an undetermined number of attempted murders of unidentified persons shot at and/or injured at the hostel which is unnamed and adjacent to Tokoza; He is also GRANTED AMNESTY in respect of malicious injury to property being the building of this hostel adjacent to Tokoza; Lastly he is GRANTED AMNESTY in respect of malicious injury to property for the attack on the bakkie thought to be the property of Bishop Khumalo. GOODMAN NSIDISI MBUKI: GRANTED AMNESTY in respect of the murder of Pinpin Bhamaera and the unlawful possession of a firearm and the ammunition SAKILE JEYIRO MOTSALE and MZWAZE NKUMALO: GRANTED AMNESTY in respect of the following:- Each for the kidnapping of Mr Dube; Each for the unlawful possession of firearm and ammunition; Each for the assault of Mr Dube; Each for pointing a Firearm at Mr Dube; Each for two attempted murders on Mr Dube; and each for malicious injury to property in respect of the damage caused to Mrs Sulkas' home. MBONGENI OTTO TSHABANGU: GRANTED AMNESTY in respect of an assault with intend to do grievous bodily harm on the unknown policeman. He is FURTHER GRANTED AMNESTY in respect of unlawful possession of a firearm or firearms and ammunition. BONGANI NKOSI: GRANTED AMNESTY in respect of the two murders of unidentified persons, being one committed in October 1993 and the other in June 1993 respectively; The unlawful possession of an AK47 and ammunition; Eleven incidents of arson as set out above; An undetermined number of incidents of arson at Mazibuko Street informal settlement; One count of malicious injury to property at Thabetha's homestead. JAMES TANKISO KOENA: AMNESTY IS GRANTED in respect of the murder of Morris Asra Ngoza on the 20th of November 1993. JOSEPH MEWENI: in respect of the unlawful possession of the firearm and ammunition amnesty IS GRANTED. DAMMY MAKHONDO: amnesty granted in respect of the unlawful possession of the firearm and ammunition IS GRANTED		Accts not associated with a political objective.
1999a	[redacted]	Refused	Robbery with aggravating circumstances, the killing of Isaac Magae and the killing of Johannes Mokaba	Convicted	Acts not associated with a political objective.
1999b	[redacted]	Refused	Murder and unlawful possession of firearms and ammunition	Convicted	Not satisfied that gave full disclosure; contradictory versions presented; unsatisfactory witnesses and convicted colluded in order to concoct the story; one applicant also denied guilt.
1999b	[redacted]	Refused	Murder of Sgt Maloah ("the deceased"), robbery of the keys of a motor vehicle, attempted robbery of a firearm and the unlawful possession of a firearm and ammunition		Serious doubt as to whether a full a political motive existed and whether a full disclosure was made.
1999b	[redacted]	Refused	Murder and robbery	(Unclear)	Offences not deemed politically motivated
1999b	[redacted]	Refused	2. The murder of a police assistant, Ntsana Collin Tsoanyana in Durban on the 28 th October 1993.		
1999b	[redacted]	Refused	NB: Incorrect Report filed under this name (report for David Solomon Simelane presents)		

Year	Name	Decision	Offence	Prior Conviction	Reason
1999b	[redacted]	Refused	1. The murder of Mr Cronje 68 years of age on 25 May 1986 on a farm in the district of Cradock. 2. The attempted murder of Mrs Cronje 63 years of age on the same day at the same farm. 3. Robbery of clothing and TV as well as R1500 00 in cash on the same occasion 4. Housebreaking with the intent to steal and theft of a motor car on the above date and same occasion	Convicted, but acquitted on appeal – applying for amnesty to prevent being held liable in delict by dependents of deceased	Committee found applicant to have been in a leadership position during the committal of the act, at which time he silently condoned the rape of helpless victim Mrs Cronje indicating malice, spite and ill-will beyond the political objective pursued. Committee not satisfied that the offences were politically motivated and also doubted whether the applicant had made full disclosure.
1999b	[redacted]	Refused			
1999b	[redacted]	Refused	Attempted murder of Mathambo Sithole ("Sithole") committed on the 12th September 1992 at KwaMandiza, Mid-Illovo, as well as his conviction for the robbery of a Datsun E20 minibus, the property of one Msolwa Mnthuna, which was being driven by Sithole, committed on the 12th September 1992 at KwaMandiza, Mid- Illovo.	Convicted (8 years)	Granted for the attempted murder but refused for the robbery as the applicant in no way associated himself with the act.
1999b	[redacted]	Granted/Refused	**GRANTED** amnesty for murder of Mr Oosthuizen, attempted murder on the other police officers and Mr Collie as well as for unlawful possession of firearms and ammunition.	Convicted	Because they deny guilt and involvement on conspiracy to commit robbery they are consequently **NOT GRANTED** amnesty for this offence.
1999b	[redacted]	Refused	Murder's of :- 1. Edwin Vuyani Nkomo; 2. Mbulelo Esau Mabena; 3. Mullane Ronel Sishange; 4. Oscar Amos Mhlangeni, and in respect of the attempted murders of : 5. Simon Morris and 6. Sekano Avanly Kgasi. Incidents occurred on 1 August 1986 in Orlando East, Orlando West and Chiawelo in Soweto near Johannesburg.		Not satisfied that the killings and attempted killings occurred in a political context. Also not satisfied that full disclosure was made and concluded that an honest account was not given.
1999b	[redacted]	Refused	Killing of Mr André de Villiers who was shot and killed outside his farmhouse in Addo, Port Elizabeth, on 17th August 1992; the attempted murders of two family members and attempted robbery	Convicted	Second applicant refused amnesty because not satisfied that killed the deceased for political objective –rather pecuniary interest.
1999b	[redacted]	Refused			
1999b	[redacted]	Refused	1. The murder of Thokozani Sydney Mthembu of Kwa Mashu, in the district of Inanda, KwaZulu Natal on 5th February 1993. 2. Robbery with aggravating circumstances of a firearm, being a 9mm Pietro Beretta pistol, which was issued to the said Mr Mthembu. 3. Illegal possession of a firearm being a 9mm pistol and ammunition without a licensed firearm from which such ammunition could be fired.	Convicted	Killing the deceased was completely disproportionate to the objective of disarming him that claimed had political motive.
1999b	[redacted]	Granted/Refused	Murder of Lifa Alwin Mtimkhulu, and unlawful possession of firearm and ammunition;	Convicted	With respect to a second killing and five attempted murders, the committee was not satisfied that the requisite political motive existed.
1999b	[redacted]	Refused	The attempted murder of Sipho Ndlovu at Sweetwaters; An attack upon unknown persons at Jesmondene; The murder of Solomon Dlamini on 19th November 1993 at Shongweni; The murder of Sathanathum Padayachee on 29th November at Pietermaritzburg; The murder of Sipho Zulu on 3rd December 1992 in the Claridge area; The murder of Jeffrey Dunyiah on 21st April 1993 at Umkomaas.	Convicted	Did not accept that the sole motive for killing the individuals was political as evidence showed there to be other motives at play in all of the offences. Committee was convinced that the acts were rather committed out of ill will or malice or for personal gain.
1999b	[redacted]	Refused	Murder of Abinaar Ramphomane Mongwala, which crime he committed in collaboration with others at Musemulle, Krugersdorp, on the 15th November 1993.	Convicted	Not motivated by a political ojective
1999b	[redacted]	Refused	1. The murder of Wellie Elephant at Tendergate Administration Area in the region formerly known as Cisker; and 2. Arson, in that at the said place and time, before he shot and killed the deceased with a firearm, he poured petrol inside his house and thereby set it alight.	Convicted	Killing of the deceased deemed "unjustified" despite the existence of conflict between ANC and UDM supporters. Acted under no imminent threat nor in terms of any orders from organization.
1999b	[redacted]	Refused	Murder, robbery with aggravating circumstances, two counts of house breaking with intent to steal and theft, unlawful possession of	Convicted	Applicants not found to have made full disclosure of the material facts.
1999b	[redacted]	Refused	Attempted murder of 41 persons,	Convicted	Amnesty granted to the first applicant and refused t the second applicant for the named offences. Reason being that the second applicant denies any knowledge whatsoever of the offences for which he was convicted and applies for amnesty
1999b	[redacted]	Refused	Robbery of a motor vehicle, the property of Isaac Khetsimula Mashivani, which was being driven by Edward Mbhazima Mkhwanazi, at Alexandra, Johannesburg on 29 April 1994.	Convicted (10 years)	Testimony fraught with inconsistencies and contradictions; deemed non-disclosure aimed at establishing a political context to support the assertion that the acts were associated with a political objective.
1999b	[redacted]	Refused	Amnesty is GRANTED to the undermentioned applicants acting on the instructions of their commander, Louis, to kill Moatshe and the two operatives: GIDEON JACOBUS VAN ZYL JOHANNES ALBERTUS STEYN CHRISTOFFEL JOHANNES SMIT ISAK JOHANNES MARAIS WILLIAM CHARLES C. SMITH DANIEL JOHANNES NIEWENHUIS PHILIP RUDOLF ERAUSE for the killing of the two operatives Solomon Mlonzi (Code name - Krushev), Schoeman Ramokgoba (Code name - Mare) and Moatshe a Botswana citizen at Silent Valley near Derdepoort on or about 4 May 1988 and any other related offences connected therewith. Amnesty is GRANTED to Loots for the killing of two operatives namely, Solomon Mlonzi (Code name - Krushev) and Schoeman Ramokgoba (Code name - Mare) at Silent Valley near Derdepoort gate on or about 4 May 1988. Amnesty is GRANTED to General Steyn for being an accessory after the facts in respect of the killing of the two MK operatives namely, Solomon Mlonzi (Code name - Krushev) and Schoeman Ramokgoba (Code name - Mare) and for defeating the ends of justice in respect of the killing of both Krushev and Mare and Mr Moatshe.		Amnesty is **REFUSED** to Loots for the killing of Moatshe at Silent Valley near Derdepoort gate on or about 4 May 1988. This because the act could not be deemed associated with a political objective.
1999b	[redacted]	Refused	Murder of Mr Rudman and robbing him of certain items.		The Committee was not satisfied that the applicant was truthful when he made his testimony
1999b	[redacted]	Granted/Refused	Attack upon Albin Hansel, housebreaking with intent to rob and malicious damage to property; attack upon Erich Ralph Gudmanz, housebreaking with intent to rob; attempted murder of Johannes Didrik Pretorius and housebreaking plus malicious injury to property; granted for attempted murder Rachel Edith Marillier, housebreaking	Convicted	Refused for attack on Anne Elizabeth Kuckers as not satisfied the applicants made full disclosure.
1999b	[redacted]	Refused	The killing on 1 September 1993 of Jeremia Asza Mkhwanazi. The killing on 18 October 1991 of Mr Job Mokgathi, a policeman.		Acting in self-defense is not an act associated with a political objective as envisaged by the Act.
1999b	[redacted]	Granted/ Refused	1. Amnesty is **GRANTED** to the applicant in respect of the following offence a. The murder of Jonas Raboshonana Ramphalile on 15 June 1990 at Plot 80, Frisgewaagd, district Kroonstad.		2. Amnesty is **REFUSED** in respect of: a. The murder of Zacharia Motlokeng at Boltrom, in the district of Sasolburg on 2 January 1991 b. Defeating the ends of justice flowing out of acts connected with the above mentioned incidents. This because it could not be ascertained that the act was politically motivated. Claimed political motive was related to the killing of farmers in order to scare others off the land for repossession, however the individual concerned was not killed and lived in a village not on a farm. Committee could not distinguish the act from an ordinary criminal one.
1999b	[redacted]	Granted/Refused	(a) Attack on Jwara during or about 1986 at or near Killarney, Orlando West; (b) Attack on Madinare during or about the period 1986 - 1987 at or		Amnesty is **REFUSED** in respect of the attacks on Bongani and Madiane during or about 1992 at or near Mzimhlope township as the Committee was not satisfied that they related to the relevant political conflict.

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Year	Name	Decision	Offence	Prior Convictions	Reason
			near Zone 1, Meadowlands; (c) Attack on unknown female informal dwelling in Orlando West during or about the period 1986 - 1987; (d) Attack on a municipal police guard at Mzimhlope women's hostel during or about 1987; (e) Attack on police during or about the period 1986 - 1987 at or near Orlando East; (f) Attempted robbery of a Cash Security vehicle during or about November 1991 at or near Immarentia; (g) Killing of an unknown IFP leader during or about the period 1991 - 1992 at or near Khubisa Street, Orlando West; (h) Attack on IFP members or supporters during or about the period 1991 - 1992 at or near Zone 1, Meadowlands; (i) Attack on an unknown IFP supporter near the Soweto Highway during or about the period 1991 - 1992; (j) Attack on a group of IFP members or supporters during or about the period 1991 - 1992 at or near Makasothe Street, Mzimhlope; (k) Attack on Boy Mpofu during or about the period 1992 - 1993 at or near Mzimhlope Township; (l) Attack on guards at or near the main gate of the Mzimhlope hostel during or about 1992; (m) Attack upon Mzimhlope hostel shops during or about the period 1992 - 1993; (n) Shoot-out at or near the main gate of the Mzimhlope hostel during or about 1992; (o) Fighting between IFP and ANC members and/or supporters at or near Zwelihle High School during or about 1993; (p) Unlawful possession of arms and ammunition in respect of: (i) Langlaagte case no. 559/93; (ii) Sebokeng case no. 1304/93; (iii) Lindela case no. 4918/93.		
1999b		Refused	1. The two applicants and one Thulani Maseweni robbed one Stuart Brian Curtis on 26 October 1993 of a MMW car, registration number JSH 130T 2. The two applicants and Mbhokoyo also robbed Trevor Allen Farquar at gunpoint of his Mercedes Benz car, his wallet with pens and ID document on 1 December 1993 3. The three of them robbed B C Thorpe of his Mercedes Benz, watch, pocket and R 700 00 cash on 6 December 1993, also making use of a long gun 4. On 13 February 1994 Mbhokoyo and Mbhokoyo attempted to rob Constable Maake of his 9mm pistol. At the same time they attempted to escape.		Failure to make full disclosure and further not satisfied that the act was associated with a political objective
1999b		Refused	Killing of Mr Ao Jui Duncan Johnston at the Ilanga Sheepdrift in the district of Ixopo (Kwa Zulu Natal)		
1999b		Granted/Refused	Multiple counts of murder, attempted murder, arson, malicious damage to property, unlawful possession and supply of arms and ammunition. Failure to report known killings, shielding, deleting the ends of justice, conspiracy to murder.		Total Truth Mangcuwe is REFUSED amnesty in respect of: 8.1 The kidnapping, rape and attempted murder of Sibile Ncala at Unit 2, Mpumalanga, on a about 19 April 1988 8.2 The kidnapping, rape and attempted murder of Sizakhele Mzimela at Unit 5, Mpumalanga, on or about 13 April 1988
1999b		Granted/Refused	1. The murder of Vidani Jacobs Soubo on 3 January 1989; 2. The murder of Stanley Mduduzi on 12 January 1989; 3. The murder of Thokozani Hlela on 13 January 1989; 4. The murder of Linda Moloi on 13 January 1989; 5. The murder of Sibusiso Frank Carrington Mdluli on 16 January 1989; 6. The murder of Bhekizazi Alpheus Gwala on 16 January 1989; 7. The attempted murder of Sibusiso Johnson Sibisi on 27 October 1988 sentenced to 7 years imprisonment; 8. The attempted murder of Joseph Ndlolo Duma on 30 November 1988 sentenced to 7 years imprisonment; 9. The attempted murder of Nicholas Ngo Bhekithemba Kulu on 31 December 1988 sentenced to 7 years imprisonment; 10. The attempted murder of Mpumelelo Sithole on 14 January 1988 sentenced to 7 years imprisonment; 11. The assault on Maxwell Bhapa Mbongwa with the intent to cause grievous bodily harm on 21 December 1988, sentenced to 2 years imprisonment; 12. The assault on Mandla Buthelezi with the intent to cause grievous bodily harm on 21 December 1988, sentenced to 2 years imprisonment to run concurrently with the previous sentences.	Convicted	Amnesty is REFUSED in respect of the murder of Majozi, the eleven year old child. Deemed a senseless murder as no evidence connected the child to the UDF.
1999b		Refused	1. The murder of Samuel Sipho Hlongwane; 2. The murder of Ngqengqosha Jerome Khuzwayo; 3. The attempted murder of Christopher Ngcobo; 4. The attempted murder of Zebion Dube, and 5. Robbery with aggravating circumstances, as defined in Section 1	Convicted	Acted for personal gain without political motive.
1999b		Refused	Murder of the following persons on 14 December 1989, at or near Motherwell in the district of Port Elizabeth: 1. Warrant Officer Mbalala Glen Mgoduka; 2. Sergeant Amos Temba Faku; 3. Sergeant Desmond Ballwonga Mapipa; 4. Kulile Shepherd Sakati alias Charles Jack.	Nieuwoudt, du Toit and Ras Convicted.	Reason for killing the deceased was to avert their threats and cover up illegal activities of the Security Police, not connected with a political objective. Also deemed wholly disproportionate to any objective the applicants might have pursued.
1999b		Refused	Attempted murder of Bongani Jonas as well as any acts and offences committed during time as a Security Policeman between 1985 and 1992		Applicant denied having intention to kill Jonas. In respect of the other offences, blanket amnesty cannot be granted for unspecified acts.
1999b		Granted/ Refused	Mazi: murder of Mtolo and Ntshingila. Barnatus: Murder of Thabiso Motseli, malicious injury to property causing damage to the Mhotoli homestead and the unlawful possession of a firearm and ammunition. Boot: murder of Mr Dabula and for the unlawful possession of the firearm and ammunition. Mkhonto: murder of Absalom Booi Shozi and for the unlawful possession of a firearm and ammunition. Nhlapho: the murder of Mr Ngcobo and the unlawful possession of firearms and ammunition. Maduna: 1. The murder of Mvalisi Twala in 1993; The murders of an undetermined number of people in a shack at Mngadi Section, Thokoza in 1993; Arson in respect of the burning of the shack at Mngadi Section in 1993; The attempted murders of an undetermined number of people in the house at the corner of Radebe and Mngadi Sections, Thokoza, in 1993; Malicious injury to property in respect of the house at the corner of Radebe and Mngadi Sections, Thokoza, in 1993; Malicious injury to property in respect of the Buyafuthi hostel in 1994; The attempted murders of an undetermined number of people in the Buyafuthi Hostel in 1994; The attempted murders of an undetermined number of persons at the Mshayazafe hostel in 1994; Malicious injury to property in respect of the damage caused to the Mshayazafe hostel in 1994		Mazi refused amnesty for killing of Yekani as act not deemed associated with a political objective.

Year	Name	Decision	Offence	Prior Convictions	Reason
			Dealing in and the distribution of firearms and ammunition in contravention of the Arms and Ammunition Act; The unlawful possession of firearms and ammunition between 1992 and 1994. Bhutelezi: an undetermined number of incidents of attempted murder and for the unlawful possession of a firearm (AK47) and ammunition. Moloi: murder of an unknown person; arson in respect of three shacks in the Mzimbeba Section; and Malicious injury to property in respect of the door which was broken. Shhosana: three (3) counts of murder of unknown persons and one (1) count of unlawful possession of a firearm and ammunition. Zakwe: murder of Joseph Skosana Sitomsi and for the unlawful possession of firearms.		
1999b		Granted/Refused	Murders of Matthew Goniwe, Sparrow Mkhonto, Fort Calata and Sicelo Mhlauli respectively The application of De Kock in respect of defeating the ends of justice and any offence incidental there to is GRANTED.		The applications of Taylor, Lotz, Van Rensburg, Snyman, Van Zyl and Du Plessis for amnesty in respect of the murders of Matthew Goniwe, Sparrow Mkhonto, Fort Calata and Sicelo Mhlauli together with all the other offences incidental to the commission of those offences are REFUSED: not satisfied that full disclosure made due to lacunae in evidence.
1999b		Granted/Refused	GRANTED amnesty for the offence of the robbery committed on 27 May 1993 at or near Dilston Farm, Umkomaas Valley in the district of Ixopo.		The application for amnesty in respect of the murder of Victoria Joyce Ferreira and Mbuthumu Mtolo is REFUSED. Deemed quite unnecessary on the applicant's own version and not associated with a political objective.
1999b		Refused	13 counts of attempted murder and arson on 16th April 1993.	Convicted (45 years)	Even if the applicant was driven by some vague political motive, the nature and gravity of the offences committed by him were totally disproportionate to any political objective
2000a	TSOTSISO EPHRAIM MOALOSI (AM00292/96)	REFUSED	(a) Attempted murder of "Alias Motshoane; and (b) Attempted robbery	1. The applicant was never charged for (a) 2. The applicant was charged for attempted robbery, convicted and sentenced to 5 years imprisonment on the 3 November 1994.	No act or omission is disclosed which would constitute and offence. There is no disclosure of any information which points to any objective (let alone any political objective) to commit such an offence, there is no indication that the alleged order of Van Wyk was in the slightest related to the commission of an offence.
2000a	MOLA HAMMINGOU YEYWANI (AM4570/97)	REFUSED	Murder of Mawonke "Pro" Jack	Unknown	Applicant did not meet criteria for amnesty
2000a	MICHAEL PHILLIP LUFF (AM3814/96)	REFUSED	17 year old youth, William Byast, was shot and killed by the applicant	Charged and the criminal trial postponed pending the outcome of this application	Applicant was acting in the executions of his general duties as a police officer in combating crime. Applicant's sole reason for acting against the deceased was his belief that the deceased had earlier committed an offence by stoning the community hall
2000a	VIVIAN KWENZOKWAKHE BHANYA NGCOBO (AM3702/96)	REFUSED	1. The murder of Bhekithemba Isaac Shandu; 2. The murder of Mbuyiselwa Petros Mbokazi; 3. Unlawful possession of a firearm in contravention of Section 2 read with Sections 1, 39 (1) (h), 39 (2) and 40 of Act 75 of 1969; and 4. Unlawful possession of ammunition in contravention of Sections 36 and 40, Act 75 of 1969.	Convicted and sentenced	At the end of his testimony it was clear that he was not being truthful. Even if we could give him a benefit of doubt and assume that he was an ANC operative and that he went to the meeting to carry out political orders, he exceeded the terms of his mandate by shooting Mbokazi and Shandu.
2000a	MAKHULUSANI THULASIZWE NGCOBO (AM3826/97)	REFUSED	Murders of Cirko Majola, Simiso Bhengu, Shoti Ndulini, Bhekizani Nzuza, Mandlethu Ngcobo, Ngoma Shelembe, Sihle Mkhize, Siyanda Ngubane, Ncamisile Zimu and Sqwili Zimu	Never charged for murders	Application does not satisfy the criteria
2000a	ANDREW MAKOFANE (AM 1474/96)	REFUSED	Attempted murder of Lucas and Paulos Skosana.	Not stated.	Did not satisfy the amnesty criteria: not a political party member and no political objective.
2000a	MZAMO THABANI MLABA (AM 6439/97)	GRANTED/REFUSED	Murders of Secrete Nkonsenhle Mkhize and Sibusiso Brian Mlaba.	Convicted and sentenced.	1. The murder of Secrete Nkonsenhle Mkhize on 16 March 1994 at or near Hlanyeni in regard to which the applicant was convicted and sentenced to undergo 20 years imprisonment in the Natal Provincial Division of the then Supreme Court; and 2. the unlawful possession of a G3 rifle and ammunition in regard to which the applicant was convicted and sentenced to undergo 5 years imprisonment in the Natal Provincial Division of the then Supreme Court. The applicant's application for amnesty in respect of the murder of Sibusiso Brian Mlaba in regard to which he was convicted and sentenced to undergo 20 years of imprisonment in the Natal Provincial Division of the then Supreme Court is REFUSED.
2000a	LUNGELO LUPUWANA (AM6371/97)	GRANTED/REFUSED	Abduction and murder of the following persons: Lindile Kula, Nkosinathi Tuku and Nathan Kota.	Amnesty is GRANTED to the applicant for the following offences: The conspiracy and attempted abduction of Wana; The abduction of Kula, Tuku and Kota; Arson in respect of the motor vehicle of the deceased and For any offence or delict arising out of his participation in the incident Amnesty CANNOT BE GRANTED for the murder of the deceased.	The evidence does not suggest that he participated or associated himself in any way with the murder of the three.
2000a	GOBHU FANYANA NGUBANE (AM5272/96)	REFUSED	Murder of Manaluthi Mbekazi.	Convicted for murder and sentenced to six years imprisonment.	Not satisfied that the applicant made full disclosure of all the relevant facts.
2000a	MHLEKHUZWA JOSEPH NGUBA (AM 8078/97)	GRANTED/REFUSED	1. The murder of Simiso Edmund Miya on 29 June 1993 at Umgababa in the district of Umbumbulu. 2. The murder of Francis Bheki Hlatshwayo on the same day and at the same place. 3. The attempted murders of five other people namely; Sibusiso Luthuli; Sipho Sikhumbuza Luthuli, Mzo Mbonambi, Chunky Msiya and Zowe Mbonambi on the same occasion. 4. The murder of Zwelethemba Wesley Hlongwane on 1 July 1993 also at Umgababa. 5. The assault on Sandile Mkomo on 1 July 1993 at the same place.	Convicted and sentenced.	In the result amnesty is GRANTED in respect of the following offences:- 1. The murder of Simiso Edmund Miya on 29 June 1993 at Umgababa in the district of Umbumbulu. 2. The murder of Francis Bheki Hlatshwayo on the same day and at the same place. 3. The attempted murders of five other people, namely; Sibusiso Luthuli; Sipho Sikhumbuza Luthuli; Mzo Mbonambi; Chunky Msiya and Zowe Mbonambi on the same occasion. 4. The assault on Sandile Mkomo on 1 July 1993 at the same place Amnesty is REFUSED in respect of:- The murder of Zwelethemba Wesley Hlongwane on 1 July 1993, also at Umgababa.
		REFUSED/GRANTED	1. Armed robbery of an employee of a hotel in Rosebank and for which applicant was found guilty and sentenced to 5 years imprisonment. 2. Armed robbery of an employee of Flamingo Dry Cleaners and for which applicant was found guilty and sentenced to 4 years imprisonment. 3. Armed robbery of a petrol garage in Daveyton and for which applicant was found guilty and sentenced to 15 years imprisonment. 4. Armed robbery of swalling trial prisoners which took place on --- and for which applicant was sentenced to 10 years imprisonment. 5. Attempted murder of a policeman whilst trying to escape from prison. Applicant was never convicted for this offence. 6. Attempted murder of a certain Mr du Plooy in Standerton during October 1981 and for which the applicant was sentenced to death.	Convicted and sentenced for some.	Amnesty is accordingly REFUSED in respect of all the offences of robbery, attempted robbery, escape, attempted murder and unlawful possessiom of firearms and ammunition committed by the applicant. As regards the arson of a bus depot shortly after June 1976, the Committee is prepared to accept that there was a political objective and therefore amnesty is GRANTED for the burning of the bus depot.

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Year	Name	Decision	Offence	Prior Conviction	Reason
			Division, has since withdrawn the application. The death sentence was later commuted to 30 years imprisonment. 7. Unlawful possession of firearms. 8. Unlawful possession of ammunition. 9. Arson to a bus depot in June 1976.		
2000a	EPHRAIM MOTTOUAN NKOSI (AM 3128/96)				
	1. SYDWELL MZWAMADODA NYISANA (AM 6310/97) 2. JANKISILE SIWIN RONGWENI (AM 6360/97) 3. HLUMELO MZWANDILILI MNUTU (AM 6362/97) 4. PUMELELE GUMENGU (AM 3630/96) 5.THOMAS MAZIZI NTSANA (AM 6361/97) 6.FUNDEBISE BLAKSIE NOMBANGA (AM 6364/97)	GRANTED/ REFUSED	Conspiracy to commit treason, and crime of treason.	Applicants 1, 2, and 3 were charged and convicted for conspiracy to commit treason. Applicant 5 charged and convicted with treason and murder together with a number of co-accused	Applicants 1, 2, 3, 5 granted amnesty because their application satisfied the amnesty criteria. Both the 4th and 6th Applicants deny that they acted in concert with the plotters and that they committed any offence or wrong. They both aver that they were merely performing their duties as policemen. Amnesty refused since this does not satisfy the amnesty criteria.
2000a					
	T.A. MZOBE (AM 4020/96)	REFUSED	a. the murder of Samuel Njabulo Ndlovela at Boboyi in the district of Port Shepstone on the 24th April 1993; b. the murder of Brian John Bazley at the same place and on the same date as mentioned in (a) above;	Sentenced.	Does not satisfy requirements for amnesty: 1) not full disclosure; 2) unclear political objective; and 3) disproportionate actions.
2000a					
	1. PUMELELE GUMENGU (AM 3630/96) 2. ARDIN TYANI (AM 3786/96)	REFUSED	Murder of Sithembele Zukwe	Charged and trial pending.	Does not satisfy requirements for amnesty: 1) not full disclosure.
2000a					
2000a	MSHALAZA NICHOLAS MZELEMU (AM 8071/97)	REFUSED	Murders of Thembekili Ncamu Sikobi and Londiwe Sibobi	Not stated.	Does not satisfy requirements for amnesty: 1) unclear political objective.
	2. TEMPLETON ZAMEKILE PATO (AM 5865/97)	PUMELELE GUMAN HERMANS was withdrawn	2. Unlawful possession of ammunition; 3. Any further offence which arises from the conduct of the Applicants during the course of the incident in question. Applicants 1, 2, and 3: 1. The murder of NYAMEKO MAPESULA, DAVID MVIMBI, EPHRAIM MOHAPE alias MZWANELE MAHLANGU and FALUYENIWA BASIA NKANYEZI; 2. Attempted murder of MICHAEL BASAMENI; 3. Unlawful possession of various firearms including R4 rifles and shotguns; 4. Unlawful possession of ammunition; 5. Any other offences resulting from the incident in question.	Applicant 3 was charged, trial pending.	Satisfied the amnesty criteria.
2000a					
	LUCKY JAMES MLENGWA (AM 4089/96)	REFUSED	Murders of Samuel Sipho Hlongwana and Jerome Bhuswayo, the attempted murder of Zebilon Dube and robbery with aggravating circumstances.	Convicted and sentenced.	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) unclear political objective.
2000a					
	1. KHULULEKANI LAWRENCE MBATHA (AM 5363/96) 2. WALTER SAMUEL (AM 3364/96)	REFUSED	Applicant 1: Instructions to throw hand grenade on the 24th May 1993" at Kimberley and the victims Ferkiel Lebogang Mokone (killed) and Joane Nel (injured) Applicant 2: Threw a hand grenade into a crowd at the Trust Bank Centre, Kimberley. One person was killed and others were severely or slightly injured.	Convicted.	Applicant 1: Does not satisfy requirements for amnesty: 1) actions were in contradiction to the political organisation's instructions. Applicant 2: Does not satisfy requirements for amnesty: 1) not full disclosure, and 2) inconsistent statements.
2000a					
	1. EDWARD TSHISU MOKAU (AM 3897/97) 2. SIPHO NKOSINATHUS MHEMBU (AM 6028/97) 3. JOHN ITUMELENG DUBE (AM 5350/97)	GRANTED/REFUSED	Unlawful possession of explosives, attempted murder and any other offence directly related to the bomb blasts at Vanderbijl Square Bus Terminus in Johannesburg and the Naledi Power Station in Soweto.	Not stated.	Granted to Applicants 1 and 2. Refused to Applicant 3 in respect of the Vanderbijl Square bus terminus and Naledi Power Station – did not satisfy criteria of amnesty.
2000a					
	1. GCINISILE LAMONI DANGALA (AM 6535/97) 2. ABUSIO ENOCK SHABALALA (AM 5727/97) 3. EUGENE DE KOCK (AM 0866/96)	GRANTED/REFUSED	Murder of Mr Batandewa Ndondo.	Not stated.	Applicants 2 and 3 comply with the requirements of the Act. Applicant 1 does not satisfy the requirements of the Act: 1) not full disclosure, and 3) inconsistencies in testimony.
2000a					
	SHADRACK FRASER TWALA (AM 7587/97)	REFUSED	Murder of Maria De Freitas, the murder of Karel Engelbrecht, robbery of a firearm from Karl Engelbrecht, the unlawful possession of firearms and ammunition and escaping from custody	Pleaded guilty (but not stated if charged)	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) unclear political objective.
2000a					
2000a	GONGANI SAVIOUR NGUBANE (AM 3946/96)	REFUSED	Killing of Mmoneesi Naumalo.	Convicted and sentenced.	Does not satisfy requirements for amnesty: 1) unclear political objective.
2000a	THEMBINKOSI VIVIAN MABIKA (AM 7761/97)	REFUSED	Robbery with aggravating circumstances, attempted murder and the unlawful possession of a 9mm Makarov pistol and ammunition.	Convicted and sentenced.	Does not satisfy requirements for amnesty: 1) unclear political objective.
2000a	ZAMAHAMA WELCOME MDANDELA (AM 7885/97)	REFUSED	Robbery, abduction and the unlawful possession of a firearm and ammunition.	Not stated	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) unclear political objective.
2000a	SITHEMBISO VANANA (AM 6540/97)	REFUSED	Murder of Mrs Jane Sophia Rossouw, the attempted murder of Mr Casper Gabriel Rossouw robbery, housebreaking with the intent to steal and theft and theft of a motor vehicle	Not stated	Does not satisfy requirements for amnesty: 1) not full disclosure; and 3) unclear political objective.
2000a	NKOLISEKO LONKI MDANDI (AM 0424/96)	REFUSED	Murder of Samuel Daniel Barnard and attempted robbery.	Convicted.	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) untruthful.
2000a	FARRELS AMOS JUSU (AM 2099/96)	REFUSED	Murder of Rabulu Joseph Mthethwa, Hlaluhlomile Alphias Mabaso, Sfesi Dadada Ndimande and Johannes Hlatshwayo and the attempted murder of Mzawenkosi Cele and Joseph Mphikseni Nxiyeza	Convicted and sentenced.	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) unclear political objective.
2000a	MICHAEL GADNALWLE LESHOMA (AM 7748/97)	REFUSED	Murder of Petronella Johanna Barnard and Willem Rasselman Fick, the attempted murder of Jacobus Johannes Christiaan van Meyeren and Hezekiel Mkolujhonsi Malinga and five robberies with aggravating circumstances.	Convicted and sentenced.	Inconsistent testimony.
2000a	1. EUGENE ALEXANDER DE KOCK (AM 0866/96) 2. DAVID JACOBUS BRITS (AM 3745/96) 3. JOHANNES JACOBUS SWART (AM 3750/96) 4. WILLEM ABBOTTUS NORTJE (AM 3754/96) 5. LAWRENCE JOHN HANTON (AM 4076/96) 6. ANDREW RUSSELL CAVILL TAYLOR (AM 4077/96) 7. JOHANNES ALBERTUS STEYN (AM 4573/96)	GRANTED/REFUSED	The conspiracy, planning, abduction, assault and killing of Goodwill Colin "Neville" Sikhakhane ("Sikhakhane").	Not stated	Amnesty is granted for the abduction, assault conspiracy, planning and killing of Goodwill Colin "Neville" Sikhakhane; unlawful possession of AK-47; assisting Sikhakhane's family unlawfully enter SA; and For defeating the ends of justice with the killing. Amnesty is REFUSED with regard to the fraud and theft of State monies in connection with the killing.
2000a					
2000a	MABHEKISENI MDUDUZI DLAMINI (AM 4246/97)	REFUSED	1. Murder of Paul Bertram Nicholson 2. Robbery with aggravating circumstances.	Charged and sentenced	Does not satisfy requirements for amnesty: 1) Not clearly politically motivated, and 2) not on behalf of a political organisation.
2000a	EUGENE ALEXANDER DE KOCK & OTHERS	CLARITY ON SEC 29 SUBPOENAS	Sought clarity about subpoenas	N/A	The fact that a person may be an implicated person does not preclude him or her from being a compellable witness in any hearing convened in terms of the Act.
	1. MNGWAMATO AMOS MUHADI (AM2717/96) 2. NDANDUSENI PHILIP ROBANI (AM 2718/96) 3. NKOSANA DE VILLIERS SIGMA (AM2719/96) 4. CHESTER NOMVULATHI RADWABA (AM 2720/96) 5. ROGAN BHATHUTSHELO ROMARUTSI (AM 2721/96)	GRANTED/REFUSED	The applications are unusual as they relate (somewhat) to the practise of witchcraft in the area of the Northern Province. (a) the murder of Edward Mavhungu on the 6 April 1990; (b) arson in respect of the deceased's home on the 6 April 1990; and (c) public violence in respect of activities at and outside the	Six charged, one convicted (doesn't state who).	Granted to all applicants except: Applicant 2 (Ileran) as he did not have any reason, political or otherwise, to commit any of the offences. Applicant 12 and 14 as did not fully disclose facts of incident. A C MUDUVHENDI (AM735/97) – must be a typo listed as Applicant 24 [illegible] – refused for the murder of

Year	Name	Decision	Offence	Prior Conviction	Reason
	6. JOHNSON THULIVHALI MAMATHULELA (AM 2724/96) 7. DAVID MABANA NEMARHAVHANI (AM 2725/96) 8. ABEL LUFUNO MULADZI (AM 2726/96) 9. A B RAMMOBWA (AM 2727/96) 10. A A MAUVHA (AM 4300/96) 11. J M MARATU (AM 4319/96) 12. FUDULWILANI LAWRENCE MADUNA (AM 7948/96) 13. AVHAPFANI JOSEPH LUKHWA (AM 3278/96) 14. TSHAMAANI EDISON TSHIBALO (AM 3277/96) 15. MALUBA DANIEL MALUNGA (AM 2597/96) 16. JOSIA DAVHANA MUKUSURI (AM 3282/96) 17. NORMAN RAMALATA (AM 3283/96) 18. SAMUEL MASHUDU MATALA (AM 3284/96) 19. KUDINGANA ISAAKUEL KUDINGANA (AM 7254/97) 20. MAKUYA SIMON MATSHISEVHE (AM 7286/97) 21. ASAPH MAMMABURU (AM 7440/97) 22. JUSTICE RAMABULANA (AM 6523/97) 23. WALTER MUDZIWIRI (AM 6678/97) 24. AZWINNDINI CEDRIC MUDUVHENDI (AM 7668/97) 25. MUTSHUTSHU SAMUEL MASORO (AM 2784/96) 26. SALANI PHILIMON BALOYI (AM 2534/96) 27. MARUBINI GEORGE LESHABA (AM 4015/96) 28. HARRIOT MATHIBELA (AM 4108/96) 29. MAVHULAMA JOHANNE'S MASANANISE (AM 4301/97) 30. TSHINYADZO DANIEL MAUMA (AM 4109/96) 31. MBULAHENI VICTOR MURIDILI (AM 7360/97) 32. FREDDY KHATUWANI DAVHULA (AM 7692/97) 33. MMABATHO POPULAR MULAUDZI (AM 0280/96) 34. MAMINGENI MUTAVHATSINDI (AM 3281/96) 35. SOLOMON MOOSE MUENDA (AM 6379/97) 36. AUBREY LESHAVHU MADALENG (AM 4102/97) 37. T A MASHAMBA (AM 3279/97) 38. A K MUTHELO (AM 4289/96) 39. L F MUNYAI (AM 7356/97) 40. N MULANDZI (AM 6680/97)		deceased's home on the 6 April 1990.		
2000a					
	MICHAEL BELLINGAN (AM2880/96)	REFUSED/ DISMISSED	(i) the theft during the period 1988 - 1989, in the then Transvaal, of various cheques intended for the National Union of Metalworkers of South Africa ("NUMSA" - the role of this acronym in the incident will appear more fully later in this decision); (ii) the murder of Applicant's first wife, Janine Bellingan ("the deceased"), during the course of the night on 20 September 1991 or the early hours of the morning on 21 September 1991 in the family home at Sandton, Gauteng;	Convicted and sentenced for murder.	Refused for the NUMSA theft. Dismissed for murder – not full disclosure and not politically motivated.
2000a	APLA HIGH COMMAND (AM 7802/97)	REFUSED (heard in chambers)	These commanders did not specify their individual names as they are accepting collective responsibility for any act, omission, offence or delict committed by members of the PAC as a result of which people died, others were injured and property was damaged.	Not stated.	Refused because does not comply with requirements of the Act (no act, omission or offence was listed in application).
2000a	MAGOME FREDDY TLADI (AM 2063/96)	REFUSED	Murder of Maisele Bapela	Sentenced and imprisoned.	Murder of the deceased in the given circumstances cannot be said to be "an act associated with a political objective" in terms of the Act.
2000a	GOLDEN HOUDINI SERGIBELA (AM 3026/96)	REFUSED	Murder of Poppy Seerane	Convicted	There is no evidence that the murder of the deceased is "an act associated with a political objective" in terms of the Act.
2000a	1. ISAAC SEMELA MOHAMANE (AM 1347/96) 2. SOLOMON NGAGOANE SEBA (AM 1333/96) 3. JACE TUMI MOFOKENG (AM 4114/96) 4. PHILLIP TSEMANE MOSIA (AM 3127/96)	REFUSED	Murder of two members of the Ciwa Ciwa police force, namely Mokete Benjamin Makau and Isefane Jacobine Mosebi as well as of being in the unlawful possession of firearms and ammunition.	All convicted of and sentenced for the murders and of being in unlawful possession of firearms	Does not satisfy requirements for amnesty: 1) unclear political objective since ANC had terminated the armed struggle against the government and it was not the policy of the ANC to murder policemen and policewomen.
2000a	1. VAZILE ARCHIBALD MADISANA (AM 4458/96) 2. MDAMILE THOMAS GONYA (AM 7842/97)	REFUSED	Murders and attempted murders of several persons who were shot and killed by CDF members at Bisho.	Not stated.	We are not satisfied that the actions of Applicants constitute acts associated with a political objective as envisaged in the Act.
2000a	1. MADUNAGWU EMMANUEL NYAMUZA (AM 7807/97) 2. ELIJAH NYAMUZA (AM 3010/96) 3. FRANCIS TEBOGO MOYANA (AM 4505/96) 4. ROBERT MAKHONYA NDIMANDE (AM 6456/97)	REFUSED	Killing of Victor Lembede	Charged and sentenced.	Applicants' version is untruthful where it conflicts with the testimony of the witnesses, particularly in regard to the reason for the attack on the deceased. We are satisfied that the deceased was killed in the course of an abortive attempt to rob the deceased's shop.
2000a	NTSUMBEDZENI ALSON TSHITANE (AM 2864/96)	GRANTED/REFUSED	1.1 arson in respect of government vehicles committed during or about June 1976 at or near Sibasa Area, Venda; 1.2 arson in respect of government school buildings at the place and time referred to in paragraph 1.1 above; 1.3 terrorism more fully set out in Pietersburg Magistrate's Court Case No. RC366/78; 1.4 sabotage more fully set out in Pietersburg Magistrate's Court Case No. RC367/78. 1.5 Offences of Robbery and the Unlawful Possession of Firearms and Ammunition in respect whereof Applicant was convicted and sentenced in the Thohoyandou Regional court under Case No. RC63/92.	Not stated.	Granted for 1.1 – 1.4 and refused for 1.5. No explanation given.
2000a	PABALLO ERNEST PULUMO (AM 6634/97)	REFUSED	1. The murder of Jacobus Petrus Ward, a seventy year old male, on 23 December 1992, on the farm Emmaus in the district of Theunissen. 2. The murder of Emmarentia Cornelia Ward, a thirty year old female, on 23 December 1992 on the same occasion.	Unclear – it seems the applicant was found guilty and therefore convicted	The Committee is not satisfied that the offences are associated with a political objective and that the applicant and the deceased (Rasta Molotsi) acted on behalf of or in support of a political organisation.
2000a	S.B. DLADLA (AM 3487/96)	REFUSED	Murder of Mr Madisela.	Not stated.	Does not satisfy requirements for amnesty: 1) Not involved in political matters; 2) not full disclosure.
2000a	1. NZIMENI DANSTER (AM 0040/96) 2. MONWABISI ERIC KHUNDULU (AM 0050/96) 3. LOUIE KWABWARI (AM 4296/96)	REFUSED/ GRANTED	1 Housebreaking with the intent to rob and murder, with aggravating circumstances on 6 February 1987; 2. The murder of Matheus Gideon Palvie a 63 year old male on 6 February 1987 on the farm Leeukloof in the district of Cradock; 3. The murder of Jeanette Johanna Palvie, a 54 year old female who died on 15 March 1987 as a result of injuries sustained during an assault on her on 6 February 1987 on the foresaid farm. 4. Robbery. 5. The illegal possession of a firearm in contravention of Section 2 of Act 75 of 1969 on 6 and 7 February 1987 to wit a 6.35mm Pistol serial no. 192710; 6. The illegal possession of .22 rifle serial no. 94980 on the aforementioned dates; 7. The illegal possession of ammunition on the aforesaid dates; 8. The malicious damage of the property of MG Palvie namely a VW Golf motor vehicle registration no. CAT12084 on 6 February 1987 at Cradock.	Convicted and sentenced.	Amnesty refused for counts 1 and 4 because robbery was for personal gain; granted amnesty for count 2 because it was politically motivated (even though a mistaken target); and amnesty for count 3 refused because this murder was disproportionate; amnesty granted for counts 5 to 8.
2000a	1. ZWELI ABSOLOM MHLONGO (AM 5272/97) 2. ASHLEY MURPHY MASILO (AM 0587/96)	REFUSED	Kidnapping and the killing of Hendrik Jacobus Pyper.	Convicted and sentenced.	Does not satisfy requirements for amnesty: 1) not truthful; 2) non-political activities

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2000/6	THEMBILE BAAS MDANDESIZU (a.k.a THEMBILE DINCA)	REFUSED	Offences committed just outside the Great Centenary Hall, New Brighton, Port Elizabeth	Not stated	Not clearly politically motivated.
2000/6	ABUSA MAHAMBANI (AM 613/4/97)	REFUSED	Murder.	Convicted and sentenced.	Does not satisfy requirements for amnesty: not for political purposes and not full disclosure.
2000/6	DANNYBOY NYATHIKAZI (AM 1106/96)	REFUSED	Murder of Zwelibanzi Ntuli	Not stated.	Does not satisfy requirements for amnesty: participation in the murder was not politically motivated.
2000/6	AARON ZIBUSE ZULU (AM 2186/96)	REFUSED	1. The murder of Nduda Mkhize aged 13; 2. the murder of Thulani Mkhize aged 19; 3. the murder of Thule Mkhize aged 9; 4. the murder of Wanda Ngubane, aged 12; 5. the murder Nomusa Gwala aged 12; 6. the murder of Ngee Mkhize aged 10; 7. the attempted murder of 15 other school children; 8. and the attempted murder of the driver of a cream white bakkie with a white canopy, Mr Makoke and/or Mr Ngubane	Not stated.	Does not satisfy requirements for amnesty: Not full disclosure
2000/6	AAPADI JOHANNES LEDWABA (AM 1198/96)	GRANTED/REFUSED	Committing public violence on the 14th April 1993 at Magopong Township.	According to the court records, charges of rape, murder and assault with the intent to cause grievous bodily harm were	Granted in respect of the offence of committing public violence on the 14th April 1993. Refused in respect of any other offence on the grounds that there was no full disclosure of the relevant facts.
2000/6	FRANK SANDY BENNETT (AM 4013/96)	REFUSED	1. Unlawful interrogation of members of the United Democratic Front; Assault with intent to do grievous bodily harm, assault, intimidation, unlawful detention and kidnapping of such members during the period 1985 - 1989. 2. The "necklacing" of an unknown male in the vicinity of Chesterville near Durban. 3. The murder of a member of the Pan Africanist Congress whose name is unknown to the applicant.	Not stated.	We are not satisfied that the applicant has made a full and truthful disclosure pertaining to any of these three incidents.
2000/6	1. JOHANNES JACOBUS GELDENHUYS (AM 5461/97) 2. ANDREAS JACOBUS LIEBENBERG (AM 6052/97)	GRANTED/REFUSED	Applicant 1, assisting in the escape of Charles Sebe from prison in the Ciskei in 1986. Both applicants: any act committed by any of those persons under their command which may constitute an offence of which they have no present knowledge.	Not stated.	Applicant 1 granted amnesty for assistance of Sebe because satisfied the amnesty criteria: full disclosure and context of political conflicts of the past. The application for amnesty for crimes committed by those under their control is refused because they could not disclose any information in this regard.
2000/6	1. MTHETHELELI ZEPHANIA MNEMBE (AM 5869/97) 2. MZONYEKELI EUCLID NONDULA (AM 7075/97) 3. JABULANI SYDNEY MASUKU (AM 6046/97)	REFUSED	Subpoena application for the summoning of J. Modise, L. Malot, and R. Kasrils.	Not stated.	Evidence wanted by Mr Wagener of the individuals will have no bearing on the applications of the applicants and is not necessary in order to arrive at a proper decision in these matters.
2000/6	ZWELAKHE THANDIWEKU CEBERWUSU (AM 4444/96)	REFUSED	Shooting and killing of two persons.	Sentenced to life imprisonment in respect of the murder convictions and varying additional terms of imprisonment in respect of the other convictions.	The attack upon the victims was in no way associated with any political objective.
2000/6	1. THEMBA STEPHEN ZIMU (AM 2806/96) 2. THULANI TERRENCE TSOTETSI (AM 4400/96) 3. NICHOLAS ZWILE CHAMANE (AM 0584/96) 4. MZWAKE SHADRACK MKUMALO (AM 6041/97) 5. MAKHOSINI SOLOMON KHUMALO (AM 8024/97)	REFUSED	Applicants 4 and 5 withdrew their applications. Applicant 1: conspiracy to murder of Sam Ntuli, murder of Vusi Shabalala, shooting and massacre at tavern and an attack on the Madlala Supermarket. Applicant 2: murder of Sam Ntuli, attack on the tavern, and killing of Norman Sithole. Applicant 3: massacre at the tavern.	Applicant 2 convicted.	Not satisfied that the first and second applicants have acted with a political objective.
2000/6	1. RODNEY ABRAHAM MOKGETSI TOKA (AM 6026/97) 2. FRANCIS PITSI (AM 7193/97) 3. JOHANNES TSHEPANG MALEKA (AM 7452/97) 4. GEORGE MATHE (AM 5697/97) 5. REGINALD NOAH LEGODI (AM 7745/99) 6. THAPELO REUBEN KGOTSA (AM 7153/97) 7. ALFRED KGASE (AM 7727/97) 8. JOSEPH NKOSI (AM 7225/97)	GRANTED/REFUSED	Attacks on police, planting of limpet mines, bombings and unlawful possession and use of firearms and explosives.	Not detailed but seems that there was prior charges.	Amnesty granted to all for everything except to Joseph Nkosi in respect of (a) The murder of Patience Rulele; (b) The attempted murder of Rose-Mary Mubvayire; (c) Malicious injury to property House No. 855, Mamelodi Gardens.
2000/6	KEVIN HALL (AM 1383/96)	GRANTED/REFUSED * mistakenly captured as "granted" only on the website	A number of incidents in which he was involved during the period between December 1974 and February 1976 while he was doing compulsory military service as a conscript	Not stated.	Granted for everything except refused for incident 3 whereby he was instructed to deliver unknown items to Pinetown and discovered that they were rifles and decided not to carry out the instruction. The applicant admitted this was not an act associated with a political objective.
2000/6	JOSIAS SEOMISE (AM8044/97)	GRANTED/REFUSED	1. The murder of Zini Shongwe and attempted murder of several other persons whose names appear below during or about 30 July 1991 at or near Ermelo. 2. The attempted murder of United Democratic Front ("UDF") members at Inakhomplasi at or near Ermelo during or about 1990; 3. The murder of two (2) unknown scholars from Thembisa Secondary School at or near Ermelo during 1990; 4. The murder of three (3) scholars at or near Ermelo in or about 1991; 5. The attempted murder of Tilly Nkosi at or near Wesselton, Ermelo, during or about 1991; 6. The attempted murder of Mr Crucket at or near Estensia, Ermelo, during or about 1991; 7. The murder of Jackson Kubeka in Kati township at or near Ermelo during 1991; 8. Various crimes of murder, attempted murder and arson committed at or near Davel during or about 1991.	Not stated.	Granted for offences 2, 3, 5, 6, 7, and 8. Refused for offences 1 and 4. Insufficient evidence for the former.
2000/6	JACOBUS JOHANNES DE RIJ (AM 1780/96)	REFUSED	Killing of three (3) persons, Makhulu Solomon Khumalo, Richard Suputane Makhubo and Phophaphang Joseph Kabokoane	Not stated.	Not committed with political objective
2000/6	JOHN HENDRICK ROELOFSE (AM 7913/97)	REFUSED	Murder of the Victor Zakhele Mlotshwa	Imprisoned	There is also no merit in the Applicant's claim that he was a supporter of the ANC and his action cannot be regarded as an action against a political enemy but an act of sheer racism.
2000/6	1. MGAMKHETENI BUTHELEZI (AM 6128/97) 2. BHEKUMUSA MKHIZE (AM 6131/97) 3. TEBOGO MAGUBANE (AM 6118/97) 4. VINCENT KHANYILE (AM 6134/97) 5. TIMOTHY STAAS MAZIBUKO (AM 6122/97) 6. JACK MBELE (AM 6119/97) 7. SONNY MICHAEL MAWANAZI (AM 6130/97) 8. THOMAS LUKHOZI (AM 7396/97) 9. MOSES MTHEMBU (AM 7394/97) 10. MKHUPO KI TSHABANGU (AM 7391/97) 11. SIPHO BUTHULEZI (AM 7319/97) 12. PETRUS MDINGI (AM 6127/97) 13. MKHULISENI SIBONGILENI MKHIZE (AM 6135/97) 14. PAULOS MOKGELENI MSATHA (AM 6121/97) 15. RICHARD BLAAUW (AM 6132/97) 16. VICTOR MATHANDENI MTHEMBU (AM 1707/96)	GRANTED/REFUSED	An attack at Boipatong Township and at the informal settlement of Slovo Park in Vanderbijlpark.	Applicants 9 and 12 convicted and sentenced to prison terms.	Applicants 9, 12, and 13 were refused amnesty because there was no evidence that their theft of property was politically motivated.

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Year	Name	Decision	Offence	Prior Conviction	Reason
			8. The intended murders of: 8.1 Nel Nkonkhla Gabela, 8.2 Phumble Ellen Gabela, 8.3 Nomvula Ada ana Sohale, and 9. Possession of arms and ammunition in contravention of the Arms and Ammunition Act 75 of 1969 (4 counts)		the context of a factional dispute between two factions in the IFP.
2000		Refused	1. Robbery 2. Attempted murder 3. Unlawful possession of explosives and firearms and ammunition	Convicted	Committee deemed it improbable that the offence politically motivated
2000		Refused	Convey by bus (and others) in unknown mode of the shootings in Boshoek on the 12th July 1993.	Convicted of 10 of the 58 charges for which he stood trial (four out of the seventeen fifth charges on which he was convicted are in relation to murder, thirteen (13) to attempted murder and two (2) to robbery with aggravating circumstances)	Applicant permitted "false or less than frank" evidence on a number of occasions and the Committee could not find on his version that the act was committed with a political objective nor that full and truthful disclosure was made.
2000		Refused			
2000		Refused	For Mumbula and Zeki Magamba are GRANTED amnesty for: 1. Murder of Elfs Mabhalihini. 2. Murder and Robbery of Mr Ado Ncanywa.	Zeki appears arrested twice, but escaped custody on both occasions	The evidence does not establish that this is an act associated with a political objective as required by the Act
2000		Refused	Offences connected to the kidnapping of Sophie Charles Mtshaka, Gadzekula Godolozi and Siphiwo Dalida in the Eastern Cape on 8 May 1986		Committee not satisfied that the Applicants made a full disclosure of all the relevant facts
2000		Refused	Offences related to the killing of four young people and serious injuring of another in shooting at Chesterville on 20 June 1986.		Vermaelen applied for amnesty for the unlawful possession of an AK47 assault rifle only. Application refused as Committee found he had committed no offence in the rifle possession. Reformers attempted to make a case that having been an accomplice to those who consumed their murders due to having driven the vehicle which transported them to Chesterville township. The Committee however found that the shooting had occurred on the spur of the moment and that the applicant could not have known of them. Not all of this amount constituted an offence and thus not satisfied that he/she/they had complied with the requirements of the Act.
2000		Refused	Amnesty is GRANTED for the explosion of a limpet mine in the 1st long area of the Johannesburg Hospital, Johannesburg on 27 July 1980 and the explosion of a limpet mine at Joubert Park, Johannesburg on 27 July 1980.		Amnesty is refused for the exploding of a Roman with anti-explosive device during or about 1987 and the transportation thereof to the Swaziland border and an attack on a home in Waterkloof as an unidentified address at or near Pretoria during the period 1986/1988 as no motive was established that these were associated with a political objective
2000		Refused	Two counts of murder and four counts of attempted murder committed on the 7th May 1993 at Ewandinei		Committee could not find the act to be associated with a political objective and deemed it committed out of personal malice. It will be spite. Also stated that even if the it were political in being between the parties the act was grossly disproportionate to any justified quote. Associated that the applicant was friendly for an unsatisfactory witness whose evidence had to be treated with caution
2000		Refused	Murder and assault with intent to do grievous bodily harm to Joseph Sibusiso and common assault in respect of pouring paraffin over Jan Nkosinathi Fusani	Convicted	Committee are well satisfied that the applicants complied with the factual requirements of the Act and that they committed the offences for personal gain from personal malice. It will be spite, but not satisfied that other acts were associated
2000		Refused	Murder is GRANTED amnesty for the abduction of Bhubesha		In the light of the above we defer to Mrs Botha, Dr Potgieter, Wessie man and Van der Westhuizen have failed to make full disclosure as required by the Act and their applications for amnesty is either REFUSED
2000		Refused	1) Murder of one Mr Ngwenya, a taxi driver which took place in Soweto on 9 July 1993, for which applicant was convicted and sentenced to 15 years imprisonment. 2) Armed robbery of the minibus vehicle which was driven by Mr Ngwenya but owned by Mr Albert Mahlangu which took place on 9 July 1993 for which the applicant was convicted and sentenced to 10 years imprisonment.	Convicted	The Committee felt that the applicants were desperately trying to bring his actions within the ambit of the Act and found discrepancies in the evidence in that led to their concluding there was no political motive for the crimes
2000		Refused	Murder of [illegible] on 1 April 1990	Convicted	Applicant cannot be said to have made full disclosure due to numerous inconsistencies and contradictions in the evidence given. Additionally failed to convince the committee that the act was committed with a political objective
2000		Refused	Public violence (applicant was granted amnesty for unlawful possession of a firearm on 14 March 1994 and the Committee only later became aware that an annexure to the application revealed that amnesty was also sought for the offence of public violence)	Convicted	Applicant failed to make full disclosure
2000		Granted			Applicant found to have acted lawfully in this escape as the shooting of a police officer and his application thus declared no offence.
2000		Refused			Amnesty not ruled to the first applicant as not satisfied that he made full disclosure of all the facts related to his case
2000		Refused	1. In the killing of [illegible] (Joe Bonnet), Shadrack Maoloes Sithole, Aaron Ntemisa Thumula (Nik Tallman) and Ntswanisa Hoebe (MK Zondo).		The Nick, Pienaar and Swanepoel are refused amnesty in respect of the killing of Shadrack Maphikela and the related cover up of his death because on the evidence the Committee could not find that his murder had been related to a political objective
2000		Refused	1.1 Unnamed taking a member of the African National Congress across the border at Oshoek border post on the Swaziland/South African border in or about 1986.		No offence is disclosed in respect of the unnamed applicants in assisting [illegible] Namibia to Vlakplaas during 1986.
2000		Refused	1. The abduction and killing of a young boy from Tembisa during 1990. 2. The abduction and killing of a young male from Hokwezi area during 1990. 3. Killing of Musi during mid 1991 4. Killing of Mafuthabeka Dlamini during 1992 5. Killing of the "three Transkei soldiers" during 1993. 6. Killing of Dutton Sibongiseni Nkomande on 21 August 1993 7. Ambush of Magubane at Pietermaritzburg area, Imbali during 1993 8. The killing of Mumu go during 1993 9. The taking of the year 2 boy from Edendale [illegible] during 1993 10. The killing of Dlangwa during 1993		Applicant did not make full disclosure and a number of the incidents for which he sought amnesty and is not acts, concessions or offences associated with a political objectives.
2000		Refused	Participating in an act aimed at [illegible] by shooting [illegible] a house apparently used by ANC stalwarts to grow and distribute pamphlets situated somewhere between Lothshill Close and Louis Botha Avenue, in Johannesburg. Participating in an operation to cause damage to the vehicle and property of a group of actors connected to the Civil Construction Campaign. The vehicle and property were situated near Wolwekloof Hostel nearby at the time of the incident.		Amnesty refused for assaults on the members of the group whose vehicle and property were damaged because fail without what the applicant had been instructed to do to achieve his political objective
2000		Refused	Application for amnesty in respect of an incident which occurred during the early hours of the morning on 26 March 1993 at or near No Street, Maumalanga, when Oscar Mpetshi Mphetha, Sibrack Mbuso Mama, Lawrence Lotsy Ngolende and Khona Gabriel ("the deceased") were shot and killed by some of the Applicants at an ambush position set up by the Inkatha Freedom Party ("IFP") during the same day when Nicholas Letsatsi "Tso" was killed and the body subsequently destroyed by means of explosives at Penge Mine near Weltevreden by some of the Applicants	On 6 July convicted on five counts of murder. Some of the other applicants appeared as state witnesses in that trial and were granted indemnity from prosecution pursuant to their testimony	Committee not satisfied that either the killings in question or any other offences committed were politic especially in the course thereof constituted acts committed with a political objective as envisaged in the Act. More particularly, the offenses were not directed against political opponents as required by the Act and the killings were grossly disproportionate on all of the circumstances of the matter
2000		Refused	Amnesty is granted for all offences committed in investigations concerning Matthew Goniwe, including conspiracy to murder		amnesty refused to applicants relating to all amnesty matters except with s 1946/7 because the applicant disclosed no offence in this regard
2000		Refused	The prosecution in respect of the robbery with aggravating circumstances of Michael Meyer's truck and its contents and the unlawful possession of arms and ammunition in the Transkei on the 27th August 1993 is GRANTED		The applications for amnesty in respect of the murder of Michael Meyers and his daughter Dorne Meyers in [illegible] failure to make full disclosure (clear conflicts and improbabilities in their evidence) and the acts could not be associated with a political objective (even if there had been such an objective, the acts were

Year	Name	Decision	Offence	Prior Conviction	Reason
2000		Refused	Malicious damage to property, crimen injuria, intimidation and defamation as well as any other offences connected to Strutcom operations at Wits University between 1982 and 1986. Arson at the Media Resources Centre Wits in 1984. Damage to the property of activists between 1982 and 1986. Illegal recording of conversations between 1982 and 1986 in Johannesburg. Distributing pamphlets leading to the offence of defamation. Intimidation between 1984 and 1985 at Yeoville. Disruption of protest gatherings between 1982 and 1986 at Wits. Intimidation, theft, assault and crimen injuria connected to the disruption of the One Million Signature campaign in 1985 in JHB city center. Theft, housebreaking, trespassing and malicious injury to property connected to the theft of documents between 1982 and 1986. Burning of a lawyer's vehicle 1985 Johannesburg. Petrol bomb attack at the residence of Sathsobvien Cooper in Frakenwald grounds of Wits University in 1985. Discrediting the opposition throughout the country between 1986 and 1992 leading to offences including crimen injuria. Blackmailing a journalist between 1984 and 1986 in JHB.		Amnesty refused for reconnaissance between 1982 and 1994 at various places in Johannesburg and refused for being an accessory after the fact to various incidents that occurred between 1979 and 1994. This was because no offences were disclosed in relation to these two issues.
2000		Refused			Amnesty for the torture of Ms Simelane refused to Coetzee, Pretorius and Mong due to their not having made full disclosure.
2000		Refused	Destruction of weapons which had been exhibits in trials against activists.		The destruction was deemed to have been committed in the normal course of their duties and so the application disclosed no offence, hence amnesty was
2000		Granted/ Refused	1. the supply of arms to the Ciskeian Defence Force during or about the period 1990-1991; 2. the creation of unlawful arms caches at or near Cullinan and Vlakplaas during or about 1990 1992; 3. the provision of arms other than pipe guns to the Inkatha Freedom Party during or about 1989; 4. the manufacturing of tyre bombs and the modification of hand grenades during the same period; 5. the manufacture of "funny rounds" of ammunition during or about the period 1990-1992. 6. the establishment of an unlawful arms cache at Applicant's home situated at Kilner Park, Pretoria during or about 1990. 7. the unlawful destruction of arms at Paardenfontein at or near Pretoria at the time of the dissolution of C Section of the Security Branch.		Amnesty is REFUSED in respect of: 1. the unlawful training of members of the Ciskei Defence Force in the handling of weapons unlawfully provided to them during or about the period 1990-1991; 2. the manufacture and supply of pipe guns to the Inkatha Freedom Party during or about 1989 (personal gain); 3. the transportation of firearms from Namibia to Vlakplaas during or about 1989 (done in ordinary course of his duties therefore no offence)
2000		Refused	Killing of Eustice "Bimbo" Madikela, Ntsungo Matabogo (referred to as "Matubane" in the application forms) and Fanyana Mtlapo (collectively referred to as "the deceased") and the attempted killing of Zandisile Musi ("Musi") in an explosion at Krugersdorp on or about 15 February 1982 ("the incident").		Committee not convinced that there was any direct or proximate relationship or nexus between the offences and the political objective which the Applicants alleged they pursued. In the circumstances their actions were also deemed wholly disproportionate.
2000		Refused/	1. The unlawful supply of firearms to be used by Craig Bull in an attempted coup d'état in the former Transkei during or about November 1990; 2. The unlawful entry into and search of a house in the Strand/Stellenbosch area and holiday home of the parents of the activist Hein Grosskopf subsequent to a bomb explosion in Krugersdorp on a date unknown to the Applicant.		Amnesty REFUSED for: 1. The transportation of firearms from Oshakati, Namibia to Vlakplaas in the Republic of South Africa; 2. Recruitment of one Meryn Fourie in the United States of America to discredit the African National Congress ("ANC"); 3. Involvement with the collection of Military Intelligence in the United Kingdom; because no offences were disclosed for which amnesty could be granted in these cases. 4. Establishment of an unlawful arms cache at the Applicant's private home; 5. Unlawful dealing in firearms; because these acts were committed for personal gain negating the requirement of a political objective.
2000		GRANTED/REFUSED	1. The supply of SAM-7 missiles to Ciskei during the period 1990-1991. 2. Creating arms caches in the Northern Transvaal Security Branch and aiding and abetting the commission of fraud during the period 1990-1992. 3. Supply of weapons to the Inkatha Freedom Party during the period 1990-1992. 4. The manufacture of "funny rounds" of ammunition. 5. Transporting arms from Namibia to South Africa. 6. Establishing a private arms cache. In addition to the above the Applicant also applies for amnesty in respect of the following: 1. The unlawful military training of members of the Inkatha Freedom Party in KwaZulu Natl during or about 1991. 2. The supply of weapons to one Phillip Powell who was involved in the unlawful training of members of the Inkatha Freedom Party in KwaZulu Natal. 3. The explosion of landmines on an unknown date at an unknown location. 4. The explosion of landmines on an unknown date at an unknown location. 5. Supplying of ammunition to other units. 6. The theft of an unidentified BMW motor car on an unknown date. 7. The packaging of explosives into an unidentified kombi motor vehicle on an unknown date. 8. Malicious injury to property by damaging two unidentified "Untag" vehicles with so-called "funny givies" in order to damage the engines. 9. The destruction of explosives from Duamboland at Paardenfontein near Pretoria on an unknown date and the destruction by explosives of an unidentified blue Toyota motor vehicle.	Not stated.	The Committee is satisfied that, with the exception of incidents three and five of those incidents, all the other acts committed by the Applicant were acts associated with a political objective and full disclosure was made.
2000	NICOLAAS JOHANNES VERMEULEN (AM4358/96)	REFUSED	The detention of African National Congress and other liberation movement members; interrogation of potential State witnesses; interrogation of former liberation movement members (askaris) into the South African Police and the searching of premises for operatives.	N/A	The facts disclosed do not constitute any offence.
2000	JAN DANIEL POTGIETER (AM5418/97)	GRANTED/REFUSED	Distribution of arms and handgrenade incident.	Not stated.	We are satisfied that the incident is directly related to the past political conflict involving members and supporters of the IFP and ANC.
2000	VICTOR MNDISI BEVIDHIKA NDLOVU (AM5753/96)	REFUSED	Unlawful establishment of a weapons cache (DLB) in the Swaziland/Pongola border during 1992	N/A	No offence has been disclosed and neither has a full disclosure of material facts been made.
2000	JOHANNES HENDRIK PETRUS HANEKOM (AM1066/96)	GRANTED/REFUSED	Transportation of weapons - Piet Retief, and from Oshakati to Pretoria.	Not stated.	Granted for the first transportation count. Refused because there is no indication that Applicant's participation in the transportation of the weapons from Oshakati to Pretoria amounts to an offence.
2000	PETRUS CASPARUS SNYDERS (AM5206/97)	REFUSED	Facilitating the escape of detainees from lawful custody and providing employment to two members of the Transkeian police.	Not stated.	It is clear that Applicant's actions in assisting the two Transkeian police officers were in no way unlawful. The facts accordingly does not disclosure any offence.
2000	JOHANNES VELDE VAN DER MERWE (AM4157/96)	REFUSED	False claims and weapons.	Not stated.	It is clear that the activities in question were not unlawful. The application accordingly does not disclose any offence.
2000	DIDUW GERBRANDT WILLEMSE (AM3701/96)	GRANTED/REFUSED	1. Damage to Jewish church 2. Applying poison to the garden of Blaauw or Whelpton 3. Damaging the vehicle of Dirk Coetzee 4. Despatching a radio bomb to Lusaka 5. Transportation of home-made weapons to Kwazulu Natal 6. Transportation of ak47 assault rifles to Harrismith 7. Video recording of the effect of "doctored" ammunition 8. Submission of fraudulent claims 9. Destruction of documents, and	Not stated.	

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Year	Name	Decision	Offence	Prior Conviction	Reason
			10. Not pursue operation at Izotsi.		
2001	IZAK DANIEL BOSCH (AM3765/96)				Granted for counts 1 to 9. Refused for count 10 because Applicant neglected to make a full disclosure.
	[redacted]	(S) WANTED/REFUSED	Unlawful possession of a firearm and housebreaking with intent to steal	Arrested and charged with housebreaking with the intent to steal	REFUSED in respect of housebreaking with the intent to steal.
	[redacted]	REFUSED	Not stated	Not stated	Not satisfied that Applicant has made a full disclosure of all relevant facts
2001	MANUEL ANTONIO OLIVANT (AM4012/96)	GRANTED/NOT USED	***deadlink to decision on website***		
2001	JOHANNES JACOBUS GELDENHUYS (AM5461/97)	REFUSED	"Temporary abduction" of Kwane and Charles Sebe.	N/A	Not clearly associated with the political conflict and not clearly politically motivated
2001	EUGENE ALEXANDER DE KOCK (AM6066/96)	GRANTED/NOT USED	Supply of weapons to the Inkatha Freedom Party, supply of weapons to Philip Powell, supply of motor vehicle to Themba Khoza, supply of motor vehicles to Victor Ndlovu, registration of IFP informers, and	Not stated.	Refused for the count of supply of motor vehicles to Victor Ndlovu because not associated with a political objective. Granted for other counts.
2001	DONALD SPENCER GOLD (AM 3646/96)	REFUSED	Participation in an operation to capture a known African National Congress ("ANC") operative in Swaziland.	Not stated.	Does not satisfy requirements for amnesty; the incident was "not unlawful or [illegible]"
2001	1. BUTATA ALFRED NOFEMELA (AM0064/96) 2. EUGENE ALEXANDER DE KOCK (AM0066/96 3. WILLEM ALBERTUS NORTJE (AM3764/96) 4. IZAK DANIEL BOSCH (AM3765/96) 5. JOHANNES VELDE VAN DER MERWE (AM4[illegible]/96 6. NICHOLAAS JOHANNES VERMEULEN (AM4358/96 7. WELLS [illegible]ERICK SCHOON (AM4396/96)	GRANTED/ REFUSED MINORITY DECISION	Various offences flowing from an incursion into Lesotho on or about the 19th December 1985.	Not stated.	Satisfied that the 2nd, 3rd, 4th, 6th and 7th applicants have complied with the requirements of this Act and in respect of all the other offences for which amnesty is applied for
2001	1. CARL CASTELING ROTHA (AM4833/96) 2. LEON ANDRE MARE (AM3634/96) 3. WOUTER JACOBUS BASSON (AM3635/96) 4. ADAM VAN ZYL (AM3636/96) 5. DANIEL DU TOIT BURGER (AM3667/96) 6. PIETER JOHAN VERSTER (AM5471/97) 7. EDWARD WEBB (AM7304/97) 8. FERDINAND BARNARD (AM7304/97)	GRANTED/NOT USED	Offences committed by them on behalf of the Civil Cooperation Bureau.	Applicant 8 convicted of murder and sentenced to an effective term of six years imprisonment.	Evans and is GRANTED amnesty in respect of the placing of a baboon foetus in Archbishop Tutu's garden; 6. Pieter Johan Verster is REFUSED amnesty in respect of the explosion at the Early Learning Centre and the conspiracies to assassinate Dullah Omar and Gavin Evans; 7. Edward Webb is REFUSED amnesty in respect of the explosion at the Early Learning Centre and is granted amnesty in respect of the placing of a baboon foetus in Archbishop Tutu's garden; 8. Ferdinand Barnard is REFUSED amnesty in respect of the conspiracy to assassinate Dullah Omar and is GRANTED amnesty in respect of the placing of a baboon foetus in Archbishop Tutu's garden.
	[redacted]	REFUSED	The [illegible] and detention of Mr Herbert Mfuli during or about November 1[illegible]2 by agents of the security branch of the then South [illegible]	Not stated.	
2001	[redacted]				The incident constitutes an act associated with a political objective.
2001	1. EUGENE ALEXANDER DE KOCK (AM0066/96) 2. JOHANNES NICOLS FRASER (AM3748/96) 3. EMMANUEL PETER MOKOENA (AM4174/96) 4. THAPELO JOHANNES ABELLO (AM5785/96) 5. GERHARDUS STEPHANUS SCHOON (AM5806/96) 6. PAUL JACOBUS VAN DYK (AM5015/96) 7. FREDERICK JOHANNES PIENAAR (AM5044/96) 8. GERHARDUS CORNELIUS BESTBIER (AM5442/96) 9. MZUZI ALBERT MAKGABA (AM6016/96) 10. ALMOND BUSANA NOFEMELA (AM6064/96)	GRANTED/REFUSED	Torture acts on an operation who is Mr Jeremiah Ngobeni. Mngadinwhy was abducted from his home in Swaziland, seriously ill treated, eventually killed and his body disposed of through an explosion at Silulwana Bay.	Not stated.	Amnesty is GRANTED to the First, Second, Third, Fourth, Eighth, Ninth and Tenth Applicants and REFUSED to the Fifth, Sixth and Seventh Applicants because they did not make a full disclosure
2001	1. HENDRIK JOHANNES PRINSLOO (AM5907/96) 2. JOHANNES PETRUS BENDOF (AM5444/97) 3. SAMUEL DUPLESSIS CRAFFORD (deceased) (AM5468/97) 4. DANIEL JACOBUS BRUGER (AM5696/97) 5. SAMUEL PHILEMON MATHEBULA (AM5756/96) 6. ROMEO JEREMIAH MATIENI (AM5[illegible]/96) 7. ERIC GOOSEN (AM4118/96) 8. WILLEM JOHANNES MOMBERG (AM4155/96) 9. JOHANNES JACOBUS STRYDOM (AM5464/97) 10. JAN HATTING ERSNIE (AM6275/96)	GRANTED/REFUSED	The kidnapping, assault and murder of Justice Mbizana (the Deceased), also known as MK Mandla.	Not stated.	The 1st, 2nd, 4th, 5th, 6th, 7th and 8th Applicants are all GRANTED amnesty for their respective roles in the abduction, assault and killing of the Deceased and the disposal of his body. The 10th Applicant is GRANTED amnesty for the abduction of and assault by the 5th Applicant on the Deceased. 10C Applicant is REFUSED amnesty for the killing of and disposal of the body of the Deceased. Did not make full disclosure The 3rd and 9th Applicants are REFUSED amnesty. Did not make full disclosure
2001	PHILIP NAMUO MASILO (AM2060/96)	REFUSED	The robbery and murder of Guerrino Ettore Zilio.	Serving imprisonment term.	Does not satisfy requirements for amnesty: no political objective.
2001	1. VONTSE MOMBOLO MOTI (AM6230/97) 2. THAPELO PATRICK MASEKO (AM5358/97)	REFUSED (/GRANTED)	A number of armed robberies which acts were committed, primarily by Vontse Mombolu Moti.	Moti was convicted and sentenced.	Amnesty should be granted to Masoko because he satisfied the amnesty criteria: full disclosure and politically motivated. Refused because not committed with political motivation.
2001	[redacted]	GRANTED (/REFUSED)	1. Accessory after the fact in defeating the ends of justice with regard to the attempted murder of Mr Justice Albert Louis Sachs and the malicious damage to property in respect of a Honda Ceve motor vehicle being used by Sachs, on 7 April 1988, in Maputo, Mozambique. 2. Accessory after the fact and defeating the ends of justice with regard to the shooting of two of three ANC operatives in Maseru Lesotho and the abduction of Simon Mokgethi a from Lesotho to Ladybrand during the period March to August 1986. 3. Accessory after the fact and defeating the ends of justice with regard to the murder by poisoning of Gibson Ncube "Gibson Mandlane" on 5 April 1[illegible] in Mozambique;	Not stated.	Amnesty refused for count 3 because the Applicant has not disclosed any specific act or omission constituting an offence or delict for which amnesty can be considered Granted for counts 1 to 4 because it satisfies the criteria for amnesty.
2001	HENNI VAN DER WESTHUIZEN (AM8075/97)				
2001	THULANI MUZOKHONA MYEZA (AM6198/97)	REFUSED	5 murders for which he has not been prosecuted.	Serving sentence for two other murders committed in separate incidents.	Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) unclear political objective.
2001	JOHAN FREDERICH VERSTER (AM7301/97)	GRANTED (/REFUSED)	All offences directly resulting from the unlawful destruction of records relating to the activities of DCC during or about the period 1987 - 1993.	Convicted and sentenced.	Satisfied the amnesty criteria: full disclosure and politically motivated.
2001	DAVID MOTSHWANE MOSI (AM7226/97)	REFUSED	An attack upon the SASOL II complex.	Not stated.	Failed to make a full disclosure.
2001	[redacted]	REFUSED	An incident which occurred during or about the period 1988 – 1989 in which a SACTU member was killed.	N/A Not satisfied that Applicant's conduct constitutes an offence or delict.	
	[redacted]	REFUSED	Unlawful possession of arms and ammunition as part of the robbery incidents.	Not stated.	The offence was clearly not associated with a political objective.
2001	MAPHUTHI JOSEPH CHOI (AM6708/96)	REFUSED	1. The murder of Johan Meintjies 7 May 1986 at Tembisa by pouring petrol on him and setting his body on fire while still alive. 2. Any other offence or delict directly linked to the offence mentioned and flowing from the evidence given by the Applicant before the Committee	Not stated.	Not satisfied that a full disclosure had been made
2001	1. ZUKILE MBAMBO (AM2892/96) 2. SIMPHIWE NCAMAZANA (AM2891/96)	GRANTED (/REFUSED)	1. The murder of Thomas Ralphsbridge; 2. The murder of Hendrina and Alta Jansen; 3. The murder of Piet Rabie; 4. The robbery of the Bonus of a Jetta motor vehicle; 5. Unlicensed possession of arms and ammunition; 6. The attempted murder of Boyle Keeton, Robert Melville and Mthuthuzeli Simon Pelem with a machine gun at or near the Kahoon Dam turn off, East London, on or about 25 March 1994 (Only Applicants involved); 7. Conspiring and attempting to ambush white people at or near the Kahoon Dam turn off travelling in a bus from King William's Town and en route to East London on or about 25 March 1994. (No person was injured); 8. The abduction and armed robbery of Khula Harry Mdongwe at an Opel Record Station Wagon vehicle bearing registration letters and numbers CEC13507 in Mdantsane on or about 26 March 1994; 9. The abduction of Mzimkulu Khoswell Mafumbe in East London on	Convicted and sentenced to 16 years imprisonment.	

Year	Name	Decision	Offence	Prior Conviction	Reason
			or about 25 March and forcing him to take them to numerous places with his vehicle in the Mdantsane-East London area where the Applicants committed crimes; 10. Theft of a Ford Sierra Station Wagon vehicle bearing registration letters and numbers CES9291 at NU 14 in Mdantsane, which belonged to Nombile Faith Freddie on or about 25 March 1994; 11. Conspiring in Butterworth and subsequently attempting to murder white teachers at or near John Knox Bokwe College in Mdantsane in or about 25 March 1994. (This only applies to Ncamazana); 12. Conspiring in Butterworth to murder white patrons in the Railway Station Bar in East London on or about 26 March 1994; 13. The attempted murder of Matt Hughes, Errol Potgieter, Errol Wilson and other patrons in the High Gate Hotel bar in East London on or about 26 March 1994. (No person was injured in the incident); 14. Armed robbery of Petros Ndoda Matakane of a Honda Ballade vehicles bearing registration letters and numbers CE 88283 in Mdantsane, East London, on or about 27 March 1994; 15. The murder of Constable Williams a member of the Crime Reaction Unit at or near Da Gama Textiles Factory in East London on or about 28 March 1994; 16. The attempted murder of Zandisile Victor Klaas, Christos Stassinnis, Zaharoula Stassinnis, Basil Rush, Wesley McClelland, Harold Lockam, Colin Kopke, Alfred Kopke, Alfred Page, Ross Templeton, Deon Whittle, Eric Bedier, Trevor Bunnlefoze, Harry Wright, Johan De Berg, Harry Lockam, Lance Shephard, Valda du Plessis, Suroyn Powan, Anthony Bulton, Fredericka Hempel and Margaret Longanthan at or near the Da Gama Textiles Factory in East London on or about 28 March 1994. (No person was injured); 17. The attempted murder of Craig Brown, Cecil Hunter and Gerhard Killian at or near Da Gama Textile Factory on or about 28 March 1994. (No person was injured); 18. The pointing of a machine gun at Charlie Lodewyk Postman at or near Da Gama Textile Factory on or about 28 March 1994 (This only applies to Ncamazana); 19. Contravening the provisions of Section 32(1)(a) read with Sections 1, 39 and 40 of Act No. 75 of 1969 in that during the period 25 - 28 March 1994 in the Mdantsane - East London area the Applicants were unlawfully in possession of unlicensed arms and ammunition; 20. Contravening the provisions of Section 32(1)(b), read with Section 1, 39 and 40 of Act No. 75 of 1969 in that during the period 25 to 28 March 1994, in the Mdantsane - East London area, the Applicants were unlawfully in possession of an M26 handgrenade and an M791 firing grenade.		Refused for count 6 because by own admission they had no instruction to carry it out.
2001	1. JOHAN HENDRIK LE ROUX (AM4148/96) 2. EUGENE ALEXANDER DE KOCK (AM0066/96) 3. WILLEM ALBERTUS NORTJE (AM3764/96) 4. EUGENE FOURIE (AM3767/96) 5. DAVID JACOBUS VAN DER WALT (AM3769/96) 6. THAPELO JOHANNES ABELLO (AM5785/96) 7. GABOUTLOWELWE CHRISTOPHER MOSIANE (AM3768/96) 8. SIMON MAMPOI RADEBE (AM7349/96)	GRANTED/ REFUSED MINORITY DECISION	The kidnapping, torture and murder of Japie Kereng Maponya.	Not stated.	Refused to Applicants 1 to 3 because they did not give a truthful account of events.
	[redacted]	REFUSED	1. Possession of a stolen 7.65 Presto Automatic Pistol presumably during 1980. 2. Accidentally discharging a firearm during or about August 1980 at Port Elizabeth when one person was injured. 3. Stabbing and killing one Mzolisi Geuma at a shebeen in Port Elizabeth. 4. Supplying information to the security branch in regard to persons present at the United Democratic Front offices in Port Elizabeth during 1985. 5. Repelling an attack by a group of persons on the house of Thamsanqa Linda during 1985 when some persons were allegedly killed. 6. Assaulting an old man, Mpumelelo Mpundu during the same incident at Linda's house. 7. Acquiring weapons, together with one Dennis Goodson at Jozini near the Mozambican border. 8. Unlawfully obtaining firearm licences during or about 1992. 9. Wrongly assuming responsibility for the massacre at Bambayi near Durban during or about 1993. 10. Applicant's appointment as general of the Natal Liberation Army ("NLA") during or about early 1994, planning certain operations by NLA and the unlawful possession of 60 boxes of AK47 ammunition and an F1 handgrenade. 11. Possession of 3 bags containing homemade firearms and explosives, 14 pipeguns, 20 rounds of shotgun ammunition and a bottle of poison with a view to killing African National Congress leaders during late May or June 1994. 12. Planning a revenge attack on an ANC member allegedly responsible for killing an Inkatha Freedom Party member during 1993, for a reward of R5000. 13. Conspiring and attempting to kill ANC leaders attending the sitting of the new KwaZulu Natal legislature after the 1994 national elections in Mlundi during May or June.	Not stated.	
2001	PATRICK MNCEDISI OLDHOWANE(AM8008/97) SUPPLEMENTARY DECISION				We are not satisfied that the incident constitutes an act associated with a political objective. We are not satisfied that Applicant's conduct constitutes an offence or a delict. The incident occurred beyond the cut off date for amnesty. Applicant acted for personal gain.
	DIRK JOHANNES COETZEE (AM0063/96) BUTANA ALMOND NOFOMELA (AM0064/96) NATSHAVHENI DAVID TSHIKALANGA (AM0065/96)	GRANTED/NOT GRANTED	Applicant 1 for 23 incidents. Applicant 2 for 20 incidents.	Applicant 2 was convicted and sentenced.	Applicant 1: REFUSED in respect of the conspiracy to murder. REFUSED to the applicant in respect of all offences or delicts directly linked to the diamond dealing, the murder of a so-called diamond dealer and the stealing of a motor car during October 1981. REFUSED in respect of the cover-up of shootings at Lindley during August or September 1981 on Messrs Motaung, Mokoena, Lephatswe and Radubu. REFUSED in respect of the theft of 5 scudos from so-called Scudo Racketeers

Year	Name	Decision	Offence	Prior Conviction	Reason
2001					during the period 1977 to December at the Oshivelo Border Post. Applicant 2: REFUSED in respect of the assault on Mr Fanie Mitzie REFUSED in respect of the murder of Johannes Hendrik Lourens on 11 September 1986 at Skeerpoort in the district of Rehoboth.
2001		GRANTED (PARTIALLY)	Applied for amnesty for 86 incidents.	Not stated	1. INCIDENT 21 - in respect of the stealing of plants because that involved personal gain; 2. INCIDENT 25 - because it does not relate to "our struggle of the past" as contemplated in Act 34 of 1995; 3. INCIDENT 44 - because it was not an offence or delict in terms of the then prevailing law; 4. INCIDENT 52 - no offence or delict; 5. INCIDENT 54 - in respect of theft that was for personal gain; 6. INCIDENT 55 - in respect of theft that was for personal gain; 7. INCIDENT 62 - because it was for personal gain; 8. INCIDENT 63 - because it was authorised by legislation; 9. INCIDENT 71 - no offence or delict; 10. INCIDENT 76 - no offence or delict; 11. INCIDENTS - 75, 77, 79, 80, 81, 82, 83, 85 because it is neither an offence or delict; 12. INCIDENT 86 - for personal gain.
2001	PAUL ERASMUS (AM3690/96)	REFUSED	1. The murder of Christina Masupa (also known as Manto) on 2 July 1987 at Daveyton. 2. The murder of Eunice Shabangu on the same date. 3. The murder of Catherine Nkosi on the same occasion. 4. The murder of Melonah Mbata on the same date and at the same place. Offences 5 to 8 relate to the attempted murders of Richard Mbatha, Godfrey Masupa, Trevor Cindi and Elinale Masupa. The ninth offence is in respect of arson relating to the house of Elinale Masupa.	Charged and convicted	
2001	PHINEAS NDEEVU (AM4702/96)				Does not satisfy requirements for amnesty: 1) not full disclosure; and 2) disproportionate actions
2001	PIET RUDOLPH (AM6329/97)	REFUSED	Assaulted two of the newspaper's journalists and also committed the offences of malicious injury to property and arrmed injuria.	Convicted and sentenced to a fine on 13 July 1993.	Not satisfied that the incident constituted an act associated with a political objective.

Total Cases Refused: 358

Amount of Refused Cases of Serious Crimes	
Murder/Killing	185
Attempted murder	70
Kidnapping/Abduction	20
Massacres	7
Assault	20
Robbery	50
Arson	14
Rape	0
Possession	53
Conspiring	2
Attacks	13
Injury	7
Torture	0

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COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION

REPUBLIC OF SOUTH AFRICA

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10 July 2020

In accordance with s 16(1)(c)

MEMORANDUM OF INCORPORATION

OF

FOUNDATION FOR HUMAN RIGHTS (RF) NPC

Registration Number: 95/08044/08

('the Foundation')

The Foundation is a Non Profit company without members, and with the following object:

Attaining a society freed from injustice and building a human rights culture through a vibrant civil society and an entrenched participatory democracy, using the Constitution of South Africa as a tool.

This object shall be achieved by, *inter alia*, supporting civil society organisations and public institutions, and engaging in activities to promote the increased awareness of and respect for the protection and fulfillment of the human rights contained in the Constitution.

ADOPTION OF MEMORANDUM OF INCORPORATION

This Memorandum of Incorporation was adopted by the Foundation, in accordance with section 16(1)(c) of the Companies Act, 2008 ('the Act'), as evidenced by the special resolution to which this Memorandum of Incorporation is annexed.

In this Memorandum of Incorporation:

(a) A reference to a section by number refers to the corresponding section of the Act; and

(b) Words that are defined in the Act bear the same meaning in this Memorandum as in the Act.

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1 INCORPORATION

1.1. The Foundation was incorporated as an Association not for Gain under section 21 of the previous Companies Act, but is now a non profit company, as defined in the Act.

1.2. The Foundation is governed by:

1.2.1. the unalterable provisions of the Act that are applicable to non profit companies;

1.2.2. the alterable provisions of the Act that are applicable to non profit companies, subject to:

1.2.2.1. any limitation, extension, variation or substitution set out in this Memorandum; and

1.2.2.2. the provisions of this Memorandum of Incorporation.

2 OBJECTS AND POWERS OF THE FOUNDATION

2.1. The objects of the Foundation are as set out on the cover sheet.

2.2. The Foundation shall have all the legal powers and capacity of an individual:

2.2.1. except to the extent necessarily implied by its stated objects;

2.2.2. except to the extent that a juristic person is incapable of exercising such a power or having such a capacity; and

2.2.3. subject to such restrictive conditions (as contemplated in section 15(2)(b)) and other limitations or qualifications contained in this Memorandum of Incorporation.

2.3. The powers of the Foundation may only be executed in accordance with the main object of the Foundation.

2.4. The Foundation may not:

2.4.1. amalgamate or merge with, or convert to, a profit company; or

2.4.2. dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposal of an asset occurs in the ordinary course of the activities of the Foundation.

2.5. All of the activities of the Foundation shall be carried out in a non-profit manner and with an altruistic or philanthropic intent and no such activity shall be intended to directly or indirectly promote the economic self-interest of any director, officer or employee of the Foundation, otherwise than by way of reasonable remuneration payable to that director, officer or employee.

3 MEMORANDUM OF INCORPORATION AND FOUNDATION RULES

3.1. This Memorandum of Incorporation of the Foundation may be altered or amended in the manner set out in section 16, 17 or 152(6)(b), subject to the following:

3.1.1. if the Foundation is exempted from payment of normal tax a copy of any such amendment shall be sent to the Commissioner for the South African Revenue Service or his authorised representative;

3.1.2. if the Foundation is registered as a Non-Profit Organisation then a copy of any amendments shall be sent to the Directorate of Non-Profit Organisations.

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3.2. The authority of the Foundation's Supervisory Board of directors to make rules for the Foundation, is limited or restricted to the extent that the powers of the Foundation are limited by this Memorandum of Incorporation.

3.3. The Supervisory Board shall publish any rules made by delivering a copy of those rules to each director by ordinary mail, or by electronic communication, provided that the directors concerned have consented to the delivery of such communication by electronic mail.

3.4. The Foundation shall publish a notice of any alteration of the Memorandum of Incorporation or the Rules by delivering a copy of these to each director by ordinary mail or electronic mail provided that the directors concerned have consented to the delivery of such communication by electronic mail.

4 OPTIONAL PROVISIONS OF THE ACT

4.1. The Foundation elects, in terms of section 34 (2), to comply voluntarily with the provisions/ some of the provisions of Chapter 3 of the Act, in that the Foundation:

4.1.1. will appoint an auditor, in terms of sections 90 to 93, and

4.1.2. will set up and appoint members to an audit committee, in terms of section 94.

5 FOUNDATION NOT TO HAVE MEMBERS

5.1. As contemplated in Item 4(1) of Schedule 1 of the Act, the Foundation has no members.

6 COMPOSITION OF THE SUPERVISORY BOARD

6.1. The number of directors shall be a minimum of eight and a maximum of twelve persons (three of whom are not 'connected persons' [as defined in the Income Tax Act 58 of 1962, as amended ("the Income Tax Act")] in relation to one another). No single person shall, directly or indirectly, control the decision-making powers of the Foundation.

6.2. In addition to satisfying the qualification and eligibility requirements set out in section 69 to become or remain a director of the Foundation, a person shall have skills, experience, suitable qualifications, professional competence and expertise in relation to the development and human rights sector, an interest in human rights and development and a sincere commitment to the ideals of the Foundation.

6.3. In addition to the appointed directors, the Executive Director shall serve as a director of the Foundation, *ex officio*.

6.4. Directors, excluding the Executive Director, shall serve two consecutive terms of three years each and shall retire at the meeting of directors following the expiry of their second term of office.

6.5. Directors retiring in terms of clause **6.4.** shall be eligible for reelection.

6.6. At the meeting at which the member of the board retires in the manner aforesaid, the remaining directors may fill the vacated office by electing an eligible and suitable person thereto. If it does not do so, the retiring member of the board shall, if offering himself for re-election, be deemed to have been re-elected, unless such meeting resolves not to fill such vacated office or resolves that such retiring member should not be re-elected.

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6.7. The directors shall have the power at any time to appoint any other suitable person as a director either to fill a casual vacancy or as an addition to the board.

6.8. The office of a director shall *ipso facto* be vacated:

6.8.1. if by one month's written notice to the Foundation, the director resigns from office;

6.8.2. if the director ceases to be a director by virtue of the Act;

6.8.3. if he/she is a director ex officio and ceases to occupy the relevant position or office, unless the remaining directors decide otherwise;

6.8.4. if the director is directly or indirectly interested in any contract or proposed contract with the Foundation and fails to declare her/his interest and the nature thereof in the manner required by the Act;

6.8.5. if the director is removed from office by resolution signed by not less than two thirds of the directors;

6.8.6. if the director no longer fulfills the role or qualifications which led to his/her appointment, as per clause **6.2.**; or

6.8.7. if the director fails to attend three consecutive meetings of directors, without being excused therefrom by the remaining directors, and the remaining directors resolve to exclude him/her from office.

7 AUTHORITY OF THE SUPERVISORY BOARD

7.1. The authority of the Foundation's Supervisory Board of directors to manage and direct the business and affairs of the Foundation, as set out in section 66 (1) is limited or restricted to the extent that the powers of the Foundation are limited in this Memorandum.

8 SUPERVISORY BOARD MEETINGS

8.1. The Foundation's Supervisory Board of directors may consider a matter other than at a meeting, and the directors may, instead of voting to make a decision at a meeting, adopt a decision by written consent of the majority of directors, given in person or by electronic communication, provided that each director has received notice of the matter to be decided upon. A decision so made shall have the same effect as if it had been approved at a meeting. Each decision so made shall be recorded in writing and tabled for ratification at the next ensuing meeting of directors.

8.2. No less than 25% of the directors (or at least three directors, whichever is greater) may requisition a meeting of the Supervisory Board.

8.3. The Foundation's Supervisory Board of directors may conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.

8.4. The Foundation's Supervisory Board of directors may determine the manner and form of providing notice of its meetings.

8.5. The Supervisory Board of directors may proceed with a meeting despite a failure or defect in giving notice of the meeting, if all of the directors of the Foundation

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8.5.1. acknowledge actual receipt of the notice;

8.5.2. are present at a meeting; or

8.5.3. waive notice of the meeting.

8.6. The directors shall appoint a chairperson, from their number, who shall preside over all meetings of the board and perform the tasks set out in this Memorandum and all the other normal functions of a chairperson of the Foundation. If no chairperson is elected, or if the chairperson is not present at a meeting within fifteen minutes after the time appointed for holding it, and the deputy chairperson is not present, the directors present may choose one of their number to preside at that meeting.

8.7. The directors shall also appoint a deputy chairperson who shall perform the office of chairperson when the chairperson is absent, as well as such other tasks as are delegated to him/her by the chairperson.

8.8. The directors shall appoint a treasurer who shall liaise with the Executive Director to ensure that the programmes are conducted within the Foundation's budgetary constraints, but the treasurer shall remain responsible to the Supervisory Board to ensure that she/he is regularly informed of all the Foundation's financial affairs and that proper accounting records are maintained for the Foundation.

8.9. A director who will not be able to attend any meeting, shall be entitled to appoint another of the directors as his/her proxy, to exercise his/her vote in their stead (in addition to his/her own vote). Such appointments shall be made in writing in advance of the meeting, and shall be communicated to the chairperson of the meeting. Those directors represented by proxy at any meeting, shall be considered present at the meeting for quorum purposes.

8.10. The rules for directors' meetings are as follows:

8.10.1. the directors shall meet together not less often than quarterly for the dispatch of business, but shall otherwise regulate their meetings as they think fit.

8.10.2. the quorum necessary for the transacting of business of the board shall be three directors, and once quorum has been established for a meeting the meeting shall remain quorate notwithstanding any temporary absence of a director from the said meeting.

8.10.3. questions arising at any meeting of the Board shall be decided by consensus, failing which, by voting;

8.10.4. each director shall have one vote on a matter before the board, except as provided in **8.13.**;

8.10.5. except as otherwise provided in this document, a majority of the votes cast on a resolution will be sufficient to approve that resolution; and

8.10.6. in the case of a tied vote, the matter being voted on shall fail.

8.10.7. for a special resolution to be adopted at a meeting of directors, it must be supported by at least 75 % of the directors who voted on the resolution.

8.11. For a resolution to be adopted by written vote of directors it must be supported by:

8.11.1. at least 50% of the total number of directors, in the case of an ordinary resolution; or

8.11.2. at least 75% of the total number of directors, in the case of a special resolution,

which votes shall be those received within 20 days of the resolution's being submitted to them.

8.12. A special resolution is only required for those matters set out in section 65 (11), being the amending of the Memorandum of Incorporation, ratifying actions by the Foundation or directors in excess of their authority, approving an application to transfer the registration of the Foundation to a foreign

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jurisdiction, amalgamating or merging with another non-profit company, approving the voluntary winding up of the Foundation, or disposing of all or a greater part of the assets of the Foundation.

8.13. Directors shall

8.13.1. disclose in advance,

8.13.2. inform the relevant meeting of material information and answer questions concerning,

8.13.3. not take part in any consideration of and leave the relevant meeting after disclosure concerning and

8.13.4. not be entitled to vote on or sign any document in relation to

any matter in which they or any person in relation to whom they are a 'connected person' (as defined in the Income Tax Act), has a personal financial interest.

8.14. The Foundation shall keep minutes of the meetings of the board, and any of its committees, and include in the minutes:

8.14.1. any declaration given by notice or made by a director as required by section 75 with reference to the personal financial interests of the director, whether it be an advance declaration of interests, or a specific declaration with reference to a specific matter; and

8.14.2. every resolution adopted by the board, which resolutions shall be dated, sequentially numbered, and will be effective from the date of the resolution, unless the resolution states otherwise.

8.15. Copies of the minutes of every meeting shall be dispatched by the person appointed by the board from time to time, to all directors within 30 days of the holding of the meeting.

9 ACCOUNTING RECORDS, BANKING AND RECEIPT OF DONATIONS

9.1. The directors shall cause such accounting records as are prescribed by section 28 to be kept.

9.2. The accounting records shall be kept in the registered office of the Foundation or at such other place or places as the directors think fit and shall always be open to inspection by the directors.

9.3. The financial transactions of the Foundation shall be administered via one or more bank accounts which shall be opened in the name of the Foundation.

9.4. The Foundation shall be prohibited from accepting any donation which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any representation with regard to the tax deductibility thereof in terms of section 18A of the Income Tax Act: Provided that a donor (other than a donor which is an approved public benefit organisation or an institution or body which is exempt from tax in terms of section 10(1)(cA)(i) of the Income Tax Act, which has as its sole or principal object the carrying on of any public benefit activity) may not impose conditions which could enable such donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation.

10 EXPENDITURE AND USE OF RESOURCES

10.1. The income and property of the Foundation, whencesoever derived, shall be applied solely towards the promotion of its main object or invested and no funds will be distributed to any person other

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than in the course of undertaking any 'public benefit activity' (as defined in the Income Tax Act) and no portion of the income or assets of the Foundation may be paid or transferred, directly or indirectly, to the directors or persons appointing directors of the Foundation; provided that this shall not prevent:

10.1.1. the payment in good faith of reasonable remuneration to any officer or servant of the Foundation, for any services rendered to the Foundation.

10.1.2. payment of an amount due and payable by the Foundation in terms of a *bona fide* agreement between the Foundation and that person;

10.1.3. payment in respect of any rights of that person, to the extent that such rights are administered by the Foundation in order to advance a stated object of the Foundation; or

10.1.4. payment in respect of any legal obligation binding on the Foundation.

10.2. No remuneration (as defined in the Fourth Schedule to the Income Tax) shall be paid to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the appropriate sector and in relation to the service rendered, and no person shall be economically benefited in any way which is not consistent with the objects of the Foundation;

10.3. If the Foundation is approved under section 18A(1)(b) of the Income Tax Act, the Foundation shall be obliged to utilise at least 75% of the funds received by the Trust which qualify for deductions under this section (being funds received from South African donors where an 18A receipt has been issued) within a period of twelve months from the end of the financial year in which the funds are received, provided that this shall not apply if the Commissioner for the South African Revenue Services waives, defers or reduces the obligation to distribute in terms of the proviso to section 18A(1)(b)(ii).

10.4. The Foundation shall not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to a director of the Foundation or of a related or inter-related company, or to a person related to any such director, unless it

10.4.1. is in the ordinary course of the Foundation's business and for fair value;

10.4.2. constitutes an accountable advance to meet

10.4.2.1. legal expenses in relation to a matter concerning the Foundation; or

10.4.2.2. anticipated expenses to be incurred by the person on behalf of the Foundation;

10.4.3. is to defray the person's expenses for removal at the Foundation's request; or
is in terms of an employee benefit scheme generally available to all employees or a specific class of employees.

10.5. The Foundation shall not use its resources directly or indirectly to support, advance or oppose any political party.

10.6. No expenditure shall be incurred by or on behalf of the Foundation except on authority of the board or of the person or persons to whom the board has generally or specifically delegated the power to authorise expenditure. The Board shall establish and maintain a delegation framework which shall record such delegation of its powers.

11 REMUNERATION OF DIRECTORS

11.1. The directors shall be entitled to a fee for carrying out their duties as directors of the Foundation, and shall also be entitled to receive all travelling, accommodation and other expenses properly incurred by them in or about the performance of their duties directors on the Supervisory Board, including those of attending and travelling to and from meetings of the Supervisory Board.

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12 ANNUAL FINANCIAL STATEMENTS AND RETURNS

12.1. The directors shall, in accordance with sections 29 and 30, cause to be prepared and laid before the board such annual financial statements as are referred to in those sections which annual financial statements shall:

12.1.1. be prepared within 6 months of the end of each financial year;

12.1.2. be audited voluntarily, as provided in this Memorandum;

12.1.3. include an auditor's report;

12.1.4. include a report by the directors as to the activities and financial state of the Foundation; and

12.1.5. be approved by the Board and signed by an authorised director.

12.2. A copy of the annual financial statements shall, at least 21 days prior to the relevant board meeting, be sent to every director of the Foundation.

12.3. The Foundation shall file annual returns with the Companies and Intellectual Property Commission within 30 business days of each anniversary of its date of incorporation, along with such payment, documents and information as may be required from time to time.

13 NONPROFIT ORGANISATIONS ACT

13.1. The directors may apply for the Foundation to be registered as a Non-Profit Organisation and shall, if so registered, ensure that the Foundation complies with all the requirements of the Nonprofit Organisations Act No.71 of 1997.

14 INDEMNIFICATION OF DIRECTORS

14.1. Every director and officer of the Foundation, every member of any committee of the Foundation, and any person employed by the Foundation as auditor, shall be indemnified by the Foundation against all liability incurred by him as such director, officer or auditor, in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in respect of any proceedings which are abandoned or in connection with any application under Section 77(9) in which relief is granted to him by the Court.

14.2. No director, officer or employee of the Foundation shall be liable for

14.3. loss or expense incurred by the Foundation through the insufficiency or deficiency of any security in or upon which any of the moneys of the Foundation are invested;

14.4. any loss or damage arising from the bankruptcy, insolvency or delictual acts of any persons with whom monies, securities or effects shall be deposited;

14.5. any loss or damage occasioned by any error of judgment or oversight on his/her part; or

14.6. any other loss, damage or misfortune whatever which shall happen in the execution of the duties of his/her office, or in relation thereto, unless the same happened through his/her own negligence, default, breach of duty or wilful misconduct or wilful breach of trust.

14.7. The authority of the Foundation's Board of directors to advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, to indemnify a director in respect of liability

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and to purchase insurance to protect the Foundation or a director, as set out in sections 78 (3), 78 (5) and 78 (6), is not limited or restricted by this Memorandum of Incorporation.

15 EXECUTIVE DIRECTOR

15.1. The Foundation will be headed by the Executive Director who shall be employed by the Foundation. The Executive Director shall be responsible to the Supervisory Board for:

15.1.1. managing the Foundation; and
the implementation of its programmes.

15.2. The Executive Director shall be established and have its principal offices and/or branch offices in Pretoria or such other place as decided by the Executive Director in consultation with the Supervisory Board.

15.3. The Executive Director shall employ and be responsible for the staff of the Foundation which shall consist of any staff as she/he may reasonably require to carry out the functions and tasks of the Foundation.

15.4. The functions and tasks of the Executive Director shall include:

15.4.1. co-operation with the Supervisory Board;

15.4.2. preparing the programmes, including annual workplans an annual budgets;

15.4.3. establishing management procedures;

15.4.4. setting up a computerised system for administering the programmes;

15.4.5. defining the funding criteria to serve as a guideline to the Foundation when deciding on applications;

15.4.6. supervising and preparing recommendations for approval of applications;

15.4.7. monitoring projects implemented within the framework of the programmes;

15.4.8. establishing regulations for the use of funds, advance payments and reporting to be enforced in connection with each individual grant;

15.4.9. ensuring that all projects be subject to an audit and random checks;

15.4.10. preparing for Supervisory Board meetings and preparing policy papers for discussion by the supervisory Board;

15.4.11. attending each meeting of the Supervisory Board as secretary;

15.4.12. preparing annual implementation reports regarding the programmes, including progress reports and financial statements, for the Supervisory Board and the Foundation;

15.4.13. contracting with third party consultants and others for the implementation of the programmes;

15.4.14. fund-raising for the programmes; and

15.4.15. communicating with Ministers, government officials, NGOs and civil society.

16 OFFICERS, COMMITTEES, STAKEHOLDERS AND PATRONS

16.1. The Board of directors may appoint any officers it considers necessary to better achieve the objects of the Foundation.

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16.2. The Board of directors may appoint committees of directors, and delegate to any such committee any of the authority of the Board, and/or include in any such committee persons who are not directors.

16.3. The authority of a committee appointed by the Foundation's Board, as set out in section 72 (2)(b) and (c) is limited and restricted to the extent that the powers of the Foundation are limited by this Memorandum of Incorporation.

16.4. The Board of directors may invite such stakeholders as it sees fit to form an advisory council of the Foundation. The Board may consult with such advisory council on matters of vision, policy and other matters which concern the stakeholders represented by such council from time to time.

16.5. The Supervisory Board may from time to time appoint patrons of the Foundation for certain periods and upon such terms as may be determined by the Supervisory Board.

17 WINDING UP, DE-REGISTRATION OR DISSOLUTION

17.1. Upon its winding up, deregistration or dissolution no past or present director of the Foundation, or person appointing a director of the Foundation, is entitled to any part of the net value of the Foundation, but the assets of the Foundation remaining after the satisfaction of all its liabilities shall be given or transferred to some other organisation or organisations to be determined by the directors of the Foundation at or before the time of its dissolution, or failing such determination, by the court and which:

17.1.1. are non-profit,

17.1.2. have objects similar to its main object;

17.1.3. if the Foundation is so registered, is/are registered in terms of the Nonprofit Organisations Act, 1997; and

17.1.4. if the Foundation is exempt from income tax, donations tax and estate duty, under the relevant laws of the country is/are:

17.1.4.1. any similar public benefit organisation, which has been approved in terms of section 30 of the Income Tax Act;

17.1.4.2. any institution, board or body which is exempt from income tax in terms of section 10(1)(cA)(i) of the Income Tax Act, which has its sole or principal object the carrying on of any public benefit activity; or

17.1.4.3. any department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(a) of the Income Tax Act,

and is/are required to use such assets solely for the purpose of carrying on such public benefit activities as are similar to the objects of the Foundation.

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FOUNDATION FOR HUMAN RIGHTS

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A just society for all

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD MEMBERS OF THE FOUNDATION FOR HUMAN RIGHTS HELD AT JOHANNESBURG ON 15 NOVEMBER 2024

Present:
Adv Lesala Mofokeng (Chairperson), Yasmin Sooka, Andile Stofile, Judge Mahendra Chetty, Dr Zaheed Kimmie

Apologies:
Prof Jonathan Klaaren, Nondumiso Nsibande

Item 4.2: *Unfinished Business of the Truth and Reconciliation Commission*

The Executive Director noted that the Constitutional Damages case, in which family members of victims of Apartheid-era gross human rights violations were claiming that their constitutional rights had been violated by the State's failure to effective investigate and prosecute perpetrators, was close to be being finalised.

The Executive Director indicated that, given the FHR's long involvement in post-TRC matters and the FHR's support for the resolution of individual cases it would be appropriate for the FHR to join the case as a co-applicant.

The Board was in agreement with this proposal and unanimously resolved that:

- The Foundation for Human Rights would join the Constitutional Damages case as a co-applicant,
- The Executive Director was authorised to depose an affidavit on behalf of the FHR in this matter

CERTIFIED A TRUE EXTRACT
DATE: 29 December 2024
CHAIRMAN: Adv Lesala Mofokeng



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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF FIRST RESPONDENT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM,

do hereby make oath and state that:

1.

I am an adult male employed by the National Prosecuting Authority (NPA). I am an admitted advocate and since 2003 to date serve as a Senior Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit (PCLU) located in the Office of the National Director of Public Prosecutions (NDPP) (First Respondent).

2.

I depose to this affidavit solely to comment on the averment made by the Applicant that the NDPP acted improperly in not dealing with the matter which forms the scope of this application in either 1996 or 2003 (the **Timol**-case). I was not involved in making the decision

to institute the current criminal proceedings against the Applicant and the processes which flowed therefrom.

3.

It is necessary to provide certain background information to give context to my account.

4.

The Truth and Reconciliation Commission (TRC) was established to ascertain the fullest extent of politically motivated human rights' abuses committed between 1 March 1960 and early May 1994. I shall refer to these crimes as TRC cases. The TRC was mandated to grant amnesty to perpetrators who made a full disclosure of their involvement in human rights' violations.

5.

TRC cases were originally dealt with by the Attorneys-General in the Provinces and Self-Governing Territories.

6.

A further development was however the appointment of a Commission of Enquiry headed by Judge Richard Goldstone to investigate some of the most serious cases.

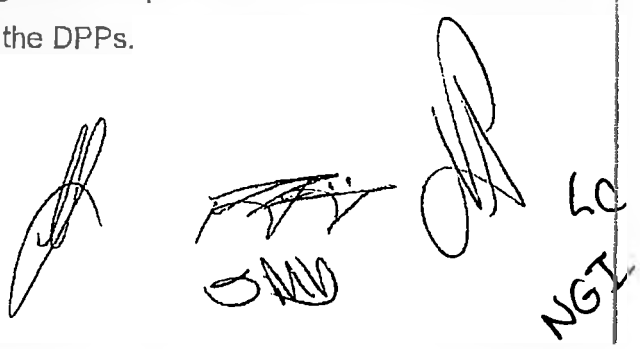
7.

When the Commission dissolved Dr Jan D'Oliveira SC, the then Attorney-General Transvaal, was appointed to head up a team to continue with the work of the Commission and to facilitate the institution of prosecutions.

8.

When the **NPA Act 32 of 1998** came into effect in October 1998 an NDPP (Mr BT Ngcuka) was appointed and the Attorneys-General became Directors of Public Prosecution (DPPs). The DPPs were seized with certain matters, many of which were put on hold pending applications for amnesty lodged by the accused with the TRC. When the TRC released a report calling for the prosecution of persons who had either been refused or not applied for amnesty provided that there was sufficient evidence, Ngcuka set up a TRC unit in his Office to deal with TRC cases not being already dealt with by the DPPs.

9.



This unit however dissolved because the amnesty process had not been concluded and therefore it was unclear which cases should be considered for prosecution. Furthermore it also lacked an investigative capacity.

10.

The unit headed by Dr D'Oliveira had ceased to function once the **NPA Act** came into effect.

11.

In March 2003 the PCLU was established by **Presidential Proclamation** as a Special Directorate in the Office of the NDPP. The **Proclamation** authorised the NDPP to refer priority crimes to the PCLU. Adv AR Ackerman SC (Ackerman) was appointed as Special Director and I was transferred from a component of the Directorate of Special Operations (DSO) to serve as one of his Deputies.

12.

Shortly after the establishment of the unit Ngcuka summoned Ackerman and I to his Office and informed us that he had decided that the PCLU should take over the TRC cases which had not been finalised either by the DPPs or by the defunct TRC unit. He further advised that the DSO would conduct any investigations which may be necessary. The DSO was a special NPA investigative unit established by virtue of an amendment to the **NPA Act**.

13.

In order to establish what cases required attention Ackerman and I took the following steps:

13.1 All the DPPs were visited and invited to handover any TRC cases which they were not in a position to finalise themselves.

13.2 We met with the Divisional Head of the Detective Services of the South African Police Services (SAPS) who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

13.3 Two former TRC researchers were appointed to trawl the TRC archives in order to identify cases warranting attention.

13.4 Interviews were conducted with former members of the TRC and D'Oliveira units.

14.

This exercise did not result in the **Timol**-case being identified as one which warranted further attention.

15.

Ackerman and I however also entertained requests for investigations from victims and other members of civil society. This resulted in the **Timol**-matter being brought to my attention by a member of his family.

16.

This led to me on 5 May 2003 requesting a Chief Investigating Officer (Leask) of the DSO to conduct investigations into the matter. I attach herewith as **Annexure RCM1** a copy of my letter to Leask setting out the information which had been brought to my attention and outlining what investigative steps should be taken.

17.

On 15 May 2003 I submitted a report setting out the cases which had been identified as a result of the outreach programme described above. The **Timol**-case was identified as a matter which required investigation. This report was addressed to the NDPP, the Head of the DSO and his Head of Operations as well as Ackerman. It is attached as **Annexure RCM2**.

18.

In terms of the DSO's legislative mandate it was for the Special Director of the DSO and not the Head of the DSO to issue declarations to investigate certain matters. At that stage the Special Director was Adv MG Ledwaba (Ledwaba).

19.

Ackerman and I met with Ledwaba to arrange for the DSO to conduct the investigations specified in **Annexure RCM2**. The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters and that these should all be referred to SAPS. A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is attached hereto as **Annexure RCM3**.

20.

As a result of the decision by Ledwaba Ackerman and I met with Commissioner De Beer (De Beer), the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman informing him that the request had been discussed with the National Commissioner (Selebi). The letter was further to the effect that the investigation of the matters was a DSO responsibility and that if it was required that SAPS in fact investigate then either Ackerman or the NDPP should

approach the President and ask him to confirm which agency should conduct the investigations. A copy of the letter is attached hereto as **Annexure RCM4**.

21.

I can confirm that neither the NDPP nor Ackerman approached the President as recommended.

22.

Ackerman and I however made a number of attempts aimed at persuading Ledwaba to reconsider his decision not to investigate. These are set out in a copy of a letter written to Ledwaba by Ackerman dated 11 November 2003 appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate. Both the NDPP and Head: DSO were copied in the letter which is attached as **Annexure RCM5**. The NDPP shortly thereafter resigned and Dr Ramaite SC was appointed as the Acting National Director of Public Prosecutions (ANDPP).

23.

The DSO however did not appoint investigators as requested and consequently none of the TRC matters requiring investigation could be taken further.

24.

In 2004 I was assigned a case relating to an international nuclear weapons syndicate which required my attention on a full-time basis until late 2007.

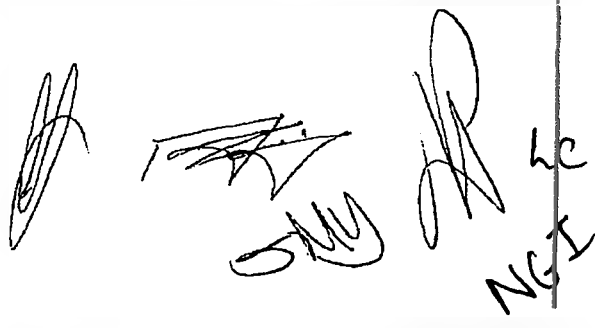
25.

I therefore no longer continued to deal with TRC matters but Ackerman regularly discussed these cases with me.

26.

At a certain stage Ackerman informed me that he intended prosecuting three former Security Branch members for their role in the poisoning of Reverend Frank Chikane. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. He indicated that he had contacted the suspects' attorney to arrange for them to appear in court.

27.



Shortly thereafter he informed me that the ANDPP had put the prosecution on hold pending the formulation of special TRC Guidelines. He further indicated that there was now a moratorium on the investigation and prosecution of TRC cases pending the adoption of the Guidelines.

28.

Neither Ackerman nor myself were involved in the drafting of these Guidelines. At a certain stage Ackerman showed me a copy of the Guidelines. We were both of the view that they were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

29.

Subsequently an application was brought by members of civil society in the High Court sitting in Pretoria which resulted in the Guidelines being declared unconstitutional for that reason.

30.

Adv Pikoli (Pikoli) was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an inter-departmental task team which would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives in the task team. On one or two occasions I stood in for Ackerman in meetings of the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

31.

At a certain stage Pikoli was suspended and fired despite the Commission which enquired into his fitness to hold office in fact finding that he was competent to be the NDPP. Adv Mpshe SC (Mpshe) was then appointed as the ANDPP.

32.

If memory serves me correct in early 2009 Mpshe summoned me to his office and showed me a letter written by SAPS indicating that it was withdrawing from the task team. This would mean that again TRC matters would not be investigated because at that stage a decision had already been taken to disband the DSO. Mpshe instructed me to negotiate with SAPS to agree to investigate the matters which he said I should take over from Ackerman.

LC

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33.

Ackerman informed me that he had already disposed of a number of matters which had not required investigation and gave me a list of small number of cases (I estimate no more than ten (10)) which I had to attend to. The **Timol**-case was not one which he had indicated should be investigated.

34.

I attach as **Annexure RCM6** a trail of emails between myself and various role-players showing my efforts to try and have these matters investigated. I initially had a series of meetings with Rayman Lalla, the then Divisional Head of the Detective Service of SAPS. He however informed me that the National Commissioner had decided that the cases had to be investigated by the Directorate Priority Crimes Investigation (DPCI). I therefore made a number of unsuccessful attempts to secure a meeting with Commissioner Dramat, Head: DPCI.

35.

Ultimately I met with Assistant Commissioner Lebeya (Lebeya) on 26 November 2009 where the issue of conducting investigations was positively discussed resulting in me writing a letter on 18 January 2010, attached hereto as **Annexure RCM7**.

36.

As a result thereof Senior Superintendent Bester was appointed to oversee the investigations of the ten (10) cases I had identified.

37.

Adv Menzi Simelane (Simelane) was appointed as the NDPP and he instructed me to guide a series of serious corruption investigations being conducted by the DPCI in the Northern Cape. He thereafter appointed me to represent the NPA in two (2) civil matters where decisions not to investigate / prosecute international crimes were being challenged. I was thereafter seized with a number of cases where complaints had been made calling for the arrests of current or former Heads of State for war crimes or crimes against humanity. This made it very difficult for me to focus on the ten (10) TRC matters. I did however increase the number of investigations due to representations being received in new matters.

38.

When Mr Nxasana (Nxasana) was appointed as the NDPP I was removed from my duties in the PCLU in order to act as a dedicated prosecutor for foreign bribery cases. Adv SK

Abrahams (Abrahams), then a Senior State Advocate, was appointed to take the TRC matters over from me.

39.

In June 2015 Abrahams was appointed the NDPP and the issue as to whether I should continue as the dedicated foreign bribery prosecutor arose. I had meetings with him in which I indicated that if he did not wish me to continue with that responsibility I would again be willing to do TRC matters. He however informed me that he was thinking of taking all TRC cases away from the PCLU and did not make a decision on terminating my appointment as the foreign bribery prosecutor.

40.

Due to the fact that another business unit of the NPA had instructed the DPCI to take all the foreign bribery files away from me I could no longer work on those matters. The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters. One of the matters which I had decided should be investigated was the **Aggett**-matter which also related to a death in detention. At that stage the **Timol**-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that **Mr Timol** had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case.

41.

Adv Johnson (Johnson) who was at that stage acting as the Head of the PCLU informed me and a Senior State Advocate who was assisting me with the cases that we should not continue to work with TRC cases as they were going to be removed from the PCLU. I was however concerned that this would result again in the cases being neglected resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof.

42.

On 4 February 2016 I was approached by Dr Pretorius SC (Pretorius) who had then taken over from Johnson as the Head of the PCLU. He informed me that a request had been received to re-open the inquests in the **Aggett**- and **Timol**-matters and required an opinion

from me. I attached as **Annexure RCM8** a copy of my opinion of even date in which I expressed the opinion that both matters should be fully investigated and that consideration to re-opening inquests should only be given once a decision whether or not to prosecute had been taken. I emphasise para 12 of my opinion in which I indicated that it was imperative that the NDPP should decide whether TRC cases should remain with the PCLU or not.

43.

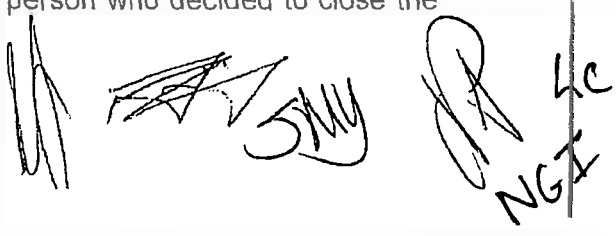
Subsequently I was informed by Pretorius that a decision had been taken to re-open the **Timol**-inquest. While the inquest was in progress Pretorius gave me a copy of a letter which I had written on 25 February 2004 to Mr Cajee, the nephew of **Mr Timol**. This letter is attached hereto as **Annexure RCM9**. He also showed me a report addressed by Ackerman to *inter alia* Ramaite and Pikoli dated 30 October 2006. I attach this report hereto as **Annexure RCM10**. He requested me to provide him with an affidavit responding thereto. I attach as **Annexure RCM11** a copy of the affidavit which I subsequently signed and which was commissioned. I have not attached the annexures referred to therein as they have either been attached elsewhere in this affidavit or are no longer relevant for the purpose of this application.

44.

At the time of deposing to this affidavit I was not in possession of **Annexure RCM1**. At this stage when I have now had sight of both this document and **RCM9** I recall that **RCM9** was written after both the DSO and SAPS had refused to investigate TRC cases. If memory serves me correct Leask had informed me that as a result of the decision taken by Ledwaba that the DSO would not investigate TRC cases he was unable to comply with my original request for investigations. Since he was however traveling to Cape Town on other investigations he contacted Ivor Powell and questioned him regarding the confession apparently made by the Applicant in this matter. The allegation was however denied by Powell and Mr Cajee was informed accordingly. I did not hear anything further from Mr Cajee and was shortly thereafter assigned other work.

45.

In order to depose to this affidavit I tried to locate such TRC files as may still be available resulting in me finding a report of 24 October 2006 addressed by Ackerman to Ramaite which is attached hereto as **Annexure RCM12**. This report identifies the advocates dealing with various TRC matters and reflects that I was not the person who decided to close the **Timol**-matter.



46.

In December 2017 I was contacted by the NDPP's Office Manager who requested me to collect certain of Pikoli's documents which he had found in a strongroom. I collected the documents from him and perused the contents. The documents included the following:

46.1 A second draft of an Indemnity Bill making provision for the President to grant indemnity to persons committing politically motivated crimes from 1 March 1960 (**Annexure RCM13**).

46.2 The terms of reference of the Amnesty Task Team dealing with the criteria which the NPA applies relating to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary. The document (**Annexure RCM14**) concludes by referring to the views of the intelligence agencies.

46.3 The further report of the Amnesty Task Team (**Annexure RCM15**) *inter alia* looking into whether private prosecution and civil litigation can be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute can approach the International Criminal Court (ICC).

46.4 A letter dated 8 February 2007 (**Annexure RCM16**) addressed to Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.

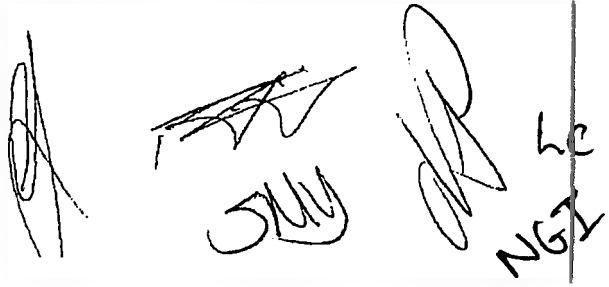
46.5 A Memorandum (**Annexure RCM17**) addressed to the Minister by Pikoli setting out in considerable detail what he construed to be interference with the dealing of TRC matters by other Government departments and concluding:

> "***I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and / or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end***."

47.

These documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated. The first three documents appear to have been authored by the Justice Department during the period when a moratorium was placed on TRC cases pending the formulation of Guidelines. The last two documents were authored by or addressed to Pikoli.

48.



On the limited occasions when I was seized with TRC matters I always believed that such matters including the **Timol**-matter should be properly investigated so that decisions whether or not to prosecute could be taken.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

R C MACADAM

Date: **1 November 2018**
Time: **09:15**
Place: **PRETORIA**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration, which was sworn to before me and the deponent's signature was placed thereon in my presence

at **PRETORIA** on **1 NOVEMBER 2018** at **09:20**

_____: (RANK)
COMMISSIONER OF OATHS

Full names:	**ALBERTUS MARTHINUS MATHYS FLYNN**
Rank:	**COLONEL**
Address:	**218 VISAGIE STREET, PRETORIA**
Ex Officio:	**SA Police Service**

NGI

KC M 1

er/timol

SCORPIONS

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Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

TO: DEPUTY HEAD

CC: CIO A G LEASK

FROM: HEAD SNPU

DATE: 5 MAY 2003 REF: A/INV/5/03 TRC

RE: INQUEST: AHMED TIMOL

1. On 2 May 2003 I was requested to investigate the above matter by the deceased's nephew Imtiaz Timol (082 445 2086) after he had been referred to my office by Minister Pahad in the President's Office.

2. The following documentation has been made available:
   - (i) Extract from George Bizoz's Book;
   - (ii) Article by Ivor Powell;
   - (iii) TRC hearing; and
   - (iv) Details of the SAPS members involved in the interrogation.

3. Imtiaz further informed me that:
   - (i) the inquest record has been destroyed;
   - (ii) he has the contact details of a fellow detainee now in England who can assist;
   - (iii) he has photographs of the body of the deceased; and
   - (iv) Ivor Powell informed him that Sgt Rodriquez had told his daughter what had really happened.

4. The following investigation focus areas are identified:

(i) George Bizoz must be interviewed to establish whether he has the post mortem report and any other information;

(ii) Ivor Powell (DSO Cpt) must be interviewed re 3(iv);

(iii) Researchers to establish whether there is any additional TRC material and whether the policeman involved after linked to any other human rights abuses;

(iv) the other detainee will have to be interviewed; and

(v) once all the evidence has been obtained the Chief State Pathologist will have to be requested for an opinion on the injuries and the claim that the witness fell from a 10 storey building.

.....
ADV R C MACADAM
HEAD
SNPU

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LC
NGT

RCM 2

s// audit trc cases

Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

TO: NDPP REF: TRC GENERAL

CC: HEAD DSO
HEAD OPERATIONS
ADV ACKERMANN

FROM: HEAD SNPU

DATE: 15 MAY 2003

RE: AUDIT OF TRC CASES

A. CASES BEING PREPARED FOR PROSECUTIONS:

1. MOTHERWELL BOMBING

(a) Leg One

The accused were all refused amnesty. On review however the High Court ordered that their applications be reheard because the TRC failed to lead evidence. Investigations conducted by my office indicate that the accused supplied a false motive for killing the deceased. Evidence will be made available to the TRC so that amnesty can be refused on a proper basis. This will open the way for legs two and three.

SCORPIONS

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JW

LC

NGI

(b) Leg Two

The three accused convicted in the 1996 prosecution were granted leave to appeal against their convictions to the SCA. I have taken over the argument of the appeal from the DPP Eastern Cape due to the fact that the prosecutor has retired.

(c) Leg Three

The prosecution of SAP General van Rensburg for ordering the killing of the Motherwell Four.

2. BRIAN NGULUNGA

The prosecution of SAP General van Rensburg for ordering the killing of Brian Ngulunga.

3. PEBCO 3

The prosecution of the Security Branch members responsible for the kidnapping of the deceased at Port Elizabeth Airport.

4. WAUCHOPE

Prosecution of AZAPO leader George Wauchope for murder and other related charges. I am awaiting the Minister's response to representations by the accused that he not be prosecuted.

5. POWELL

The prosecution of Phillip Powell for possessing hand grenades in April 1994. The matter is with the NDPP.

6. NQUTU ARMS CACHE

The prosecution of J. M . Nqcobo and others for the concealment of the weapons found in the Nqutu Bunker in May 1999.

7. The prosecution of the CCB members responsible for the bombing of the Early Learning Centre (it must however be established that the accused did not receive indemnity in terms of the Indemnity Act of 1990).

B. POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE

1. Murder of the PEBCO 3

There is currently no reliable evidence on the murder charge. If the accused are however convicted of kidnapping it is likely that at least one of them may supply information as to the killings in order to obtain a lesser sentence.

2. Cradock 4

There is no reliable evidence on this case. The TRC however established that the crime was committed by the same people who were involved in the Motherwell and PEBCO 3 cases. The successful prosecution of these cases could lead to some of the perpetrators coming forward also to obtain lesser sentences.

C. NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES

1. Murder of the COSAS 4
2. Murder of Askari Strongman Sambo
3. Murder of detainee on the East Rand by "Timol" Coetzee
4. Murder of Askari Dan Maboto
5. Allegations by IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988
6. 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit
7. 6-8 dockets linking AWB to Pre election bombings previously dealt with by Advocate Fick

D. HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE

1. Murder of Victoria Mxenge
2. Kidnapping, torture and murder of Ntombi Khubeka
3. Kidnapping, torture and murder of Nokutulu Simelane
4. Decision by DPP Pretoria not to prosecute SAP General Engelbrecht
5. Uninvestigated allegations against SAP General Bassie Smit
6. Ciskei Coup De AT
7. Transkei Coup De AT

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8. Pre Election Train Violence in Gauteng
9. Murder of Reggie Hadebe
10. Murder of Dulcie September
11. Refusal of Amnesty to 37 High Ranking ANC officials
12. Decision by DPP KZN not to prosecute IFP hit squads

E. REPRESENTATIONS TO INVESTIGATE SPECIFIC CASES

1. Death in detention Ahmed Timol
2. Murder of UDF activist Nelson Sithole
3. Murder of Pro Jack
4. Murder of IFP families in Table Mountain by A. M. Zulu
5. Murder of ANC supporter Batondo
6. False Conviction of Skouldies
7. Assault on A. Bult
8. Vlakplaas member Piet Snyders
9. Murder of Castro Khumalo

F. CASES IN THE PROCESS OF BEING CLOSED

1. Assault on Carl Niehaus- complainant does not desire a prosecution
2. APLA murder Mphahlela attacks on police stations; lack of reliable evidence
3. Mphaphela murder charges- lack of admissible evidence against him
4. Winnie Mandela- lack of reliable evidence
5. Steve Biko- crime prescribed in 1997
6. Smit Murders- perpetrators deceased
7. Ermelo Black Cats- lack of reliable evidence
8. IFP Murders Chadwick- accused in a mental institution in the United Kingdom

G. ASSISTANCE TO OTHER AGENCIES

1. Police Intelligence supplied with a breakdown of AWB amnesty hearings to assist in profiling of persons currently involved in Right Wing Activities
2. TRC supplied with material relating to IFP human rights abuses to assist them to oppose IFP application to have findings against it set aside

H. REPARATIONS RELATED ACTIVITIES

1. Exhumation of bodies of Mamelodi 10
2. Reparations of remains of victims in the Kwaggasnek incident in Lesotho
3. Representations by members of the public to locate their missing relatives
4. Partnership with SA Disappearance Foundation

I. INVESTIGATION PUT ON HOLD PENDING THE APPEAL IN THE BASSON CASE RELATING TO JURISDICTION FOR CONSPIRACY TO COMMIT CRIMES OUTSIDE THE RSA

1. Murder of Anton Lubauwski
2. Lesotho Raid
3. Botswana Raid
4. Swaziland Raid

J. POLICY CONSIDERATIONS

1. Prosecutions not to be conducted on a piece meal basis except where special circumstances (e.g. witness on point of death, accused about to leave RSA or engaged in current criminal activities)
2. Once all the cases earmarked for prosecution have been investigated a presentation will be given to the NDPP in order for him to confirm the prosecution strategy. Thereafter prosecutions will be instituted
3. After convictions have been obtained attention will be given to cases which currently had evidence since convictions may act as incentive for perpetrators to come forward

Kind regards,

ADV. R. C. MACADAM
HEAD
SNPU

RCM 3

./nvestigations

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Office of the Head
Priority Crimes Litigation Unit
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INTERNAL MEMORANDUM

TO : CIO Leask

FROM : Adv M G Ledwaba

DATE : 15 JULY 2003

SUBJECT : SNPU INVESTIGATIONS

1. Due to the recent creation of the PCLU it has become necessary to re-define the mandate and operations of the SNPU as follows:

   (i) **TRC cases**

   I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv **TONGWANE** must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators and you are accordingly authorized to conduct the necessary handovers.

   (ii) **Operation Sunflower**

   Advocate **MACADAM** will continue to oversee the disruptive action with the Consumer Council with your assistance. Once the SAPS report is received and evaluated, I will make a decision on the final disposal of the case.

SMV

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(iii) **Operation Black Widow**

Adv **TONGWANE** must oversee the finalization of the investigation and conduct the prosecutions which may arise.

(iv) **Operation Final Curtain**

SAPS must continue with the investigations under the direction of the prosecutor arranged by Adv **ACKERMANN**. You may give limited assistance to SAPS and the prosecutor on specific aspects when necessary.

(v) **Foreign Mercenaries**

Adv **PRETORIUS** has been delegated to assess all cases currently being investigated by both SAPS and the DSO. (I have communicated separately to the Regional Head Gauteng in this regard). I will make a decision as to the involvement of the DSO in such investigations once I have received a report from Adv **ACKERMANN**.

Adv M G Ledwaba
HEAD : OPERATIONS

/tp

RCM 4

O.F.-S. 002-0121 SAP 21

SUID-AFRIKAANSE POLISIEDIENS



SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag X302

Verwysing Reference	3/9/9/1(93)
Navrae Enquiries	Div Comm De Beer
Telefoon Telephone	(012) 393 2191
Faksnommer Fax number	(012) 393 2193 ( )

Afdelingskommissaris/Divisional Commissioner
Speurdiens / Detective Service
Hoofkantoor / Head Office
PRETORIA
0001

2003-09-26

Advocate AR Ackermann, SC
Special Director
Head: Priority Crimes Litigation Unit
National Prosecuting Authority
Church Square
PRETORIA
0001

Dear Advocate Ackermann

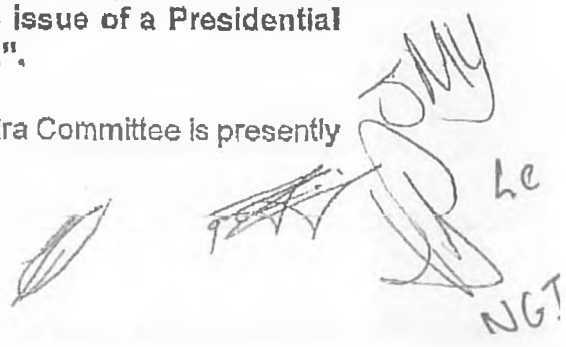
INVESTIGATION OF TRC CASES

Your letter dated 20 August 2003, as well as the preceding discussion between ourselves, have reference.

As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefor understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations(DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: **"In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard.".**

You are aware of the fact that the capacity created for the D'Oliveira Committee is presently with the DSO.



In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the **DSO** would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing. Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues.

You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary.

Kind regards.

DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER

LC

NGI

RCM 5

er/memo

Office of the Head
Priority Crimes Litigation Unit
HEADQUARTERS

INTERNAL MEMORANDUM

TO: ADV GEOPH LEDWABA

CC: 1. NDPP
2. DR S RAMAITE SC
3. ADV LF MCCARTHY SC

FROM: ADV A R ACKERMANN SC

SUBJECT: INVESTIGATION OF TRC CASES BY THE DSO

DATE: 11 NOVEMBER 2003

P. O. Box 1511
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Dear Geoph

1. In the light of current developments, I am constrained to document the history of the above saga.

i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition Advocate Sonn gave the President a full briefing on the matter.

ii) In 2002 the SNPU was established in order to investigate the cases.

iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP

iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC cases identified for prosecution.

My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.

v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.

vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)

vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate experience to the DSO in order to capacitate it to conduct these investigations.

viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.

ix) On 3 November 2003you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.

x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.

xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations. You informed him:

a) That you are not prepared to sign any declarations

b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigaion and familiar with all the witnesses and the facts of the cases.

c) That during the course of 10 November 2003 another investigator will be appointed.

d) The President should not be approached to involve SAPS

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreplaceable damage

LC

NGJ

Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of Section 28(1)(b). This chapter in our country's history must be closed without further delay.

Kind regards

ADV AR ACKERMANN SC
SPECIAL DIRECTOR
HEAD: PCLU

3

RC176

Helena Zwart (H)

From: Sibongile Mzinyathi
Sent: 20 May 2009 07:50 AM
To: Willie Hofmeyr (WA); Helena Zwart (H); Aubrey T. Mngwengwe
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: RE: Investigators for TRC cases

Thanda

This is for your information/attention.

Kind regards

S Mzinyathi

From: Willie Hofmeyr (WA)
Sent: 19 May 2009 08:56 PM
To: Helena Zwart (H)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman; Sibongile Mzinyathi
Subject: RE: Investigators for TRC cases

HI

It sounds like a good idea, but let me do some consultation in the DSO on the issue.

Regards

Willie

From: Helena Zwart (H)
Sent: Mon, 18 May 09 13:23
To: Willie Hofmeyr (WA)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: Investigators for TRC cases

Dear Willie

I met this morning with Commissioner Lalla concerning the appointment of SAPS investigators to investigate the TRC cases where victims have asked the NPA to look at prosecutions. We have been taking quite a beating due to the fact that nothing has been done on these matters for a number of years and in fact, in certain cases, the victims are threatening us with *mandamus* applications. In this regard, Commissioner Lalla asked me to provide him with the names of three/four investigators who had the necessary experience. We are only looking at a small number of cases, plus-minus nine. Obviously, no progress at all will be made if the investigators do not have previous knowledge of the relevant Apartheid security structures and role players therein.

The only persons I could think of off-hand, were CSI Marion and three/four of his KZN DSO investigators, who were previously involved with the Goldstone Commission and ITU. All these persons have indicated their willingness to transfer to SAPS. Commissioner Lalla indicated that the TRC investigations would constitute a special tasking and the investigators would be permitted to finalise these cases before taking on other commitments. He also indicated that he would pay the costs of the investigations from his budget. This would ensure that they could deal with these matters irrespective of whether they are located in DPCI or any other police structure. He asked me to communicate directly with you on this issue.

Kind regards

Chris Macadam

From: Bezuidenhout Colla - Superintendent [mailto:BezuidenhoutColla@saps.org.za]
Sent: 07 July 2009 08:56 AM
To: Helena Zwart (H)
Subject: RE: TRC cases

Hallo Helena,

Comm Lalla agreed to the meeting but requested that we involved Deputy National Commissioner Dramat. Welma will speak to his office and let you know. We are currently looking at the week of the 20th July.

Regards,

Colla

Superintendent Colla Bezuidenhout
Staff officer: Divisional Commissioner: Detective Service
Tel : +27 12 393 1024
Fax : +27 12 393 2193
Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 01 July 2009 11:34 AM
To: Bezuidenhout Colla - Superintendent
Subject: TRC cases

Dear Colla

Can you set up a short meeting with the Commissioner when he is available to discuss the TRC matters? We are under intense pressure and have been called upon to report on progress to the Minister and the Justice Portfolio Committee. The one matter which requires investigation prescribes on 12 September 2009 and this case must be fully investigated and the family afforded an opportunity to exercise their right to a private prosecution before the crime prescribes.

Our previous discussions on this topic did not materialise due to the fact that Willie Hofmeyr was not appointed as the head of DPCI.

Kind regards

Chris Macadam

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Helena Zwart (H)

From: Lalla Rayman - Divisional Commissioner [LallaR@saps.org.za]
Sent: 14 July 2009 08:32 AM
To: Helena Zwart (H)
Subject: RE: TRC cases requiring investigation

Dagsê Helena

Kommissaris Dramat se kantoor het nou net geskakel hy wil die vergadering uitstel na Augustus. Hy is nie beskikbaar volgende week nie.

Ek sal die nuwe datum met jou kommunikeer.

Groete

Welma

-----Original Message-----
From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 13 July 2009 04:08 PM
To: Lalla Rayman - Divisional Commissioner
Subject: TRC cases requiring investigation
Importance: High

Beste Welma

Aangeheg vind asb. 'n lys van die TRC-sake wat by die vergadering bespreek gaan word. Sal jy asb. so vriendelik wees om dit aan te stuur na die twee Kommissarisse, aangesien ons nog nie Kommissaris Dramat se kontakbesonderhede het nie?

Het Colla die dringendheid van die Lubowski-saak met jou bespreek?

Baie dankie en groete!

Helena Zwart
NPA

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Helena Zwart (H)

From: DPCI:Head [dpci.head@saps.org.za]
Sent: 28 August 2009 02:02 PM
To: Helena Zwart (H)
Subject: FW: TRC/Nuclear matters

Good day Mr Macadam,

We wish to acknowledge receipt of your e-mail. DNC Dramat is unable to meet with you presently but will revert back to you in due course.

Thank you

Secretary : Pumla N Mphothulo
The Head : Directorate for Priority Crime Investigations
6th Floor Koedoe Building
Tel : 012 393 5463
Fax : 012 393 5079
Cell : 082 778 3664
E-mail : (internal) DPCI : Head
(external) dpci.head@saps.org.za

From: Bezuidenhout Colla - Superintendent
Sent: 27 August 2009 07:18
To: Helena Zwart (H)
Cc: DPCI:Head
Subject: RE: TRC/Nuclear matters

Good morning,

Commissioner Dramat's office is at room 627, 6th floor, Koedoe building (opposite Police Head office in Pretorius str). His office number is 012 393 5463 and email dpci.head@saps.org.za His secretary is Pumla.

I will ask Comm Lalla about joining the meeting and will inform Helena.

Regards,

Colla

Superintendent Colla Bezuidenhout
Staff officer: Divisional Commissioner: Detective Service
Tel : +27 12 393 1024
Fax : +27 12 393 2193
Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 26 August 2009 12:19 PM
To: Bezuidenhout Colla - Superintendent
Subject: TRC/Nuclear matters

Dear Colla

I recently had a telcom with your Commissioner in which he advised that the TRC and the nuclear matters which we have previously discussed would now have to be attended to by Commissioner Dramat. Is it possible to provide me with Commissioner Dramat's address and fax number so that I can set up a meeting with him? Would your Commissioner be amenable to facilitate the meeting, as it might help if the two of us can inform Commissioner Dramat of the history of these matters.

Kind regards

Chris Macadam

Deputy Director of Public Prosecutions
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RCM 7

Priority Crimes Litigation Unit

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18 January 2010

Assistant Commissioner Lebeya
Directorate for Priority Crime Investigations
South African Police Service
Private Bag X302
PRETORIA
0001

Dear Commissioner Lebeya

INVESTIGATION BY SAPS OF CRIMINAL OFFENCES ARISING FROM THE TRC

My letter dated 13 July 2009, addressed to Deputy National Commissioner Dramat and Divisional Commissioner Lalla, and our meeting of 26 November 2009 have reference.

The issue related to the appointment of investigators to investigate the 11 matters identified by the NPA, which were itemised in my letter of 13 July 2009. Subsequently, the Acting National Director of Public Prosecutions declined to prosecute in the Lubowski matter and consequently, only the remaining 10 cases on the list required attention.

Senior Superintendent Bester of your office attended our meeting and informed you that he was in possession of a number of further dockets which he felt also required investigation. On 6 December 2009, I had a meeting with Senior Superintendent Bester and established that these dockets related to cases against the Liberation Movements in respect of which a decision was taken in 2004 by the then National Director not to prosecute. It should be noted that in the main, all the suspects implicated in the dockets had applied for and received amnesty. I therefore informed Senior

Superintendent Bester that there was no basis upon which these cases could be reopened.

Consequently, only the remaining 10 cases on the list require attention. Since you raised the sensitivity of the matters with me, the National Director of Public Prosecutions was given a full written briefing on the matters. I had a meeting with him today and he indicated that SAPS should in fact investigate all the matters which required investigation. The matters should be referred to my office once the investigations have been concluded. Should you require any guidance as to how the matters should be investigated, you are at liberty to approach me for any such assistance which you might require.

Given the nature of the cases, it may be desirable that we meet to discuss the issues in person and in this regard, I would be grateful if you could indicate when you would be available to meet with me.

Yours sincerely

ADV RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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INTERNAL MEMORANDUM

TO	:	DR JP PRETORIUS SC ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS: PCLU
FROM	:	ADV RC MACADAM SDDPP: PCLU
DATE	:	4 FEBRUARY 2016 (Opinion requested on even date)
SUBJECT	:	OPINION: REOPENING TIMOL/AGGETT INQUESTS
REF	:	10/3/1/PCLU

Dear Torie

1. This opinion is provided arising from a meeting between members of the NPA and Messrs Varney, Dutton and others. An oral presentation was given, motivating the reopening of both inquests.

2. In order to address the request, it is necessary to briefly refer to the relevant provisions of the Inquest Act:

   2.1 Section 5 requires that an inquest be held in respect of each natural death where the deceased is suspected of having died of unnatural causes.

   2.2 Section 16 requires the inquest Magistrate to make findings as to:

      2.2.1 the identity of the deceased
      2.2.2 the date and cause of death
      2.2.3 whether the death was caused by a criminal act on the part of any person

   2.3 Section 17 requires the Magistrate to refer the inquest to the DPP in the event of either not being able to determine the death or in the event of a finding of criminal liability. He is also required to refer the matter to the DPP irrespective of his findings if so requested.

2.4 Section 17(2) empowers the DPP <u>at any time</u> [my emphasis] after receipt of the inquest request the Judicial Officer to reopen the inquest and take further evidence.

2.5 Section 17A(1) also empowers the DPP to request the Minister to request the Judge President to appoint a Judge to reopen the inquest.

3. Sections 17(2) and 17A(1) both empower the DPP to cause inquests to be reopened on the basis of further evidence. The sole difference is whether the Minister and the Judge President must be involved and whether the inquest would be reopened by the original Inquest Court or by a Judge appointed by the Judge President. The invocation of section 17A(1) would be a more time-consuming process and would also place a burden on the High Courts which are under pressure with their existing civil and criminal rolls.

4. In my view, it would be appropriate to invoke section 17(2) where the new evidence would lead to certain of the original findings being amended, but would have no other public interest consequences, e.g. a prosecution or in a transparent manner to test the new evidence orally. Section 17A(1) would in my view be appropriate if there was high public interest in the new evidence, but the DPP was of the view that it should first be tested before instituting a prosecution.

5. It has to be stated that if the DPP is of the view that new evidence justifies the institution of a prosecution, then there is no need to first reopen the inquest before instituting the said prosecution.

6. The background to the two cases is as follows:

6.1 <u>Achmed Timol</u>

6.1.1 He died in detention in Johannesburg in October 1971 while under interrogation by the Security Branch having been arrested on charges linked to his involvement with the SACP.

6.1.2 The then Attorney General declined to prosecute and a formal inquest was held in the Johannesburg Regional Court, which handed down a verdict that he had committed suicide and that the police were not responsible for his death.

6.1.3 Shortly after the establishment of the PCLU in 2003, Mr Timol's nephew (a member of the NIA) approached the unit and indicated that he had established that the inquest record and docket were not available. (Governmental archive directives require the destruction of documentation after a certain period.)

6.1.4 He however alleged that the daughter of Sergeant Rodriques (who had been alone with the deceased immediately before he fell to his death) had approached Ivor Powell (then a journalist) and informed him that her father had confessed to her that the deceased had been murdered. The NDPP had directed that the DSO must assist the PCLU with the investigation of TRC matters. The DSO reported that the journalist had been interviewed, denied the allegation and produced the newspaper article which he had written, which contained no confession or new evidence. In the circumstances the DSO deemed it inappropriate to approach Rodriques or his daughter. The nephew was satisfied with this explanation and the matter was not taken further.

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6.1.5 In late 2015, I however asked the DPCI to register an enquiry due to extensive publicity given to the matter by the media and as a result of statements made by Adv Bizos SC and the family.

6.2 Neil Aggett

6.2.1 Dr Aggett died in police custody in Johannesburg in 1982 after a lengthy period of detention and interrogation by the Security Branch.

6.2.2 The then Attorney General declined to institute a prosecution and a formal inquest was held before a Regional Court Magistrate in Johannesburg. He handed down a verdict to the effect that the deceased had committed suicide and that the police were not responsible.

6.2.3 In 2013, a group of Dr Aggett's friends submitted a petition to the President and Minister of Justice, calling for the prosecution of the police officials responsible for his death.

6.2.4 As a result of this petition, the PCLU requested the DPCI to open an enquiry.

7. The status of the PCLU/DPCI investigations:

7.1 Achmed Timol (I/O Captain Ben Nel)

7.1.1 It has been established that the original inquest and docket are not available.

7.1.2 A copy of the inquest donated by the family attorney to Wits has been downloaded. It is missing 652 pages, which include the evidence and cross-examination of all the police officers involved. However, on the remaining evidence it was possible to establish who the witnesses were and what the issues in dispute were.

7.1.3 Captain Nel has been requested to canvas the availability of all the witnesses, i.e. the police officials, medical doctors and members of the deceased's family.

7.1.4 It has been established that other detainees who were never called as witnesses could possibly shed light on the matter. The first is a Mr Mohammed Essop, who was arrested at the same time as Timol. The second is Quentin Jardine, whose identity, it is alleged, led to the deceased deciding to commit suicide. The third is a Mr Pahad, whom it is alleged was arrested arising from Timol's interrogation. Ms Fullard has been tasked to uplift the detention files from DoJ&CD so that Captain Nel can conduct the necessary investigations in this regard.

7.1.5 It has been established that the TRC appointed a journalist, Piers Pigou, as an investigator and he dealt with the Timol matter. He has indicated that he is available for an interview when he returns to the country. As a matter of interest, it was in fact he who approached Sergeant Rodriques and not Ivor Powell. His notes reflect that Rodriques stood by his original statement. It may therefore be that Timol's nephew confused the two journalists and what Rodriques said.

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7.1.6 It has been established that Gordon Winter published a book in which he claimed to have first-hand knowledge of the Timol incident. Ms Fullard has undertaken to establish whether he is alive and where he is residing.

7.1.7 A Methodist priest in the UK made public statements to the effect that when Timol's body was viewed in the mortuary, it showed signs of gross mutilations. This claim would have to be followed up although it is in conflict with the evidence of the three doctors who testified at the inquest, including a pathologist, appointed by the family.

7.1.8 What also has to be followed up is whether the police, who were involved in the incident, were involved in other cases, which could have a bearing on their version in this matter. It would also have to be established whether there were other incidents involving detainees which would be relevant.

7.2 **Neil Aggett** (I/O Col Sam Mahlangu)

7.2.1 Col Mahlangu indicated that he was unable to locate the original inquest and docket.

7.2.2 He however established that a copy of the inquest was available on the Wits website and requested the PCLU to peruse it and to thereafter indicate whether further investigations were required.

7.2.3 The record is in the regional of some 8 500 pages and has been uploaded in blocks, which makes online reading time-consuming. Obviously downloading 8 500 pages would place an extreme burden on the office's printing facilities.

7.2.4 It has however been established that Adv Bizos SC, who acted for the family, conceded that there was no evidence to justify the conclusion that the deceased had been murdered. (Adv Bizos SC was assisted by a private pathologist and other medical experts.) He however submitted that Whitehead and Cornwright (the two officers responsible for Aggett's interrogation) should be prosecuted for culpable homicide. If the learned advocate is in fact correct, then the crimes prescribed in 2002 and no prosecution is feasible as requested by the deceased's friends.

7.2.5 The matter is however complicated by the fact that the former Deputy Judge President of the KZN High Court (Nicholson DJP) has published a book, alleging that the facts of the Aggett matter demonstrate unequivocally the crime of murder by induced suicide. If the learned Judge is correct, then the NPA would still have jurisdiction to prosecute on a charge of murder.

7.2.6 It has been established that Goosen, Pollock and Erasmus applied for amnesty on charges relating to breaking into the house of Aggett's parents, looking for evidence to support the claim that he had committed suicide. The TRC material has been uplifted and has been perused.

7.2.7 Aggett's detention file was also uplifted, but it contains no relevant information.

7.2.8 Deborah Quin was given the list of witnesses, who testified at the inquest and was requested to establish their availability, present whereabouts and

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also whether any of them were connected to other incidents which would be relevant. She is also looking into the issue of whether there were other deaths in detention at the same time, which could be relevant. She has already indicated that Cornwright is deceased and that Auret van Heerden, who was in detention in close proximity to Aggett, is currently in an old age home in the USA.

8. Currently the two matters are not receiving the attention of the PCLU due to firstly, operational constraints which arose since October 2015. (Adv Bukau was given an urgent espionage-related case and uncertainty surrounded Adv Macadam's position due to the NDPP on 8 October 2015, indicating that he had not cancelled his appointment as the OECD Foreign Bribery Prosecutor.) In a meeting with Adv Macadam in September 2015, the NDPP raised the issue as to whether the TRC matters should be taken away from the PCLU. As a result of all these uncertainties, a memorandum was prepared in January 2016, requesting the NDPP to confirm whether the PCLU should continue to deal with TRC cases or whether they should be referred to the DPPs. A response to this memorandum is still outstanding.

9. In my view, a decision on the request made by Messrs Dutton *et al* cannot be taken solely by the NPA.

9.1 Both are the subject of enquiries being conducted by the DPCI and clearly the views of the relevant senior managers within the DPCI should be canvassed.

9.2 In the Aggett matter a group of his former colleagues has formed an association, *"Friends of Neil Aggett"*, which has called for the prosecution of the police officials involved. The request to reopen the inquest runs contrary to the group's position. The group has a direct interest in the matter and its view should be consulted.

9.3 Also in regard to the Aggett matter, although Cornwright is dead, Whitehead is still available and would clearly be affected by the reopening of the inquest. He would be entitled to legal representation, access to relevant material and the right to challenge any new evidence.

9.4 In the Timol matter, it still has to be established whether any of the police involved in his interrogation are still alive and whether any new evidence could result in a prosecution of them on a charge of murder.

10. In my view, it would be inappropriate at this stage to reopen the two inquests. On what has been placed before me it would not appear that Mr Dutton has conducted a comprehensive investigation which would justify all the relevant factors which would have to be taken into consideration by both the NPA and the presiding officers of the inquests.

10.1 The original inquests are not available and consequently the NPA would have to request Wits to make available its originals and to pay for all the relevant copies to be made.

10.2 A decision would have to be taken as to whether to invoke section 17(2), 17A(1), which would require a determination as to whether the witnesses and suspects are available, whether a charge of murder is feasible, whether a *viva voce* hearing, which would involve having to provide the suspects with legal representation, is necessary.

10.3 In my view, a Presiding Officer and the Judge President (if section 17A(1) is invoked) would be reluctant to reopen the inquests, to receive only Dutton's evidence and before the police have concluded their investigations and the NPA decided that there are no prospects of a successful prosecution. This would be particularly apposite in

the Aggett matter where there are 8 500 pages of evidence to be perused, numerous witnesses who would be required to be recalled and where Whitehead could still be prosecuted.

11. In my view therefore, it would be inappropriate to accede to the request prior to the conclusion of the DPCI investigations and the NPA deciding not to prosecute. I am of the view that even if a decision not to prosecute is taken, then there would be new evidence which would justify the reopening of the inquests. At this stage it is not possible to predict what the consequences of this new evidence would be and therefore it cannot be predicted:

    11.1 whether the additional statements should simply be placed before the Regional Court, which could in chambers consider them and elect to amend the original Magistrate's findings

    11.2 whether a Judge should be appointed to hear the additional evidence *viva voce*

12. Having said that, it has to be, in the strongest possible terms, stated that it is imperative that the NDPP make a decision as to whether the TRC cases must remain with the PCLU or not. It will serve no purpose to decline the request, but to be placed in the position that two or more years down the line the cases have not been finalised because either the DPCI or NPA or both are unable to commit the necessary resources to finalise the matters timeously. It has to be emphasised that the Aggett matter requires a considerable amount of work due to the volume of evidence to be assessed, which may include an MLA request to the USA to interview Van Heerden. In the Timol matter there are also indications that evidence may be located in the UK, which would also have to be accessed through an MLA process.

13. Currently a member of the PCLU could give almost fulltime attention to the two matters. However, it is only to be anticipated that this will not be the case when shortly the unit's current workload will increase.

14. It is recommended that you:

    14.1 advise the NDPP not to accede to the request to reopen the inquests until the investigations have been concluded and a decision taken not to prosecute

    14.2 request the NDPP to, as a matter of urgency, make a decision as to whether the TRC matters must remain with the PCLU.

Kind regards

ADV RC MACADAM

RCM 9

Office of the National Director of Public Prosecutions

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25 February 2004

A/INV/5/03/TRC

Imtiaz Cajee
P O Box 1888
GARSFONTEIN EAST
0060

Dear Sir

INVESTIGATION INTO TIMOL CASE

I acknowledge receipt of your fax of 18 February 2004 and have to inform you hat the case is registered under the above reference number. Last year investigations were conducted into the allegations that former security branch officer Rodrigues head confessed to his daughter who in turn informed IVOR POWELL.

The investigations produced negative results. I confirm that you furnish me with the following documents:

i) Extract Bizos' book
ii) Article Powell
iii) TRC transcripts
iv) INPUT Detainee
v) Photographs

The testimony of a detainee who was held out of the window was not included.

I would be grateful if you would furnish me with a copy of it as well as any other relevant material, which you may have. The case will again be considered the light thereof.

Kind regards

RC MACADAM
DEPUTY HEAD: PCLU

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RCM 10

/Z56 forms

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INTERNAL MEMORANDUM

TO: DR MS RAMAITE

CC: ADV VP PIKOLI

CC: ADV K PILLAY

FROM: ADV AR ACKERMANN SC

SUBJECT: 1. DETAILS OF TRC CASES CLOSED BY THE PCLU

2. REAPPOINTMENT OF SENIOR SUPERINTENDENT BRITZ

DATE: 30 OCTOBER 2006

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1. On 25 October 2006, the PCLU was requested by the "TRC Committee" to furnish more details regarding all the cases which the PCLU had declined to prosecute. The PCLU was also requested to furnish the background which led to the prosecution of one Blani.

2. <u>TRC CASES CLOSED</u>

2.1 <u>Death in detention Ahmed Timol</u>

2.1.1 This death in detention matter goes back to 1971.

2.1.2 The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.

2.1.3 The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the

deceased had definitely been murdered and all other crimes had prescribed.

2.1.4 The matter was therefore closed.

2.2 Death in detention of Steve Biko

2.2.1 Mr Ngcuka asked that this matter be investigated because of its high profile.

2.2.2 The DPP: Eastern Cape had recommended that no prosecution be instituted due to lack of evidence.

2.2.3 It was established that all the doctors who had treated the deceased were dead, except for the Chief State Pathologist, who, when consulted, conceded that he could not exclude that the injury to the deceased's head could have been accidentally caused.

2.2.4 The police officer in charge of the interrogation who was responsible for making the decisions as to whether the deceased should receive medical treatment himself died after he was denied amnesty by the TRC.

2.2.5 The evidence against the remaining police officers only established *culpable homicide* which had prescribed in 1997.

2.2.6 The NDPP made a press statement to the effect that no prosecution was possible. An NGO organization obtained the opinion of Adv Trengove who also concurred with the decision.

2.2.7 Subsequent to this decision, the police officer who transported the deceased to Pretoria also died.

2.3 Carl Niehaus

2.3.1 A member of public asked for a prosecution after the media published an interview with Carl Niehaus in which he alleged that he had been tortured during detention.

2.3.2 Mr Niehaus was consulted and did not desire prosecution.

2.3.3 File closed.

2.4 Skoulides

2.4.1 Skoulides had been convicted of murder.

2.4.2 After his release from prison, his sister alleged that he had been framed by the CCB. There was no evidence to substantiate this claim and it was suspected that the purpose of the allegation was made so as to have the convict's criminal record deleted so that he could emigrate to Greece.

2.4.3 The file was closed.

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2.5 Nelson Sithole

2.5.1 The deceased was a Cape Town activist. He was killed outside his home. No perpetrators were identified and arrested by SAPS.

2.5.2 His lawyer alleged that the perpetrators were known to SAPS.

2.5.3 The DSO interviewed the eyewitnesses, perused the SAPS docket and interviewed a convicted prisoner whom the lawyer claimed knew about the case. The prisoner denied all knowledge of it. The witnesses had not identified the attackers. SAPS were of the view that the deceased was the victim of a criminal gang which was terrorizing that area. An identification parade had been held to see if the victims could identify members of the gang who were in custody on other charges but with negative results.

2.5.4 File closed.

2.6 Pro Jack

2.6.1 A person was refused amnesty for the murder of a Western Cape activist.

2.6.2 The TRC asked that this matter be looked into.

2.6.3 The DSO investigated the matter and came to the same conclusion as the TRC's Amnesty Committee, to the effect that the amnesty applicant had lied in respect of each and every material aspect relating to the murder of the deceased. There was no acceptable evidence to prosecute him or any other person and the file was closed.

2.7 AM Zulu

2.7.1 A convicted prisoner was refused amnesty for his role in the killing of a number of people in the Table Mountain area.

2.7.2 The TRC: KZN recommended that this matter be looked into further.

2.7.3 The convicted prisoner was an unreliable witness in his amnesty application and there was no other acceptable evidence implicating the persons whom he alleged had taken part in the attack with him.

2.7.4 The file was therefore closed.

2.8 Bult

2.8.1 Representations were made to the NPS by Bult, who alleged that he had been assaulted by the police during the Apartheid Era.

2.8.2 His allegations were however not serious enough to warrant investigation by the TRC unit which had been mandated by the NDPP only to consider serious human rights

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abuses.

2.8.3 The file was therefore closed.

2.9 Castro Khumalo

2.9.1 The victims requested that a prosecution be instituted.

2.9.2 The deceased was a member of a group of activists who had been killed by the Security Branch.

2.9.3 The perpetrators had however all received amnesty, but the bodies of the deceased had not been traced.

2.9.4 The case was therefore referred to the Missing Persons' Task Team for further action.

2.10 Winnie Mandela

2.10.1 She was implicated in the kidnapping of a youth in Soweto.

2.10.2 These allegations had been investigated by a component of the D'Oliveira Investigation Unit. It was established that all the relevant witnesses had been extensively interviewed and all had been found to be unreliable. Various allegations as to the location of the body of the missing person had been followed up with negative results.

2.10.3 There was therefore no reliable evidence to institute a prosecution against Mrs Mandela. It was noted that she had been convicted on another charge. The allegations that she was involved in the murder of Dr Asvat were also investigated with negative results. The allegations of Falati, Cebenkulu and Richardson were also looked into and it was found that these three persons were thoroughly unreliable and had strong motives to falsely implicate Mrs Mandela.

2.10.4 The file was therefore closed.

2.11 Ermelo Black Cats

2.11.1 The D'Oliveira Investigation Unit had charged members of an IFP grouping called the Black Cats for various crimes committed in the Ermelo area.

2.11.2 The investigations had been put on hold pending the finalization of the TRC.

2.11.3 The main 204 witness was interviewed by the DSO and found to be thoroughly unreliable.

2.11.4 The TRC had refused to grant him amnesty and the DPP: KZN had also rejected similar allegations made by him relating to activities in KZN.

2.11.5 The witness also indicated that he would not testify unless he was released from prison

first. There was therefore no evidence to prosecute and the file was closed.

2.12 Chadwick

2.12.1 The accused was a UK citizen who absconded to the UK after being indicted for the murder of two suspected IFP supporters.

2.12.2 The DPP: Pretoria applied for his extradition which he resisted in the UK for a period of almost eight years.

2.12.3 When his final appeal against extradition was exhausted, the UK authorities requested an undertaking from the NPA that the evidence available was sufficient to ensure this conviction.

2.12.4 A key witness had retracted his statement and there were other evidential problems. The original extradition application had to be abandoned although a new witness had been found. The UK authorities indicated that a fresh extradition application would have to be lodged before extradition could be granted on his version. Given the fact that the accused had been in custody for several years, combined with the fact that there was medical evidence suggesting that he could have been insane at the time of the crimes, it was not considered worth bringing a fresh application.

2.12.5 The Acting NDPP confirmed this decision.

2.12.6 Interpol has been requested to establish whether there is truth to the rumours that the accused might try and return to South Africa. If he were to voluntarily come to South Africa, the extradition problems would not apply.

2.13 Anton Lubowski

2.13.1 The original TRC unit was looking into this matter which related to the murder of a Swapo leader in Namibia.

2.13.2 A South African Court would only have jurisdiction in the event of evidence of a conspiracy to murder the deceased formulated in South Africa.

2.13.3 All the available evidence was perused. The most likely candidate to have killed the deceased was an Irish citizen, Aitcheson, who was arrested in Namibia, but skipped bail.

2.13.4 There was no reliable evidence against any other parties and the file was closed.

2.14 Ciskei *coup d'etat*

2.14.1 The original TRC unit was looking into this matter.

2.14.2 It was established that although certain former Military Intelligence members had indicated their intention to apply for amnesty on the basis that the *coup* had been

orchestrated so as to ensure the murder of ANC supporters, they had withdrawn their applications.

2.14.3 The former Head of State of Ciskei had been prosecuted for ordering the killing of two alleged coup conspirators, but had been found not guilty by the Bisho High Court.

2.14.4 There was no other evidence available to justify a prosecution of any person and the file was closed.

2.15 General Basie Smit

2.15.1 Mr Ngcuka asked that this matter be looked into as a result of media attention.

2.15.2 The available evidence as gathered by the D'Oliveira unit was considered and found to be inadequate to base any prosecution for a human rights abuse. The suspect was a former Head of the Security Branch.

2.15.3 The file was therefore closed.

2.16 *S v Bongani Wana*

2.16.1 This matter relates to the murder of Zolile Sangoni, Zonwabele Mayapi and an MK cadre Gift Mgibe who were killed by Vlakplaas operatives in 1988 in Umtata.

2.16.2 Mr Wana had applied for amnesty but later withdrew his application.

2.16.3 After a careful perusal of the TRC transcript and consulting with all relevant potential witnesses it became clear that there was no sufficient evidence upon which prosecution of Mr Wana can be instituted.

2.16.4 The matter was then closed.

2.17 Representation by Mr SM Mavuya

2.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

2.17.2 We however informed him that we have no such authority and that TRC committee has disbanded. His activity did not amount to any criminal offence thus we could not even consider it in terms of prosecution guidelines.

2.18 Representation by Mpho Masemola

2.18.1 This matter arose from a representation by Mr Masemola, a former ANC who claimed to have been arrested and subsequently tortured in 1985.

2.18.2 He also claimed that in 1991 members of the Counter Insurgency Unit shot at him during a march he had organised. We however informed him that in as far as the

torture in 1985 the matter has since prescribed and in respect of 1991 shooting there was no evidence to support his allegations as he bases his accusations on assumptions.

2.19. Representation by Mr N Dlamini

2.19.1 Mr Dlamini had made allegations against Swaziland police whom he claimed to have sold out some MK cadres during 1985 to 1986. Unfortunately he could not supply us with any proof apart from a newspaper article from Times of Swaziland which we did not receive.

2.19.2 Apart from lack of substance in his allegations the NPA does not have jurisdiction in crime committed in Swaziland. He could not indicate to us his interest in the matter when requested to do so.

2.20 Thabo Armando Sithole

2.20.1 The mother of Thabo requested the NPA to investigate death of his son who died in police custody after being arrested for robbery in 1976.

2.20.2 They received a report from Greytown police that he committed suicide by hanging himself.

2.20.3 The PCLU could not find any records of the inquest and the police in Greytown police station could not assist us as they could not find any records of Thabo though they remember that he was indeed detained there. The PCLU therefore decided to close the file as there was no further action contemplated.

2.21 Murder of Michael Mcetywa

2.21.1 The matter arises from a representation by Zolile Mcetywa who is the son of the deceased who was an ANC chairperson in Pongola and murdered in 1993.

2.21.2 A man called Mavuso is currently serving 25 years for the murder.

2.21.3 During his amnesty application which was refused, he implicated a number of IFP leaders.

2.21.4 The family of the deceased requested the PCLU to consider prosecution of the implicated IFP leaders.

2.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.

2.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.



2.22 Smit murders

2.22.1 Perpetrators all deceased except one suspect who apparently lives in Australia.

2.22.2 Insufficient evidence to apply for extradition.

2.22.3 Matter closed.

2.23 Refusal of amnesty to the President and other high-ranking ANC officials

2.23.1 The TRC refused amnesty to the President and plus-minus 37 other high-ranking ANC members certain of whom held Ministerial positions or other key positions in Government.

2.23.2 The TRC found that they had not disclosed that they had committed specified crimes.

2.23.3 There was no evidence implicating them in criminal offences and the file was closed.

2.23.4 The NDPP, Mr Ngcuka, made a media statement to this effect as the DA was making an issue of the matter.

2.24 IFP Hit Squads (allegations of Luthuli, Mbambo, Mkhize and Hlongwane)

2.24.1 The DPP: KZN asked that this matter be looked into as a result of the controversy which the allegations had caused in the province.

2.24.2 Certain IFP supporters, e.g. Luthuli, Mbambo, Mkhize and Hlongwane had made various allegations against high-ranking IFP officials.

2.24.3 Luthuli had been used as a witness in one case, but the accused had been acquitted and Luthuli was found to be an unreliable witness by the Court.

2.24.4 A Deputy in the DPP's Office: KZN had considered all the allegations and had declined to prosecute as a result of the discrepancies between the versions of the accomplice witnesses.

2.24.5 After their release from prison, Mbambo and Mkhize were interviewed and indicated that they did not want to testify in any matters. Hlongwane had been refused amnesty and indicated that he was not prepared to testify unless released from prison. He had a poor reputation for reliability.

2.24.6 There were therefore no reliable grounds upon which the decision of the DPP: KZN not to prosecute could be reversed and the file was closed.

2.25 Bombing of Early Learning Centre and other Western Cape CCB activities

2.25.1 A request was received from the Legal Resources Centre in Cape Town requesting that CCB members who had been refused amnesty for the above case be prosecuted.

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2.25.2 It was established that the main perpetrators had either been granted indemnity under the Indemnity Act or in terms of section 204 of the Criminal Procedure Act, arising from their testimony in the Wouter Basson and Ferdi Barnard prosecutions.

2.25.3 The only persons who could be prosecuted were Ferdi Barnard and the whistle-blower who had assisted the victims.

2.25.4 In the case of Ferdi Barnard, he was serving a lengthy gaol sentence in C-max. Were he to be charged, he would have to be transferred to Cape Town, posing a burden on Correctional Services. Any sentence he would have received for this case would run concurrently with his current sentence. No useful purpose would therefore be achieved by prosecuting him.

2.25.5 The prosecution of the whistle-blower would undermine reconciliation.

2.26 Plus-minus 80 cases against members of the Liberation Movement

All these cases were investigated by SAPS and closed by Ackermann for a number of reasons, i.e. offences were not of a serious nature, amnesty had been granted to the perpetrators or the perpetrators could not be traced.

2.27 S v Blani

2.27.1 The two deceased were an elderly married couple who resided on the farm, Enhoek.

2.27.2 The accused was associated with an organization known as the "Addo Youth Congress".

2.27.3 At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

2.27.4 On the night of 17 June 1985, the accused and his co-conspirators armed themselves and travelled to the farm of the deceased.

2.27.5 Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

2.27.6 The group then broke into the house despite attempts by the deceased to defend himself with a firearm.

2.27.7 Both deceased were assaulted and killed inside the house.

2.27.8 The group ransacked the house and removed certain items.

2.27.9 The Murder & Robbery Unit in Port Elizabeth originally investigated this matter.

2.27.10 The suspect was linked to the crime by fingerprint evidence.

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2.27.11 A warrant for his arrest was obtained but not executed, because he could not be traced. This warrant was never cancelled by SAPS.

2.27.12 As a result of Commissioner Fivaz's instruction of 7 November 1996, namely that all cases be referred to Dr D'Oliveira's Unit, the docket came into possession of Britz. The investigation diary of the docket confirms that on 16 July 2003, Director Nel received it for further investigation. Director Nel established that certain suspects were still outstanding on warrants and thereafter traced them. He thereafter furnished the Serious & Violent Crimes Unit in Port Elizabeth with copies of the witness statements with instructions to trace the suspects and witnesses.

2.27.13 In 2003, Britz referred the docket to the PCLU, requesting a prosecution of Blani on the basis that he had been traced by SAPS and had not applied for amnesty. This case is reflected as case No 266 in the SAPS register.

2.27.14 On 25 January 2005, the accused pleaded guilty and received a partially suspended term of imprisonment.

2.28 The reappointment of Senior Superintendent Britz

2.28.1 At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to investigate the dockets in possession of SAPS.

2.28.2 I wish to express my concern at this. Britz was a former member of the Security Branch, who, prior to the PCLU being involved with TRC cases, assisted the DPP: Pretoria with cases involving the Liberation Movement.

2.28.3 Former Police Commissioner General van der Merwe had formed an organization entitled "*The Foundation for Equality before the Law*" which was intended to ensure that no further prosecutions of Security Branch members would take place.

2.28.4 When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization, but had regular contact with General van der Merwe.

2.28.5 In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were Security Branch members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of Security Branch members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.

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2.28.6 When the issue of prosecuting Security Branch members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.

2.28.7 The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.

2.28.8 This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the DPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.

2.28.9 I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe.

ADV AR ACKERMANN SC

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RCM 11

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

In the matter of: Case Number: 01/17

RE-OPENED INQUEST: MR AHMED TIMOL

AFFIDAVIT OF ADV. RAYMOND CHRISTOPHER MACADAM

1.

I am a Senior Deputy Director of Public Prosecutions in the office of the National Director of Public Prosecutions.

2.

Since 2003 I have been a member of the PCLU.

3.

My attention has been drawn to paragraphs 27 to 30 of an affidavit made by Mr Imtiaz Cajee, which was placed before this Honorable Court on 14 August 2017. In my view this creates the impression that I had investigated a complaint made to the then National Director that the police officers involved with the death of Mr Timol be charged with murder and had advised Mr Cajee that my investigation had produced "negative results". This is not a true reflection of my involvement in the matter.

4.

I was not aware of a complaint made to the National Director but was approached directly by Mr Cajee who informed me that the daughter of Sgt. Rodrigues had approached a journalist Ivor Powell and informed him that her father had told her how the deceased was murdered. I immediately reported the allegations to the DSO ("The Scorpions") A Chief Investigating Officer was sent to interview Mr Powell and establish whether Sgt. Rodrigues could be charged with murder. I was informed that after

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investigation no basis for the allegations could be established. Mr Powell was emphatic that no such approach had been made to him.

5.

On 25 February 2004 I wrote to Mr Cajee informing him that this investigation had produced negative results. I did however invite him to supply me with additional information so that the case could be reconsidered. I did not however hear anything further from him. I attach a copy of my letter addressed to him as RCM1.

6.

Shortly thereafter, I was assigned a very lengthy prosecution relating to an international nuclear weapons syndicate and was no longer involved in TRC cases.

7.

I have had sight of the letter dated 29 November 2006 entitled "Report of the progress made by the Task Team on TRC Cases" which was attached as Annexure "A" to Mr Cajee's affidavit. I was not the author of the report. As the report clearly indicates it related to the work of a task team. I was not a member of this task team. As the report also reflects it was the decision of this team to close the matter relating to the deceased.

8.

At a later stage I was again instructed to deal with TRC cases. The investigation of these matters was now the responsibility of the DPCI. In late 2015 I looked into this matter and was of the view that it should be investigated. I therefore requested the DPCI to open an investigation into the matter.

9.

I downloaded the copy of the inquest record which was held by Wits and requested the police to establish the whereabouts of the implicated parties, witnesses and medical experts. I also contacted Mr Piers Pigou who had dealt with the matter at the TRC. I also requested a researcher to obtain the detention files of persons who were detained at the same time as the deceased. Copies of my communications are attached hereto as RCM2 and RCM3.

10.

I was however assigned a very urgent matter relating to international terrorism and plans to carry out terrorist attacks in South Africa. I briefed Adv. Pretorius SC on what work had been commenced on

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the matter of the deceased. He informed me that he would monitor the police investigation and later advised me that he had decided that it would be appropriate to hold a formal inquest.

_____

DEPONENT

Thus signed and sworn to at _____ on this _____ day of _____ 2017

The Deponent having knowledge that he knows and understands the contents of this affidavits, that it is both true and correct to the best of his knowledge and belief, that he has no objection to taking the prescribed oath and that the prescribed oath would be binding on his conscience.

_____

COMMISSIONER OF OATHS

FULL NAME: _____

BUSINESS ADDRESS:

_____

_____

_____

_____

CAPACITY: _____

AREA: _____

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RC7/12

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
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Tel: (012) 845 6474

INTERNAL MEMORANDUM

TO: DR MS RAMAITE

FROM: ADV AR ACKERMANN SC

SUBJECT: AUDIT OF CASES EMANATING FROM TRC PROCESS

DATE: 24 OCTOBER 2006

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1. HISTORICAL BACKGROUND

1.1 After the closure of the Goldstone Commission in 1993/94 the government of the day decided that its work in investigating human rights abuses relating to conflicts of the past should continue under the supervision of the then Attorney General of Pretoria, Dr J D'Oliveira. A team of the South African Police Service was seconded to his office to conduct the necessary investigations.

1.2 The team was divided into two groups. One focusing on offences committed by security force members and the other group on offences committed by Liberation Movements and the Right Wing.

1.3 This latter team comprised of Director Nel and Senior Superintendent Britz.

1.4 The Attorney General decided that Deputy Attorney General Fick would supervise all the investigations conducted by the two police officers while he would deal with cases involving security force members.

1.5 On 7 November 1996 the National Commissioner at the request

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of Dr D'Oliveira instructed all his Provincial Commissioners to submit all outstanding and unsolved cases pertaining to the entire political spectrum of the conflicts of the past to Dr J D'Oliveira's office. Such instruction also related to cases where not all the accused had been prosecuted.

1.6 With the appointment of the NDPP the cases dealt with by D'Oliveira were transferred to his office while Fick continued to deal with the cases originally allocated to him i.e. the Liberation Movement cases. He continued to be assisted by the SAPS members, Nel and Britz. Their contracts were routinely extended by SAPS.

1.7 The NDPP however instructed Fick not to institute any prosecutions without his authorisation and no prosecutions were therefore instituted.

1.8 With the creation of the DSO in 2001 the cases with the NDPP were transferred to the DSO Head Quarters. Fick however continued with his cases assisted by the two police officers.

No prosecutions were instituted because the TRC's final report and the President's response thereto were outstanding.

1.10 With the creation of the PCLU in March 2003, the NDPP assigned all TRC matters to it after the TRC had tabled its final report and the President had mandated the NDPP to institute prosecutions where appropriate, arising from the TRC process.

1.11 The PCLU was not an investigative agency and was therefore dependant on SAPS and the DSO for investigations. The PCLU reports monthly to a Deputy National Director and the NDPP approved all its decisions to institute TRC prosecutions and, in certain high profile cases, certain decisions not to prosecute.

1.12 The DSO policy guidelines for prosecutions in these matters were accepted by the PCLU. In essence, these were to the effect that prosecutions should only be instituted for serious human rights abuses, based on reliable evidence while accepting that humanitarian factors and the interests of reconciliation could also be taken into consideration.

3 It was decided that Ackermann would take over Fick's cases and Macadam would take over the DSO cases.

1.14 The PCLU conducted an audit of all the cases in both offices.

1.15 In this auditing process it was established that the police officers at Fick's office at the DPP Pretoria had registered 395 police dockets.

1.16 During 2003/2004, Ackermann declined to prosecute in +- 80 of the abovementioned cases.

1.17 Similarly +- 50 cases from the DSO were finalised by Macadam and Ackermann.

1.18 The audit process further identified a small number of cases warranting prosecution which are dealt with hereunder.

1.19 The 395 police dockets which were in the possession of Nel and Britz were returned to SAPS and the NDPP informed Commissioner Tim Williams that these dockets were police property and that the NPA had no interest in them except if SAPS desired prosecutions in which case they could be re-submitted for these purposes. The then Director General of Justice, Mr V Pikoli and other high ranking officials were present when this discussion between the NDPP and Williams took place. As of the date of this memo, no such dockets have been submitted to the NPA for decision.

2. CASES FINALISED IN COURT

2.1 *S v Khwezi Ngoma and Others* (Mhaga)

This matter involved four APLA cadres who attacked Willowvale police station in 1994 resulting in the death of a policeman and another injured. They didn't apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges but it was rejected and entered into plea bargain and received suspended sentences.

2.2 *S v Aron Tyani & Another* (Mhaga)

The matter relates to the attempted murder and murder of Stembele Zokwe an MK cadre during 1987 and 1988 by the Transkei security police. They were convicted and sentenced to direct terms of imprisonment in 2005.

2.3 *S v Eugéne Terre'blanche* (Ackermann)

In November 2003 the accused pleaded guilty to several charges of terrorism, linked to 1994 pre-election bombings. He was sentenced to 6 years wholly suspended.

2.4 *S v Blani* (Macadam and Ackermann)

The accused was convicted on two counts of murder in Grahamstown High Court and sentenced to a partially suspended sentence.

3. MATTERS CLOSED BY PCLU

3.1 Death in detention Ahmed Timol

3.1.1 This matter relates to the death of Ahmed Timol who died in police detention on 27 October 1971 during interrogation by the Apartheid Security Police.

3.1.2 There was an allegation that one of the interrogators had confessed to a journalist that Timol had been murdered and that was followed up but was later denied by the said journalist.

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3.1.3 The matter was therefore closed.

3.2 Death in detention of Steve Biko

The matter prescribed in 1997 as evidence only proves culpable homicide which according to our criminal law prescribes after 20 years.

3.3 Carl Niehaus (Macadam)

3.3.1 Victim tortured during detention.

3.3.2 Victim does not desire prosecution.

3.3.3 File closed.

3.4 Skoulides (Macadam)

3.4.1 Victim's sister alleged that her brother had been framed for a murder committed by the Security Forces.

3.4.2 No evidence to substantiate this claim.

3.4.3 File closed.

3.5 Nelson Sithole (Macadam)

Closed – no evidence as to perpetrators.

3.6 Pro Jack (Macadam)

Closed – no reliable evidence as to perpetrators.

3.7 AM Zulu (Macadam)

No admissible evidence arising from TRC.

3.8 Bult (Macadam)

Offence not serious – assault common.

3.9 Castro Khumalo (Macadam)

Matter was referred to Missing Persons' Task Team.

3.10 Winnie Mandela (Macadam)

No reliable evidence.

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3.11 Ermelo Black Cats (Macadam)

No reliable evidence to prosecute IFP members in Mpumalanga linked to this incident.

3.12 Chadwick (Macadam)

Extradition request withdrawn because of a lack of evidence.

3.13 Anton Lubowski (Macadam)

No evidence.

3.14 Ciskei *coup d'etat* (Macadam)

No evidence.

3.15 General Basie Smit (Macadam)

No evidence.

3.16 *S v Bongani Wana* (Mhaga)

3.16.1 This matter relates to the murder of Zolile Sangoni, Zonwabele Mayapi and an MK cadre Gift Mgibe who were killed by Vlakplaas operatives in 1988 in Umtata.

3.16.2 Mr Wana had applied for amnesty but later withdrew his application.

3.16.3 After a careful perusal of the TRC transcript and consulting with all relevant potential witnesses it became clear that there was no sufficient evidence upon which prosecution of Mr Wana can be instituted.

3.16.4 The matter was then closed.

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3.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

3.17.2 We however informed him that we have no such authority and that TRC committee has disbanded. His activity did not amount to any criminal offence thus we could not even consider it in terms of prosecution guidelines.

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3.18.2 He also claimed that in 1991 members of the Counter Insurgency Unit shot at him

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3.19.2 Apart from lack of substance in his allegations the NPA does not have jurisdiction in crime committed in Swaziland. He could not indicate to us his interest in the matter when requested to do so.

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3.20.3 The PCLU could not find any records of the inquest and the police in Greytown police station could not assist us as they could not find any records of Thabo though they remember that he was indeed detained there. The PCLU therefore decided to close the file as there was no further action contemplated

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3.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.

3.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.

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3.22 Smit murders (Dr Pretorius)

3.22.1 Perpetrators all deceased except one suspect who apparently lives in Australia.

3.22.2 Insufficient evidence to apply for extradition.

3.22.3 Matter closed.

3.23 Refusal of amnesty to the President and other high-ranking ANC officials

No evidence that specific crimes had been committed, which attracted personal criminal liability could be found. Consequently, the case was closed.

3.24 IFP Hit Squads (allegations of Luthuli Mbambo and Mkhize)

No reliable evidence upon which to overturn the decision of the DPP: KZN not to prosecute.

3.25 Bombing of Early Learning Centre and other Western Cape CCB activities (Macadam)

The perpetrators were all granted indemnity in terms of the Indemnity Act or in terms of section 204 of the *Criminal Procedure Act, 1977 (Act 51 of 1977)*.

3.26 Plus-minus 80 cases against members of the Liberation Movement (Ackermann)

All these cases were investigated by SAPS and were all closed.

4. POTENTIAL PROSECUTIONS IDENTIFIED BY PCLU

4.1 *S v Otto & 2 Others* (poisoning of Rev. Chikane) (Ackermann)

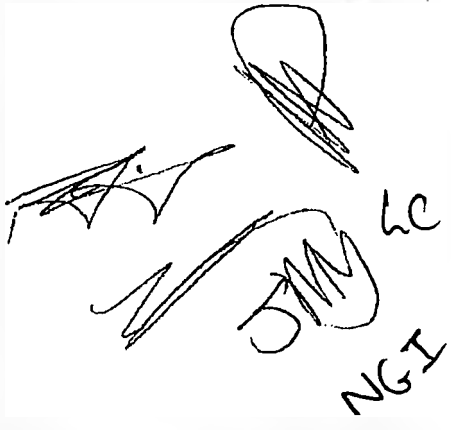
4.1.1 Indictment already drafted in 2004 – prosecution was put on hold pending approval of guidelines.

4.1.2 In February 2006, NDPP authorized prosecution.

4.1.3 In terms of the guidelines, representations were received from the accused which were considered by the NDPP.

4.1.4 On 19 September 2006, Ackermann was directed to proceed with the prosecution against the accused.

4.1.5 Beginning of October 2006, it was decided to put prosecution on hold, pending the obtaining of a legal opinion on whether the accused have received indemnity or not in terms of the Indemnity Act, 1990.



4.2 Pebco 3 (Ackermann)

4.2.1 In February 2004, the three accused were charged in the High Court on three counts of kidnapping and murder.

4.2.2 The matter is currently on review.

4.2.3 Next court appearance of accused is August 2007.

4.3 Cradock 4 (Ackermann)

4.3.1 Potential prosecution.

4.3.2 Legal obstacles.

4.3.3 Extensive investigations required.

4.4 *S v Botha and Others* (kidnapping of Ntombi Kubheka) (Ackermann)

4.4.1 Priscilla Ntombi Kubheka was an MK operative who lived in KwaMashu township in Durban.

4.4.2 She was kidnapped by Askaris, interrogated, tortured and subsequently killed by members of the Security Branch C1 Unit in 1987.

4.4.3 Seven members applied for amnesty for kidnapping, killing and disposing of the body of Kubheka. Only Baker and Radebe received amnesty while Botha, Du Preez, Van der Merwe and Visagie were refused. Docket in possession of PCLU.

4.5 S *v Coetzee and Others* (Nokuthula Simelane Kidnapping) (Ackermann)

4.5.1 Nokuthula Simelane was an underground MK operative acting as a courier and had been a major communication link between an MK base in Swaziland and SA.

4.5.2 She disappeared in 1983 after being sent on a mission in SA .

4.5.3 Docket in possession of PCLU.

4.6 Cosas Four (Ackermann)

4.6.1 The matter relates to the killing of Eustice Bimbo Madikela, Ntshingo Mataboge, Fanyana Nhlapo and attempted killing of Zandisile Musi (collectively referred to as the Cosas Four) in an explosion at Krugersdorp on or about 15 February 1982..

4.6.2 The four officers and an Askari who were involved in the incident applied for amnesty and were refused.

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4.6.3 The PCLU is not in possession of the docket.

4.7 Murder of Askari Strongman Sambo

The matter had been identified as a potential prosecution case but a decision has already been made by the DPP in Pretoria not to prosecute.

4.8 Matter of SAP General Engelbrecht

The matter had also been identified for prosecution but a decision was made by the DPP in Pretoria not to prosecute General Engelbrecht.

4.9 Death of George Mashele and Lilian Magosha (Mhaga)

4.9.1 This office received representation from Joseph Yende who claims to be the son of Lillian and brother of George.

4.9.2 George and his mother died during a raid by the SAP at his home in July 1992.

4.9.3 According to the police statements and post-mortem reports, the two died as a result of hand grenade explosion.

4.9.4 There is no evidence to rebut that version but Yende claims that there are witnesses who claim to have seen otherwise.

4.9.5 The PCLU is currently arranging consultations with them to verify these allegations. The family was compensated by the TRC for the incident.

4.10 Nicolas Boykie Thlapi (Dissappearance in police custody) (Mhaga)

4.10.1 ANC branch in Klerksdorp submitted a memorandum demanding investigation into the disappearance of Boykie in March 1986 after being arrested by police with other members of Ikakgeng Youth Congress.

4.10.2 The matter is currently investigated by Capt Mathi of Klerksdorp serious and Violent Crimes Unit.

4.11 Lethlapa Mphahlele (Heidelberg Tavern and St James Massacre)

4.11.1 A representation was received by PCLU from Democratic Alliance and the father of Lynn Fourie who was killed during the attack.

4.11.2 A number of APLA cadres involved in the attack applied for and received amnesty after serving sentences. Mr Mphahlele applied for amnesty but later failed to appear before the commission resulting in his application refused in his absence.

4.11.3 As soon as an investigator is appointed for the case a decision will be made on whether

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to prosecute or not.

4.12 Bathandwa Ndondo (Murder by Vlakplaas operatives in 1985) (Ackermann)

4.12.1 Batandwa Ndondo was an MK underground cadre operating in Transkei after his expulsion from the University of Transkei for his political involvement.

4.12.2 He was wanted by the Security police in Transkei and the Vlakplaas operatives and subsequently murdered in 1985. We received a representation from Adv Dumisa Ntsebeza requesting prosecution of the police officer who did not receive amnesty.

4.12.3 A decision had been made by the former NDPP not to prosecute him, we are therefore still considering the request as this will require overturning the previous decision if we decide to prosecute.

4.13 Moss Morudu (kidnapping and murder) 1987

4.13.1 Moss Morudu was a Cosas member in Mamelodi and had been politically active during 1986.

4.13.2 He was alleged to be a member of the underground unit of Umkhonto Wesizwe under the command of Obet Masango.

4.13.3 He disappeared from his home during October 1986 after the Security police had been looking for him in connection with a landmine explosion.

4.13.4 He was kidnapped by three security operatives under the pretence that they were MK cadres taking him to exile for military training. He was never seen again by his family.

4.13.5 The three officers who kidnapped Moss received amnesty for kidnapping and others did not apply for amnesty. As soon as an investigator is appointed a decision will be made on whether to prosecute or not.

4.14 Kidnapping and murder of Betty Boom, Mashiya and Selamane

The perpetrators were refused amnesty by the TRC.

4.15 Kidnapping and murder of Mbulelo Ngono

The perpetrators were refused amnesty by the TRC

4.16 Gaberone raid

The perpetrators were refused amnesty by the TRC

4.17 Maseru raid (General Johan van der Merwe implicated)

The perpetrators were refused amnesty by the TRC

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4.18 Samora Machel (Dr Pretorius)

This matter was reopened in 2005.

4.19 Philip Powell (Macadam/Ackermann)

4.19.1 NDPP directed that the PCLU apply for the extradition of Powell.

4.19.2 However, accused indicated that he wished to make representations.

4.19.3 Representations are awaited.

4.20 Victoria Mxenge (Macadam)

Allegations of an amnesty applicant must be investigated.

4.21 George Wauschope (Macadam)

4.21.1 The accused is a former leader of AZAPO. He was indicted to stand trial in the Johannesburg High Court in 1989 on charges of murder and attempted murder.

4.21.2 He absconded and took up exile in Zimbabwe.

4.21.3 The TRC rejected his application for amnesty, because he denied that he had admitted any crime.

4.21.4 In 2003, representations were made on his behalf to Minister Maduna to withdraw the charges.

4.21.5 The DSO evaluated the case in order to enable the Minister to respond.

4.21.6 The victims, who were also the eyewitnesses, were traced and they confirmed their allegations against the accused and also requested that he be prosecuted.

4.21.7 On their version, it would appear that the accused shot the deceased in the mistaken belief that he was a member of COSAS and in the process wounded an innocent bystander.

4.21.8 The former NDPP and the Minister decided that the prosecution should proceed.

4.21.9 The case was referred to the DPP: Johannesburg, who has in turn requested SAPS to conduct investigations.

4.21.10 These investigations are in progress.

4.22 Eugéne de Kock

4.22.1 De Kock's legal representative has indicated that he has laid a wide ranging number of charges with SAPS relating to matters which were not put before the TRC or in respect of which false testimony was presented to the TRC.

4.22.2 These allegations must be considered insofar as they are relevant to the TRC processes.

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RCM 13

ANNEXURE "B"

REPUBLIC OF SOUTH AFRICA

INDEMNITY BILL

(Second Draft)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2003]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VRYWARING

(Tweede Konsep)

(MINISTER VIR JUSTISIE EN STAATKUNIDGE ONTWIKKELING)

[W - 2003]

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BILL

To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the period from 1 March 1960 to the cut-off date; for the said purpose to establish a Committee on Indemnity to consider and investigate applications for indemnity and to make recommendations to the President; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provided for a law to be adopted by Parliament in terms of which amnesty should be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

AND SINCE that law was adopted and the mechanisms and procedures established by that law have run their course and have been concluded;

AND SINCE there remains a need for reconciliation and reconstruction as contemplated in that Constitution;

RCM 14

TERMS OF REFERECE OF THE AMNESTY TASK TEAM

The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past.

2. The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflict of the past.

3. Bearing the above-mentioned guidelines in mind, whether legislative enactments are required.

4. Whether any of the two Bills that have already been formulated can be proceeded with, bearing in mind the views of our intelligence agencies.

DRAFT

Leon Robinson
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RCM 15

AMNESTY TASK TEAM

FURTHER REPORT

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FURTHER REPORT: AMNESTY TASK TEAM

1. **Background Information**

1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.

1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:

(a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.

(b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.

(c) The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.

(d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.

(e) Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court.

(f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

2. **Discussion**

2.1 **The establishment of a Departmental Task Team**

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

2.2 **Ad paragraph 1.2(a): The involvement of existing structures**

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

2.3 **Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution**

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

2.4 **Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee**

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

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between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

2.5 **Ad paragraph 2.1(d): National interest should be the paramount objective**

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

2.6 **Ad paragraph 2.1(e): The involvement of the International Criminal Court**

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

2.7 **Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work**

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is proposed that the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.

RCM 16

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
9/2/07
NATIONAL PROSECUTING AUTHORITY

COPY

RCM 17



The National Prosecuting Authority of South Africa
Igunya Jikelele Labeshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;

(ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;

(iv) such agreements should be in accordance with the NPA's prosecution mandate; and

(v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*).[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU **"shall be assisted in the execution of its duties"** by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C"** and **"D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken.".
- "In my view a comprehensive report...should be discussed by the Directors-General".

- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "**normal legal processes**" and "**prosecuting mandate**" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

Report for the Office of the National Director of Public Prosecutions

Since the meeting with the above office in early February 1999, the Commission has begun a process of establishing mechanisms for identifying potential cases. The following is a report on progress thus far.

A: Categories of violations

In discussing possible prosecutions, we have identified a range of categories and/or issues around which we believe prosecutions can be considered. We would recommend that there be some discussion around these categories to determine viability as well as prioritisation.

1. **Torture:**
   Much of the Commission's data on torture is to be found in HRV statements. However, the 'private' nature of torture and absence of witnesses frequently makes corroboration difficult. Bearing this in mind, the Commission has begun to draw up an initial list of all security force members implicated in torturing more than three victims. This list is extensive and includes many rural cases.

   Another possible approach is to look at amnesty applications and hearings where torture was conceded and to identify the names of co-perpetrators who have not applied for amnesty. Such a list could then be checked against our HRV statements for further evidence. This figure would considerably reduce the potential number of cases. It would however be more difficult to extract as few security force members applied specifically for torture. Rather, evidence of torture often only emerges during amnesty hearings and is thus embedded in transcripts rather than on the TRC database.

2. **Post-Caprivi hitsquads:**
   The Commission has a fairly rich seam of data and information on this category. It is also one which we believe would be relatively easy to proceed on immediately given that at least one case was previously prepared by the ITU but not prosecuted [also see KZN report].

3. **Cases involving a cover-up by the security forces:**
   There are a number of potential cases in KZN including the cover-up by senior policemen of the Trust Feeds massacre. Another potential case would be the cover up of the Ribeiro killings by senior military personnel, but this may already be an AG case.

4. **Destruction of Documents**
   The Commission conducted a lengthy enquiry and investigation, assisted by the National Archives and the Human Rights Commission, into the destruction of literally scores of tons of documentation relating to state security in the early 1990s. Much of this destruction, authorised by the former government and overseen by the National Intelligence Service, clearly constituted unlawful destruction. In the course of this investigation, much documentation was collected and an overall report was drawn up, as well as comprehensive reports dealing with the SAP, the SADF and the NIS. Verne

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Harris of the National Archives was centrally involved in this investigation and would be prepared to provide assistance.

5. **Gun-running**
The Commission conducted an investigation into gun-running and received several amnesty applications in this regard. While the investigation was inconclusive, a comprehensive report and other documentation is available. This area is seen to be significant in its capacity to begin to unravel networks involved in fomenting violence in the 1990s.

6. **Assassinations**
The Commission has received amnesty applications in respect of several of the high profile assassinations. Not all implicated persons applied in all of these cases and thus possible prosecutions could arise. In other cases such as the assassination of Joe Gqabi in Zimbabwe and Victoria Mxenge, no amnesty applications were received. We are currently assembling information on the Gqabi case.

7. **Winnie Madikizela-Mandela**
Extensive documentation has been collected around Mrs Madikizela-Mandela and the MUFC and a comprehensive investigative report was compiled. [We need to establish whether this is currently being pursued by the AG's office]

8. **Samora Machel**
Also a possible AG matter.

9. **Target identification**
The Commission investigated the process whereby the security forces identified targets the purpose of which included, inter alia, physical elimination. This included a range of structures, sometimes involving more than one arm of the security forces/ intelligence structures. Such evidence is primarily contained in amnesty applications and section 29 hearings. While there was insufficient time to conclude this investigation, there is evidence regarding the establishment in the mid-1980s of a target identification centre within, firstly military intelligence and subsequently the project section of Special Forces.

However, much of the evidence given to the TRC, while acknowledging the existence and purpose of such target identification groups, refers to planned but subsequently cancelled operations. In other words the gaps in our evidence are in directly linking specific processes of target identification with specific killings. One possible exception would be cross-border raids which are discussed below.

10. **Cross-border raids**
While difficulties clearly exist in bringing charges for the execution of cross-border activities, there are no doubt possibilities of conspiracy to murder charges relating to the planning of such operations, which invariably took place on SA soil.

The Commission did receive several amnesty applications relating to cross border activities from former Security Branch members, but virtually none from the SADF, although SADF members are cited in a number of the Security Branch applications.

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Clearly, the possibilities of extradition to a large degree influenced the willingness to disclose involvement in such activities and would presumably be a factor to be considered.

B: Other Regional Cases

In addition to the above, we have asked personnel in regions to identify possible cases for prosecution. This process is logistically difficult owing to the fact that regional offices have closed and documentation has been transferred to the national office in Cape Town. Further, regional staff except for those servicing the Amnesty Committee are no longer in the employ of the Commission. Despite this, we have received some feedback:

1. **KZN**
The KZN region has begun to identify cases where people who did not apply for amnesty have been implicated. The KZN region also has a number of HRV statements implicating perpetrators where such information was not previously disclosed during investigations due to perceived police partiality.

This is a mammoth task and needs to weighed up in relation to:

- The likely unwillingness, given the current climate in KZN, of amnesty applicants to testify against their leadership
- The capacity of Chris McAdam's office to deal with new cases considering his involvement in Richmond;
- The mooted Commission of Inquiry into political violence in KZN.

Nonetheless, some preliminary work has been done and a report is attached.

2. **Eastern Cape**
A former researcher in this region has been approached to identify potential cases. Her report is attached and deals primarily with cases in East London and the western part of the Eastern Cape. A further report is awaited dealing with the eastern side of the Eastern Cape (primarily Ciskei and Transkei regions).

It should be noted that the list of cases drawn up here differs from the KZN one in the sense that it takes as its starting point HRV statements where specific concerns were raised by deponents regarding the failure of the criminal justice system in investigating and successfully prosecuting such cases. Given pressure on resources, a policy of low level corroboration was adopted for most HRV cases and thus most of such cases were not comprehensively investigated by the Commission. This would mean that such cases would still require extensive ground work and investigation. However, such cases may well be important in ensuring that justice is seen to be done in cases that are not well known and do not involve profiled people.

There is a need for some discussion around such issues before proceeding as a different and lengthier modus operandi is required to identify such cases more broadly.

3. **Western Cape**

A very preliminary list is attached.

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4. **Gauteng**

Former and current investigators have similarly been approached and a report is awaited.

5. **Free State**

The former Orange Free State fell under the Commission's KZN office. There are a number of potential cases here, but given the pressure on time, KZN personnel have requested assurance that some capacity exists (or will be established) to deal with such cases before they proceed.

C: Section 30 notices and S29 investigative enquiries

A preliminary spreadsheet of section 30 notices sent out is available. This list only reflects Section 30 notices sent out during the preparation of the TRC Report and does not include all S30 notices arising from individual HRV statements or those sent out by the Amnesty Committee following an amnesty hearing.

Also available is a table of all Section 29 investigative enquiries that were held, reflecting person, issue and whether amnesty applications were received.

D: Analysis of indemnity and amnesty applicants

We are also currently engaged in a process of identifying whether perpetrators implicated either via HRV statements or in amnesty applications previously applied for indemnity. In this regard our IT department has devised a programme whereby lists of those on the various indemnity lists in the 1990 to 1994 period have been correlated with amnesty data. This spreadsheet is currently being analysed. The IT department are engaged in a similar exercise in relation to HRV data.

E: Further issues

1. It needs to be emphasised that the Commission has very limited resources at present. The Commission itself is in suspension; the remaining HRV component consists of one Commissioner and one researcher; regional offices have closed and documentation transferred to the national office; and the Amnesty Committee is hard-pressed to complete the amnesty process on schedule.

   Further, it needs to be understood that our HRV material is currently archived according to victims and not perpetrators. Similarly, amnesty material is filed according to applicant and information regarding co-perpetrators is thus potentially scattered across numerous files or embedded in transcripts of amnesty hearings. While our database provides an initial tool for identifying cases to which individual perpetrators may be linked, the task of retrieving all statements and documentation is a lengthy and painstaking one.

   Given this, it is suggested that a fairly limited focus is worked out that would enable existing staff to begin feeding cases/ material through, without engaging in what would virtually mean copying the entire TRC archive.

   We further propose that in determining a more limited focus, the resources of the TRC Task of the NDPP is taken into consideration. Thus, for example, if the current capacity in KZN is already stretched, it is questionable as to how productive it would be to involve

LC NGT

already over-burdened TRC staff in assembling numerous dossiers around KZN cases.

We recommend that a draft plan or framework that prioritises specific categories or regions is drawn up.

2. In view of the extremely limited resources, a line of communication needs to be developed that prevents potential duplication of tasks. Thus for instance, the request forwarded to Advocate Coetzee on 4 March 1999 in many respects duplicates work arising from the meeting in Cape Town.

3. We still urgently require a list of cases already being pursued by the various AG offices.

7 March 1999

LC NGT

Potential Prosecutions: KZN Region

Please note this is just the beginning of a draft list, and the names and incidents are examples

A: Security Branch

1) **Dreyer, JG**
Abduction of Ndluli and Cleophas Ndlovu from Swaziland 1975
Torture of Michael Gumede and Harry Gwala in PMB in 1975 - see amnesty of JD Potgieter
[See section 30 notices]

2) **Myeza, "Spuiker" Vusi Ismael**
Commander of the group of askaris under Andy Taylor.
Killing of Khambule in Kwamashu on 28 May 1982 at shopping centre.
See section 29 hearing

3) ***Buchner, JAC**
1976 Swaziland raid
Affidavit of askari Mdande re Mozambique raid
Early 1981 abduction of Joe Pillay in Swaziland by askaris (see amnesty applications of Dirk Coetzee, Andy Taylor, David Tshikilange)
See also section 30 notices for cross border raids

4) **Viktor, JJ**
1980 attempt to murder Chris Hani in Lesotho (amnesty of Eben Frederick Coetzee)

5) **Robertshaw, CAP**
Abduction of (KZN/FN/176/DN) Sipho Themba Frederick Msomi in March 1984
Torture of Rieaz (Mo) Shaik in June 1985. Yunis Shaik detained and tortured. Brandt Visagie (AM5169/97), Christo Nel (AM6609/97). Police involved in interrogation and torture of Mo were Lt Botha, Lt Robertshaw, Col Coetzee.
29 June 85 - Shirish Soni detained ISA s29 - Father granted restraining order. Lt CAP Robertshaw, Visagie and Col Baker mentioned in affidavits.
24 May 88 - Ficksberg, MK member Steve Bogashu killed, Robertshaw implicated - amnesty and witness statements

6) **Moses Nzimande**
Vlakplaas askari
June 1985 - Ingwavuma, Jameson Ngoloyi Mngomezulu (KZN/NNN/340/EC) Abduction and killing of MK commander from Swaziland. See amnesty applications of Gert Schoon and Vlakplaas members, Van Dyk (AM5013/97) GC Beeslaar, Mngadi, BA Nofomela, De Kock, askari Thapelo Johannes Mbelo, Johannes Koole, and Steve Bosch.

7) **Murder of Victoria Mxenge**
Murder of civil rights lawyer Victoria Mxenge on 1 August 1985. According to a statement by Jimmy Mbane, an askari Thabiso Sphamla, Eric Maluleke, Peggy Hadebe and Samuel went to Durban by car, where they murdered Victoria Mxenge. He alleges that they were paid on their return for the operation. Thabiso told this to Mbane when he was drunk. Also see Pat Hlongwane statement on Malinga in detention in exile and his final demise. See ANC second submission re SB Ntombela

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8) **HJP Botha**
May 1987 murder of Ntombi Khubeka. See amnesty applications.

9) **Const Elliot Mfanozi "Vusi" Ninela**
Murder of MK member Njakazi in Warwick Ave, Durban - see amnesties of Tjaart Fourie and Cloete. MK Mandla and Col Wearing also implicated.

10) **Sgt Mbongonkosi Simon Makhaye**
Involved in the kidnapping of Blessing Ninelo; murder of a person armed with a grenade in Sobantu in 1990; killing of Vula operative Shabalala. Also worked in Port Shepstone and Tongaat - allegedly tasked to kill informant for speaking to TRC - subpoenaed to TRC, but revealed nothing. Now working at Loop Street Police Station.

B: Warlords and Traditional Leaders

1) **South Coast**
Chief Mavundla,
Sgoloza Xolo (deceased but sons still involved in violence)
*Chief Khawula - Hlanzeni area of Umgababa

2) **Magabeni**
Mkhize
Chief Patisizwe Luthuli

3) **Amanzimtoti**
See Vusi Hlengwa (IFP) amnesty

4) **Durban and Surrounds**

Ndwedwe/Sonkombo
Phineas Mfayela and son,
Dladla (AM6599/97),
RB Hlope - Inkatha chairperson for the area (AM4504/96);
Petros Mbongeni Ndlovu

Lindelani
Thomas Mandla Shabalala (currently involved in violence) several amnesties and HRV statements implicating him

Umlazi
SE Shozi (IFP)

Chesterville
Mpanza
Nala, J - SPU training with Vlakplaas askaris

5) **North Coast**

Mandeni/Sundumbili
Owen Nzama (KZP station commander – check amnesties of Caprivi Trainees)
*Chief Mathaba
Mr Cele

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Mrs Mbuyazi (Israel Hlongwane)

6) **Ulundi**
Xesibe (relating to Caprivi, Mandleni-Matleng)

7) **Midlands**

Pmb
Velaphi Ndlovu (IFP) Mweli amnesty
Abdul Awetha (IFP) Mweli amnesty

Greytown
Psychology Ndlovu (IFP)

Richmond
Paulos Vezi (IFP)
Mzimela (IFP)
Meeding (SAP)

Ixopo
Chief Robert Mkhize and family (see Mbhele amnesty)
Chief Xhawulengeni Mkhize (deceased but sons still involved in violence in Highflats area)

8) **Nqutu**
Themba Khoza - attack on Chief Molefe's house (check others involved)

C: ANC perpetrators

1. **Bodyguards of Zweli Mkhize**
Amnesty applicants Tobias Ronnie Mbanjwa (AM5967/97) and Sakhamuzi Horale Elvis Ndaba (AM6387/97) were denied amnesty for a killing in Dambuza (PMB)

2. **Killing of IFP leaders**
The Commission undertook an investigation into the alleged killing of 400 IFP leaders. A comprehensive report and extensive documentation and/or references is available.

D: Section 30 notices

Section 30 notices were sent to the following people:

1) **Operation Marion**
Bhengu, S (IFP)
Blaauw, HM Col (SADF)
Botha, L Col (SAP)
Botha, PW (NP)
*Buthelezi, MG Dr (IFP)
Cloete, A Sgt (SADF)
Groenewald, PJ Gen (SADF)
Jacobs, GM Lt-Col (SADF)
Khumalo, MZ (IFP)
Langeni, L Capt (KZP)

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Malan, MA Gen (SADF)
Mathe, SM Gen (KZP)
Mncwango, M (IFP)
More, JR Col (SADF)
Nieuwoudt, JA Col (SADF)
Opperman, J Capt (SADF)
Putter, A Vice-Admiral (SADF)
Smith, SJJ Gen (SAP)
Van Den Berg, MA Col (SADF)
Van der Merwe, J Gen (SAP)
Van Niekerk, CJ Col (SADF)
Van Tonder, CJ Gen (SADF)

2) **Esikhawini - Caprivi**
Biyela, BB (IFP)
*Buthelezi, MG Dr (IFP)
Buthelezi, T (IFP)
Dlamini, DD (amnesty)
Hlongwane, IN (amnesty)
*Langeni, L Capt (KZP)
Luthuli, DW (IFP) (amnesty)
*Khumalo, MZ (IFP)
Mathaba, K (Chief – IFP)
Mathenjwa, N (IFP)
Mbambo, RN (KZP) (amnesty)
Mbuyazi, L Mrs (IFP)
Mbuyazi, S (IFP)
Mkhize, R (IFP)
Mkhize, BG (KZP)
Mchunu, Major (KZP)
Mthethwa, CJ Rev (IFP)
Mthethwa, J (IFP)
Mzimela, CPJ Brig (KZP)
Mzimela, Robert (IFP)
Ndlovu, P (KZP)
Ntombela, D (IFP)
Nyawose, D
Zulu, Prince G (IFP)

3) **Trust Feeds Massacre**
Gabela, J (Inkatha and police agent - refused indemnity as a state witness)
Marx, CP Gen (SAP)
Van den Heever, J Supt (SAP)
Van Zyl, JPR Major (SAP)
Should also include KZP responsible for hiding police suspects at Mlaba Camp - Langeni
Should also include *Chief Khawula for hiding of special constables

4) **The 7 Days War**
Meyer, Daan Director (SAP)
Should also include Ntombela

5) **Mlaba Camp**
Armstrong, S (IFP)
*Buthelezi, MG Dr (IFP)

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Jamile, Hlankaniphani (check – should be under Khuzwayo murder)
Jamile, BS (IFP)
Langeni, L Major (KZP)
Mathe, SS Gen (KZP)
*Mthethwa, C (IFP – Minister of Justice)
Nyawose, D
Powell, P (IFP)

6) **Khuzwayo murder - Clermont**
Jamile, H
Jamile, BS
Khumalo, MZ

* Denotes people mentioned in more than one category

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POTENTIAL EASTERN CAPE CASES

Method of identifying cases:

All I have done is conduct a survey of the synopses of the Public HRV Hearings in the Western part of the Eastern Cape, including the first hearing in East London. In many of these cases the perpetrators were identified but were not brought to justice, or the cases were a travesty of justice. In many cases the victims' families specifically requested that the case be investigated and that the perpetrators be brought to justice. Someone could do a full database search but I don't have access now – so have just looked at cases with which I am familiar.

There are other 'big' cases which could be the subject of criminal prosecution – for example, the Uitenhage amaAfrika conflict – but investigators would need to look at the evidence in order to decide. In the testimony the individual perpetrators are not named.

These are cases where named perpetrators have not applied for amnesty or have been denied amnesty, or where perpetrator has not been named but there is evidence of who in the generic sense (eg security police) was the perpetrator. They are also cases where the family have specifically requested further legal action, investigation, or that the perpetrator be 'brought to justice'.

I have identified certain types of case which should be followed up, and then given examples of each type of case. This is by no means an exhaustive list of individual cases within that category. I have also given the synopsis of the case from the Hearing Summaries – ie this is not drawn from the database and needs to be checked against the database for corroboration, investigation, whether perpetrators are identified etc. The hearing at which the case was heard is given in brackets at the end of each example.

a) Cases of death in detention/police custody:

Sithembele Zokwe

Testimony was given by the mother of the victim. **Nonceba Beauty Zokwe,** and by his neice, **Mampi Zokwe.** Sithembele was killed by the Transkei Police on **12 January 1988** at **Nqamakwe, Transkei.** Sithembele was a member of Umkhonto we Sizwe. In 1987 he was abducted and shot by Transkei police, and left for dead. He survived, and in January 1988 the Transkei police arrested him, took him to his home at Nqamakwe and shot him repeatedly. They then took his body and when his mother finally found where the corpse was being held, she found "a big hole on the side of his head and there were papers and plastics protruding from the hole." Two Transkei policemen were arrested and charged with the murder of Sithembele Zokwe. The state claimed that they had planted hand-grenades near his body, to make it appear that he had died in an armed confrontation with police. The two police officers escaped from custody two days before they were due to stand trial in Umtata in November 1988, and they are still free. His mother wants the perpetrators who killed him to be brought to justice. She also wants the identity of the perpetrators who took out his brain, and the tape-recording of his funeral which the police made. She is also asking for some financial assistance. (EL Hearings)

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Mzukisi Melvin Nobadula

Testimony was given by the brother of the victim, **Mpumelelo Benjamin Nobadula,** about the **death in detention** of his brother in **Port Elizabeth** in **December 1977.** Mpumelelo was a student activist. His brother, Mzukusi, was not an activist. Mzukisi was arrested at 3 or 4 am at his New Brighton home, and appeared in the Grahamstown Supreme Court on a case against Thozamile Botha and two others. He refuted a statement he had been forced to sign implicating Botha. The accused were released, but Mzukisi was redetained. The lawyer was informed that he had died in police custody. Mpumelelo identified his brother's body in the mortuary, and saw that the body had scars, burn marks and blood on it. However, at the post-mortem Dr Laing (the district surgeon) said he had died of natural causes. Mpumelelo believes that his brother was detained and tortured in his place, and died in the same way as Steve Biko and Lungile Tabalaza. He is requesting that the Commission investigate his brother's death, and put up a monument to those who died - like the monument to the people who died during the sinking of the *Mendi.* (Second PE hearings)

Popi Michael Vukile Magwaca

Testimony was given by the wife of the victim, **Amanda Eunice Magwaca**, about the **disappearance in police custody** of her husband in Port Elizabeth in **1986.** Her husband was a member of the UDF street committee in Kwazakele township. He was detained by security police at home with four other 'comrades' on the morning of 20 June 1986. Her lawyer was informed that her husband had been held at Bethelsdorp Police Station, but that he had escaped from custody.

Wonga Billie, one of those detained with Popi Magwaca, testified that on 23 or 24 June 1986 Popi was removed from his cell at Bethelsdorp police station by security policemen. This was the last time they saw him.

Mrs Magwaca is requesting an investigation into the disappearance in police custody of her husband. She wants his remains so that she can give him a proper burial. She is also requesting support for her children from the state, as she believes that her husband died in the hands of the state.
(Second PE Hearings)

Lungile Tabalaza

Testimony was given by the mother of the victim, **Mrs Priscilla Ntokazi Tabalaza.** Her son died in detention in the custody of the South African security police at the Sanlam buildings in **Port Elizabeth** on **10 July 1978.** An inquest was held into his death, but the court did not find any member of the police responsible. Mrs Tabalaza wants the commission to investigate the circumstances surrounding her son's death, and establish how he died and who was responsible. (EL Hearings)

Mapetla Frank Mohapi

Testimony was given by witness **Nohle Mohapi**, wife of Maptela Mohapi. Mapetla was regional organiser of the **South African Students Organisation** and a member of the **Black Peoples Convention.** Mapetla Mohapi died in detention at Kei Road police station in **East London** in **1976.** Mrs Mohapi was told by the police that Mapetla had hanged himself with his jeans. However, a 'suicide note' from Mapetla

was apparently not in his handwriting. Mapetla had on previous occassions been detained, interrogated and severely tortured, and served with a banning order. After the death of Mapetla, Nohle was detained and subjected to torture, threats and severe ill-treatement, and was served with a banning order. Mrs Mohapi requests the Commission to find out who was responsible for her husbands' death, so that his children can be given an explanation and the hurt caused by his death can be healed. (EL Hearings)

Saul Kholisile Ndzumo

Testimony was given by the son of the victim, **Sithilufu Ndzumo.** His father, Saul Ndzumo, died in policy custody at **Idutywa, Transkei in 1980.** Saul Ndzumo was a Minister of Interior and Social Welfare in the Transkei Government. He was arrested at home by members of the Transkei police force in 1980, and died in custody at the Idutywa police station from 'excessive bleeding' and a 'clot on the brain'. The family heard over the radio that he had died in police custody, and a lawyer instructed to represent the family was arrested by Transkei police and deported. A post-mortem was conducted without the knowledge and presence of the family. The family is requesting the Commission to investigate the death of Saul Ndzumo, and for the perpetrators to be brought to justice. (EL Hearings)

Xoliswa Ethel Mboya

Mrs Mboya testified that her brother, John Vuyisile Mboya, died in police custody in Cradock in 1992. He had removed the South African flag and tried to put an ANC flag on the top of the police offices in Cradock during a march into town. After being arrested he was taken by police to offices where he was shot for allegedly resisting arrest. He was shot inside the offices and there were no witnesses except for police. There was no prosecution of those responsible. (Cradock hearings)

Boniswa Elsie Khethwa

Mrs Khethwa testified that her son, Simphiwe Khethwa, was assaulted and shot dead by police at Venterstad in 1986. He was 13 years old. The police had come to her house looking for the older brothers who were activists, and Simphiwe had run away. The police chased him and he did not return. It is not clear whether he died of a broken neck or a gunshot wound. Mrs Khethwa's father was forced to watch the post-mortem, and told that his grandson deserved to die. The death certificate was taken by police and never returned. A charge against the police was laid but never came to anything.

Mrs Khethwa is requesting an investigation into the case, including what the findings of the post-mortem were, and what happened to the death certificate. She is also requesting a tombstone for her son and assistance with her own medical expenses. (Cradock hearings)

b) Cases involving public order policing

NB there were many such cases testified to at the Grahamstown HRV hearings - each case needs to be checked as to whether the IU found the relevant documents, and whether the case was 'closed'. Louise Flannagan notes that there were cases where the IU found the inquest record and there was clearly evidence indicating that the perpetrator should be prosecuted - but that such prosecutions often did not happen.

Bully Aliston Kohl

Testimony was given by the victim's parents, **Mr Robert and Mrs Cecilia Kohl**, and also by his friend and witness to his shooting, **Tyrone Austin.** Bully Kohl was fatally wounded when shot by a policeman during a funeral in **Grahamstown** on **12 May 1985.** He was a member of the Students Representative Council at the Mary Waters High School, and was also a member of the Grahamstown Youth Movement. He attended the funeral of a friend in Joza township. The police acted provocatively at the funeral, and fired on the mourners after diverting their route, hitting Bully Kohl. His friend Tyrone Austin tried to get him to hospital quickly, but was prevented from doing so by the police - firstly they would not let him out of the house where he had carried Bully, to find a car; secondly, once he had a car, he was stopped at a roadblock for a time. Bully died on the way to the hospital. Subsequently, when Tyrone was detained under the State of Emergency regulations, the policeman who had shot Bully told Tyrone that he had been aiming at Tyrone. When Bully's father went to the police station, he claimed the police were 'holding a party', and that they taunted him about the death of his son. The inquest found nobody responsible for the death of Bully Kohl. His father was told after a year that the body of his son could be exhumed to identify the origin of the bullets; but he was not willing for this to be done after such a long time. Moreover, the policeman responsible, who is known to them, has since died. However, Bully Kohl's parents would like the matter to be investigated, as well as the death of others in Grahamstown; a girl of fourteen was apparently also shot dead on the same day. (EL Hearings)

Thando Gene Mpambani Ngwila testified about the death of his brother, **Luvuyo Mpambani,** in Uitenhage in 1987. Luvuyo was 15 years old at the time of his death, and a member of the Uitenhage Youth Congress. On **25 August 1987** he was apprehended by men wearing balaclavas and driving a car in KwaNobuhle. He fled and the men chased him, shot him twice in the back, and assaulted him while he was lying on the ground. They prevented his mother from going to him while he was still alive, and turned back an ambulance called to assist. The attack was made jointly by members of ***amaAfrika*** **and municipal policemen**, who are known to the witness and are named in testimony. The witness is requesting that the municipal policeman who shot his brother is brought to justice. He is still a policeman in Uitenhage. (Uitenhage hearings)

William Gilbert

Mr Gilbert testified about the killing of his son, George Oupa Gilbert, in Graaff-Reinet in 1986. His son was 18 years old at the time of his death. Police in 'hippos' were moving around the township, and some policemen came into Mr Gilbert's yard and wanted to break into one of the shacks in the backyard. Oupa prevented a policeman named Hills from breaking the lock of the shack. Mr Gilbert told his son to leave the policeman alone. The policeman then broke into a shack, found nothing inside, and made a comment that "PW Botha had said that policemen should not argue with blacks but should shoot them dead like flies". He left, threatening that he would be back. Later, Oupa was shot by Hills as he was about to enter a neighbour's yard.

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Mr Gilbert took the case up through a lawyer, but the policeman, Hills, was acquitted. Mr Gilbert wants the arrest of those who were acquitted. When asked if he would accept amnesty for Hills, he said "He had no mercy for me then, I have no mercy for him now. After I asked him to leave my house and children alone, he shot my son".

Mr Gilbert is unemployed, ill and waiting for a pension. He is asking for counselling, as well as a tombstone for his son and some form of assistance. (Cradock hearings)

Nombulelo Ethel Msutu

Mrs Msutu testified that her son, COSAS member Mthunzi Pendly Msutu, 21, was shot dead by Constable Nobele in Tantyi location, Grahamstown, on 18 July 1986. After the shooting, police dragged the body to the home of a Councillor where they surrounded the body with stones to give the impression he was involved in an attack on the Councillor's house. The funeral was restricted and disrupted by heavy police presence. At one point the coffin was opened at the graveyard. A court case failed because witnesses would not testify, for fear of their lives. (GT hearings)

Nomalady Nomelumzi Tyuku

Ms Tyuku testified that her brother, Madodana Tyuku, died after he was shot in the spine during a police raid in Nemato township, Port Alfred, on 06 November 1985. The undertaker offered a lump sum to the family if they would accept the death as illness. They refused. A court case was opened and the perpetrator, a constable, was acquitted. (GT hearings).

Melvin Mkwenkwe Ndotshayisa

Notayiti Mavis Ndotshayisa gave evidence about the **killing** of her husband by **municipal police** on **24 September 1985** in **Soweto, Port Elizabeth**. On the night of 24 September, the *amaTshaka* raided their home and demanded 'the boys'. When her husband tried to stop them from assaulting their daughter Norita, one of the policemen shot him in the knee. His wife ran out and heard a second shot. The municipal police then went to report to a 'hippo' where 'white senior officers' were waiting. She went into the house and found her husband with a severe stomach wound. By the time the ambulance arrived he had died. An inquest found nobody responsible for his death. Mrs Ndotshayisa is requesting that the perpetrators be found and brought to justice, and that she be provided with financial support as her husband was the breadwinner. (Uitenhage hearings)

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c) Cases involving homeland security forces/vigilantes (Ciskei and Transkei)

[Check with Louise Flannagan and Abner Jack re further investigation into these cases]

Billy Shiyani

Testimony was given by the victim, **Billy Shiyani**, about the attack on him in **Mdantsane, East London** on **25 December 1988.** Shiyani was an ANC activist and trade unionist, formerly chairman of COSATU in East London. He and a group of other people in two cars were ambushed as they were parked outside a bottle-store, and fired on with automatic rifles. Two people were killed in the attack; Shiyani's girlfriend, Nori Njoli, had her head blown away, and Ms Virginia Panziso was also killed. Shiyani, who was sitting next to Ms Njoli, was shot in the spine and lost consciousness trying to get help. He recovered in hospital. The Ciskei police claimed that they had investigated the matter but that there was not enough evidence to prosecute anyone. Shiyani is requesting the Commission to investigate the matter and find out who was responsible for the killings, as he believes it was a politically-motivated attack. One of the other men who was with them at the time, Jeff Wabena, was subsequently assassinated. (EL Hearings)

Andile Rweqana

Testimony was given by the brother of the victim, **Mxolisi Rweqana,** and by his close friend and witness to his death, **Mzwaxolo Matoto Nano.** Andile Rweqana was an activist who had been arrested recently for distributing pamphlets about June 16. He was sleeping at his friend Mzwaxolo Nano's house at **Phakamisa Location, East London** on **17 July 1987** when it was surrounded by Ciskei police and soldiers of the Ciskei Defence Force. They fired on the house in the middle of the night. Andile was shot at close range through the window of the bathroom, and his body removed by the police. Mr Nano was forced into the boot of a car, then detained for a week, threatened, but released without charge. On his return home, he found his room had been burnt out. The perpetrators of the murder are known and are still at large, and the family are requesting that they be brought to justice. (EL Hearings)

Sister Janet Mahonga

Testimony was given by a friend and witness to the events, **Mike Kota.** He testified that Sister Janet Mahonga, a community leader and ANC Women's League activist in **Seymour, Ciskei** died after an attack on her house on **21 October 1992**. Her house was attacked by two men wearing balaclavas, and a petrol bomb was thrown at her chest. She died of burns after five days in hospital. Neighbours who came to help put out the fire in her house were shot at by Ciskei police at the nearby police-station, who taunted them by saying "It serves you right". The sister who had called the ambulance to help Janet Mahonga was also threatened, and subsequently left the area. An inquest found that members of the Ciskei police were responsible for the arson attack on her house, but charges against the policemen were withdrawn due to lack of evidence. The police responsible are known to the community and are still in the police force; Mr Kota is asking the Commission to ensure that they are removed from the police force, as there will be no peace in Seymour while they are still there. In addition, he is requesting that the investigation into the murder and

NGI 4c

arson charges be reopened, and that Sister Mahonga's four children receive some assistance. (EL Hearings)

Mandisa Nongenisile Mbovane

Testimony was given by the victim's father, **Jackson Mbovane.** His home in **Ndakana location, King Williams Town**, was attacked on 10 September 1992 and partially burnt down. He and his wife then left home. When they returned, his children reported that while he was away members of the Ciskei Peace Force had demanded liquor and had assaulted his daughter. He then went to Nolizwe place, where the Peace Force in Ndakana was based, and reported the assault to Chieftainess Nolizwe Sandile. That night, three people came to his home and demanded entry, claiming to be policemen. They then broke a window and fired three shots, after which they fled. One of the shots killed his daughter, Mandisa Mbovane. The matter was reported to the police but up until the present there has not been any progress in the case. He wants the perpetrators to be identified and brought to court if necessary, and he also would like assistance for the education of Mandisa's two children, as he is unemployed. (EL Hearings)

d) Killings by identifiable members of the mass democratic movement/liberation movements

Aubrey Jacobs Fulani (Nokuzola Carol-Anne Fulani - wife) was a policeman who was abducted and **killed** by UDF-aligned 'comrades' in Port Elizabeth in 1985. His wife was also abducted and he was brutally burned in her presence. She wants the commission to investigate the matter and see that the perpetrators, who are known to her, are brought to justice. She also received no compensation at all from the government for the death of her husband. (First PE hearings)

Mattys Stols

Testimony was given by the victim's wife, **Sybil Robin Stols,** about the murder of her husband in **Port Elizabeth** on **3 July 1987.** Thys Stols disappeared on 3 July, having gone out to have a drink. His body was found on 4 July in Veeplaas (Soweto by the Sea) township. His body was burnt beyond recognition, had 24 stab-wounds and was mutilated. He was a mechanic who was apolitical. The police told her that the murder was politically motivated. Eight people were charged but not convicted for the murder. She requested the Commission to investigate why those who were responsible for her husband's death are not imprisoned.
(Second PE hearings)

Mick Fikile Mpehlo

Testimony was given by **Nontuthuzelo Mpehlo**, the widow of Mick Mpehlo who was shot and killed in the street in **Grahamstown** on **27 July 1986.** Mick Mpehlo was a successful businessman who was under suspicion of being an informer who had betrayed Steve Biko, although his wife denies this and claims that he did not even know Biko. When her husband was shot in 1986, their business was being boycotted, and their home had been attacked with petrol bombs. In addition, their drivers and vehicles were attacked and burnt by 'comrades'. Mr Mpehlo approached community leaders at the offices of the United Democratic Front in High Street to try

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and solve these problems and clear his name; however, although a meeting was called, the community leaders did not respond and so his efforts were fruiteless. Her husband was then shot dead outside the home of another person in the area; he was shot from behind while he was talking and joking with others. While she was preparing for the funeral, youths looted their shop, threatened her, pointed guns at her and chanted freedom slogans in front of the house. In addition to the emotional trauma of these events, Mrs Mpehlo was bankrupted by these events. To her knowledge, nobody was tried for the murder, and the police have not given her any information on the matter. She is thus calling for investigation into who was responsible for the killing; she wants an apology from the perpetrators; and she wants some form of compensation for her loss or financial assistance with the education of their children. (EL Hearings)

Ntombizodwe Cynthia Mketshane

Mrs Mketshane testified that her husband, municipal policeman Mthuthuzeli Stweart Nziweni, was stoned to death in Adelaide in July 1986. He had previously been ordered by a group of youth to leave the township and stay in town. His body was buried in Bedford because of threats that a grave in Adelaide would have been desecrated. The Adelaide Magistrate's Court was unable to find the named culprits. (Gtown hearings)

(See also cases from Grahamstown and PE hearings of UDF assaults and killings of AZAPO members in Port Alfred)

Wendy Sizeka Ramathe

Mrs Ramathe gave evidence to the Commission about the **murder** of Nontsikelelo Dlanjwa and the attempted murder of herself by *amabutho* of **Veeplaas in Port Elizabeth** on **29 July 1986**. She and Mrs Dlanjwa were employees of the Municipal Department of Health, Welfare and Pensions. Two petrol bombs were thrown between herself and Mrs Dlanjwa by a young man known to them both. Both women sustained severe burns and Mrs Dlanjwa died after eleven days in hospital. The UDF denied that it was responsible for this attack. Mrs Ramathe was told that the attack was because "we were working with the system". However, she suspects that a 'third force' influenced the youth to attack them, "to make it look as if her work with Molly was not favoured by the comrades" (She was involved with a community project with Molly Blackburn among others). Her sister-in-law, Mrs Mayinga, testified that charges against the youth responsible came to nothing as they were not identified. Mrs Ramathe lost an ear, cannot sit without support, and has no job as a result of the attack. Her house was looted and her furniture taken, but police did not investigate. She is requesting that the Commission bring forward the perpetrators to confess and state why they did what they did. (Uitenhage hearings)

e) Cases of torture.

I think it is going to be extremely difficult to bring charges of torture against the police – but here is an example where a women was tortured with electric shocks and names the perpetrator and his current position. There are many other torture cases but I am not convinced about the possibilities or value of bringing prosecutions against individual policemen – maybe a group action against the head of security

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police/minister of police etc (Vlok?) should be considered? This would need considerable research.

Victoria Nondzuzo Makinana-Vena

Mrs Vena gave evidence to the Commission about her **torture and severe ill-treatment in 1986**. She was an activist of the Uitenhage Women's Organisation. On 1 July 1986 she was detained in **KwaNobuhle, Uitenhage** by security police. Money was taken from her clothing and she was taken to the Uitenhage police station where she was interrogated and tortured. She was given electric shocks to her neck, and threatened and verbally abused by the security police. She was then taken to North End prison where she was held until January 1987 without charge. She became ill in prison because of poor diet and manual labour. She experienced severe headaches, painful knees and legs, and a weak bladder. She was released in January 1987 and suffered a stroke. She is now unable to work and gets a disability grant, with which she supports her three school-going children. She told the Commission that a security policeman called Gerber who was responsible for her torture is now head of Crimestop in Uitenhage. She is requesting that he not be allowed to retain that position. She is also requesting assistance with repairs to her house, as the walls and door were damaged by the police when she was arrested.

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PROSECUTIONS: WESTERN AND NORTHERN CAPE

Killings by SAP

- Killing of the Guguletu Seven, 3 March 1986
- Killings in police custody: inter alia
  - Killing of MK member Zola Michael Dubeni, March 1987 by the security police
  - Killing of ANC member Patrick Welile 'Deks' Dakuse on 23 January 1989
- Killing allegedly during arrest: Killing of MK member Samuel Mzuga Baloi on 22 February 1990 in Guguletu by SAP members and askaris
- Killing of Adri Faas in Paarl, 28 August 1985 by SAP

Killings by other groups

- Killing of ANC member Mziwonke 'Pro' Jack, 1991, by members of the ANC. This should only be looked at when the relevant amnesty application has been heard, which implicates others.
- The attack on the home of Prince Gobingca in September 1989 allegedly by allies of Mali Hoza and the Lingethu West Town Council in which seven people died. Charges were withdrawn for unknown reasons.
- Khayelitsha killings 1990s. Several cases implicate Lingelethu West town councillors under Mayor Mali Hoza. The TRC did not achieve conclusive investigative results. However, it is apparent that in several cases the SAP investigation was completely inadequate. In certain cases charges were withdrawn for unknown reasons, eg the killing of Nomsa Mapongwana in October 1990.
- Violations associated with members of a renegade SDU in Trevor Vilakazi area, Khayelitsha including the illegal transfer of weaponry from the Ciskei, and killings.
- An investigation into why certain ANC members were acquitted of the murder of ANC member Nelson Maseko in Plettenberg Bay on 24 March 1990 despite eyewitnesses.

Witdoek Attacks, May/June 1986

The Commission uncovered a range of documentation from SSC level to the local JMC indicating a positive attitude towards the witdoeke. An assessment would need to be made in conjunction with attorneys from the LRC (Steve Kahanovitz) regarding the previous court case which was settled by the withdrawal of the action and the allegations set out in the claim. Thus there was no judgement and no court decision.

Torture by SAP Cases

- There are several identifiable torture perpetrators in small rural towns such as Mossel Bay, Kimberley, Upington, and Worcester.
- Further, there are members of the Cape Town Terrorism Detection Unit (colleagues of Jeffrey Benzien) such as Piet Goosen, Warrant Officer Nel and others who are linked to torture.
- Torture of members of the Bonteheuwel Military Wing by members of the SAP's special Unrest Investigation Unit members, under Captain Louis van Brakel.

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truth reconciliation commission

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11 March 1999

VC Saldanha
Office of the National Director of Public Prosecutions
Maize Board Building
Belvedere Rd
Arcadia
PRETORIA
0002

Dear Vincent

Thank you for the opportunity of meeting with your unit earlier this week. I hope that you found the occasion productive.

We look forward to your feed-back as regards the preliminary document which I gave to you regarding potential prosecutions, as well as other matters discussed during the meeting.

I will be meeting with Martin Coetzee hopefully in the next week regarding the information you require and I will respond to you later regarding the outcome and logistics of obtaining such information.

Regards

Yasmin Sooka
Commissioner

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FA14

1. Adv. Ferreira
(012) 321 9988

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tions

Attention : Adv. C.B. Ferreira

Per Telefax: (012) ~~328-9940~~ 3211848

Advocate Ferreira

HUMAN RIGHTS VIOLATION FILES AND OTHER RELEVANT RECORDS

Your letter dated 31st August 2000 (and stamped 2000-09-11).

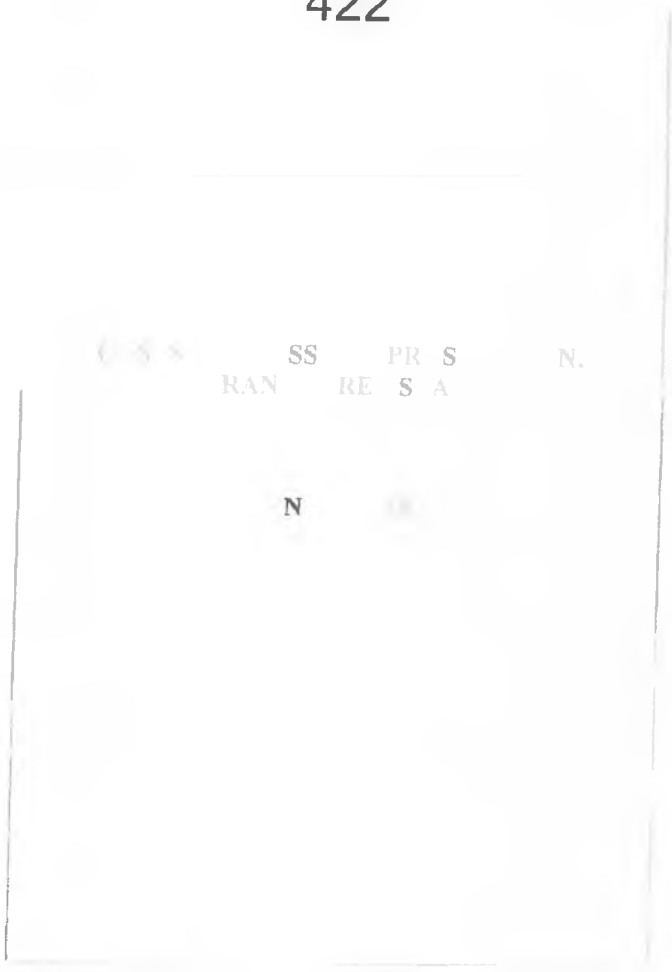
We acknowledge receipt hereof and shall respond in due course.

Yours faithfully

ADV. P.C. PRIOR

106 Adderley Street Cape Town, 8001 Tel (021) 245 161 Fax:(021) 233 280 / 245 225.
Sunlam Centre, 10th Flr, Cnr Von Wielligh & Jeppe Str, Johannesburg, 2001 Tel (011) 333 6330 Fax:(011) 333 0832/6341.
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Date & Place	Offence(s)	Victim(s)	Perpetrator(s)	Organisation
12/2/1992 'Stormberg' Verkeerdevlei	Murder & severe assault	Mr RJ Fourie killed & Ms May	Amnesty applicants: Mishek May Hendrik Leeuw Daniel Magoda Order. John Showa (deceased)	
January 1991	Murder	Mr M Rampahle	Convicted: JJ de Ru, ex-SAP police officer AM1780/96 who implicated his superior as having given orders to have the victim killed Another person mentioned is Officer Mafaje who was present at the killing, but did not participate.	SAP Security Branch
1990, Date unknown Brandfort	Murder	Councillor Susan Phelane Patrick Phelane (11 years) Edward Phelane	Jack Menera (amnesty applicant) & underground structure of the SDU	UDF/ANC

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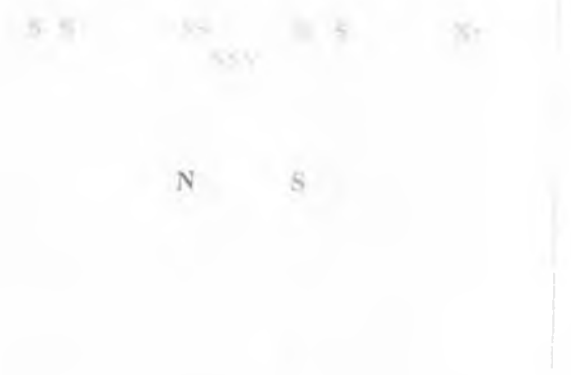
1989-1992 Kroonstad	Allegations: Three Million Gang created/supported by SB, as counterinsurgency strategy to undermine UDF & ANC activism. Justice officials worked to undermine criminal prosecutions against gang members. See p. 366-369 TRC report Vol. 3	Affidavits made to Commission Mr PM Thulo Mr JJ de Ru MS Taka FM Taje HRV statement of SAP officer Petros Mzosane	see affidavits by persons as mentioned in previous column for details	
October 1987, Parys Police Station & Sasolburg Police Station	Assault & Torture	Isaac Maduma KZN/JRW/058/PS	Cst. Hennie Sochiva & others, Parys police station, assault Torture, Sasolburg Police Station, unclear	SAP
April 1986 Fountain Police Station Bloemfontein	Torture	20 UDF activists incl: White Mohapi KZN/TIS/038/BL	Sgt. Mamome Sgt. Motsamai (both amnesty applicants) Col. Coetzee Col. Stevenson (both gave orders to assault victims)	SAP.SB
1986 (during state of emergency) Bethlehem	Assault	Polediso Motsoeneng KZN/MR/268/FS	Maj. Stephenson forced victim's father to beat him	SAP

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4/5/1985 Odendaalsrus police station	Murder	Sipho Mutsi COSAS regional organiser KZN/ZJ/115/BL	W/O Maxwell Sithole D/Cst. Magwesa Moya Cst Mashabe Cst Makhuwe See. Post Mortem 9/5/85 Inquests, Welkom Mag. Court Dec 1985 &1988	SAP Odendaalsrus
May 1985 place unknown	Murder	Sello Mofokeng KZN MR/240/WL	counsellor operating with the A-team, name not provided	
March/April 1985 Tlali Park, Thabong, Welkom	Assault	Thabo Ramatsa KZN/AT/005/FS	members of A-Team, identified by victim at a parade, but none charged	A-Team (emerged in April/May 1985. leader Councillor Albert Phakathi, deceased & several community councillors) see page 362-3

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Date & Place	Offence(s)	Victim(s)	Perpetrator(s)	Organisation
January 1994, place unknown	Torture	Phillipus C Kloppers, AWB member JB06109/03 WR & AM4627/97	unnamed/unknown	SAP
Between Sept 1993 & Feb 1994, more than 20m explosive devices placed on railway tracks, power stations & black townships	Attempted murder	Victims unknown. number of people injured	Jan Cornelis Labuschagne AM3671/96 Daniel Wilhelm vd Watt AM3673/96 Johannes Jacobus Botes AM3672/96	AWB

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Toaster Gang (ANC members) Date unknown. Tembisa (roadblock manned by hostel residents)	Murder & attempted murder	12 minibus taxi passengers killed. Mtzulisi Mashobanet (5 years) & driver survived	3 men arrested (establish if prosecuted)	
12/4/1992 Umthambeka section	Murder & attempted murder	7 men killed & 6 seriously injured incl Duma Fakude JB02319/01ERTEM Anton Chauke Absolom Mayo Oupa Eave Cefane Mofatt Makaza Friedah Monama	21 members of Toaster Gang charged & charges were withdrawn. lack of evidence	

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-167

December 1993, roadblock	Murder & attempted murder	4 black people killed incl. Teboho Makhuza JB05972/01G1SOW Theophilus More Gabriel Shabangu Simon Nkomboni 6 injured	Phillipus Cornelius Kloppers AM4627/97 Deon Martin AM4621/97 Andre F Visser AM7003/97 Petrus Matthews AM4624/97 Gerhardus J Diedericks AM6662/97 Frederick J Badenhorst AM7004/97 Carel H Meiring AM7002/97 Marthinus L vd Schyff AM5435/97 Implicated Japie Oelofse (matter heard)	AWB
November 1993 near Pofadder	Murder	Frikkie Witbooi	GJ vd Sandt	Right wing
September 1993 Potgietersrus	Assault	Tshamaano Robert Mahebeledzha	2 persons, names withheld	AWB
July 1993 Rustenburg	Murder	Rustenburg policeman	Gerald John van Dyk AM0113/96	AWB

12/7/1993 Zone 3 Sebokeng	Murder	4 ANC members	Victor Mthandeni Mthembu AM7107/96 AM6130/97 Implicated: Prince Gideon Zulu aka Vanana Zulu, KwaMadala hostel (orders)	IFP
1/7/1993 Carletonville	Kidnapping & murder	William Lesejego & another person	AML Fourie AM0361/96 Gert Jonker AM0484/96	AWB
22/3/1993 place unknown	Murder	unknown policeman	Mosiuwa Isaiah Khotle AM3443/96	

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Khumalo Gang 15/1/1993 Thokoza	Murder & attempted murder	11 people killed incl. Sabeth Khumalo	Reverend Mbhekisini Khumalo (husband of deceased) convicted: Thami Zimu Thulani Mlaba (amnesty applicants) (Leader of Gang) Note: arrested twice for murder, attempted murder & illegal possession of firearms, and released on bail	Khumalo Gang alleged to be 'integrated to the hierarchy of the IFP' which was initiating and directing the execution of the political projects (See p 716, TRC report, Vol 3 para 692)
29/9/1991 Thokoza Khumalo Street	Murder	Sam Ntuli JB00389/01ERKWA	Thami Zimu & Thulani Mlaba (convicted & amnesty applicants) implicated: Gertrude Mzizi Albert Mlaba aka Mufulela Induna Msomi	IFP, Thokoza Khumalo Gang

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1992 Johannesburg Witbank	Murder	unknown person	V. Vosloo AM1003/96 Janse v Rensburg brothers	AWB
Union conflict: 28/9/1992 Escort Bacon Factory, Heidelberg	Murder & attempted murder	1 person killed & 13 people injured incl. Deborah Jokazi JB0347/01ERKWA	Note. amnesty applications re incident (IFP members)	
May 1992 Witbank	Murder	unidentified black man	brothers Janse van Rensburg (2)	AWB

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26/3/1992 near Nelspruit	Murder	Khona Khabela Tsetso Leballo JB00241/01GTSOW Masilo Mama Mxolisi Ntshaota Lawrence Nyalende	Eugene de Kock (convicted) AM0066/96 Rolf Dieter Gevers AM3752/96 Deon Gouws AM3759/96 JJ de Swardt AM3750/96 Ben Burger van Zyl AM7722/97 JHP Hanekom AM3886/96	SAP
24/1/1992 Sharpville	Murder	SAP member Peter Ransanyile	Simon Khakha S'dumo Ngubeni AM3128/96	ANC

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Train violence: 13/11/1992 East Rand 3/11/1992 East Rand 1/7/1991 Germiston-Katlehong line 25/6/1991 Kliptown train violence 13/9/1990 Benrose massacre July 1990 Johannesburg-Soweto line	Murder & attempted murder	Lazarus Shabangu JB00354/01ERKWA 6 people killed & 7 injured 11 people killed 7 people killed & 18 injured 26 people killed & 100 injured 1 person killed & approx 30 injured	Train squad: Khayo Sylvester Mvelase Shushe Joss Kiline (commander) Xola Frank 'Jimmy' Mbane Xolani Mguni AM3551/96 convicted Albert Msuseni Dlamini (convicted) AM1557/97 refused Wayne Hugh Swanepoel AM3727/96 Implicated: Mr Hadebe Selous Scouts, PTG 5 Reconaissance Regiment ID, Spoornet Security	Alleged: SADF & SAP links to violence dating back to 1988 Involvement of Vlakplaas, as well as link between it and hostel residents (Joe Mamasela & Xola Frank 'Jimmy' Mbane's statement in Thapelo Mbane's amnesty application file AM3785/96 & Wilhelm Bellingan's amnesty application file AM5283/97 Note: Evidence to Commission, Goldstone Commission implicates: Themba Khoza Musa Myeni Humphrey Ndlovu Mr Zondi
August 1991 Ventersdorp NP meeting	Murder & attempted murder	3 people killed & more than 50 injured	Amnesty applicant: Eugene Terre'Blanche	

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August 1991 Bophutatswana	Assault & torture	Itumeleng Isaac Mayovo JB00938/03NW	Officer Shuffle	
27/7/1991 Wesselton	Murder	Belesta Malinga JB03768/01MPPIT	unknown members of Black Cat gang & police Implicated: Napoleon Mkonza, Wesselton Mayor	SAP Black Cat Gang
May 1991, Tshing, near Ventersdorp	Assault	Simon Rabesi Phiri JB01567/03NW Maart Matlakala Phiri Judas Sithole Pauline Sithole Nkete Wlemina Mangwela	Eugene Terre'Blanche Piet 'Skiet' Rudolph	AWB

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14/3/1991 Daveyton	Murder & attempted murder	13 people killed & 29 injured 8 statements made to TRC: Samson Zolani Xakeka JB05056/01ERKWA David Sam JB00271/01ERKWA JB01641/03VT JB05380/03VT JB05031/03VT JB04623/03VT JB05224/03VT KZN/TIS/039/BL JB04929/03VT	unknown Judicial enquiry found police used excessive force. Justice B Donovan & referred to AG. declined to prosecute	SAP

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16/2/1991 Johannesburg	Murder	Bheki Mlangeni JB00195/016GTSOW	Eugene de Kock convicted AM0066/96 WA Nortje AM3764/96 ID 'Steve' Bosch AM3765/96 WR Bellingan AM5238/97 Kobus Klopper AM3762/96 JF Kok AM3812/96 J 'Kobus' Kok AM3811/96 Wahl du Toit (head, security police's technical division) AM3812/96 JJ de Swardt AM3750/96 Implicated: Brig. Nick Janse van Rensburg	SAP. SB Vlakplaas
February 1991 Belfast	Murder	George Nkomane	HJ Slippers AM1002/96 & 3 other persons	AWB

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Date unknown Penge mine	Murder (Explosives detonated)	Johannes Temba Mabotha askari	Willem W. Mentz AM2775/96 Sgt. Dawid J. Brits AM3745/96 Eugene de Kock AM0066/96 Col. Jan D. Potgieter AM5418/97	SAP.SB
Date & place unknown	Murder	SAP member Peter Ransanyile	Simon Khakha S'dumo Ngubeni AM3128/96	ANC
September 1990 Johannesburg	Murder	Johannes Masango	2 persons incl. Van Deventer AM2045/96	

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19/7/1990 Skurwebergpad, near Vlakplaas	Murder	Brian Ngqulunga (akari & testified at Harms Commission re Mxenge murder)	WR Bellingan AM5283/97 Pieter H Botha AM5458/97 Eugene de Kock AM0066/96 Capt Willem W Mentz AM2775/96 Willem A Nortje AM3764/96 Implicated: Simon Radebe Dave Baker	S.A.P. SB
26/3/1990 Vereeniging	Murder & attempted murder (Police shooting)	13 people killed & more than 400 injured	unknown police Recommend action by Judge Goldstone that police be prosecuted. no action was taken	SAP

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2 7 1989 railway lines at Mofolo, Midway & Kliptown	Murder	Mofolo 3. Ncebe who had a unit in Mofolo & 2 others	Lt Col Anton Pretorius AM4389/96 Moleke Peter "Frank" Lengene AM4033/96 Manuel Olifant AM4032/96 Sarel Petrus Nienaber AM4391/96 Capt. Daniel Johan Steenberg AM4374/96	
December 1988 Brakpan	Murder	Linah Masesi Mazibuko JB04588/01ERKWA	named CP member	
23/9/1988, bus terminus, Vanderbijlpark	Attempted murder (bomb explosion)	19 people incl William Henry Ryan JB06463/03WR	ANC amnesty applicants Sipho Nicodemus Mthembu AM6028/97 Tsehisi Edward Mokati AM6028/97	

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22/9/1988 'Why Not' nightclub, Hillbrow	Attempted murder (Bombing)	some people sustained injuries	Charles Zeelie W/O AJ v Heerden AM4134/96 PL Du Toit AM4131/96 GN Erasmus, then divisional commander of the Witwatersrand 4134/96	
1/9/1988 Khotso House JHB	Attempted murder	23 people injured	Adriaan Vlok (amnesty applicant) Col Eugene de Kock Gen. JV vd Merwe (amnesty applicant) Implicated President PW Botha	Members of Government & SAP. SB
23/8/1988 near Pondrift, Alldays	Murder	3 people killed: Mzikayise Mgzangxeni Mkhatshane Johannes Shangaan Mark Mkoto	unnamed farmer Note: I.O Barend vd Merwe	

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10/7/1988 Benoni Wimpy Bar	Murder & attempted murder	Injured Catharina & Tarina Janse v. Rensburg JB06049/01ERKAT Johanna CA Edwards JB06048/01ERKAT Illana Howe Died: Maryanne de Oliveira Neto Serrano JB01274/01ERKAT	Ernerst Phumizi Sigasa AM5300/97 Elfas Mabore Ndhlovu AM5301/97	ANC
2/7/1988 near gate at Ellis Park Stadium, JHB	Murder & attempted murder (Car bomb)	2 people killed: Linus Mare Clive Clucas JB06084/990VE 37 people injured incl. Christian Hagery EC1442/97ELN	Amnesty applications: Harold Mathsidid AM8007/97 Billy Algie Shoke AM8014/97	ANC/MK

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17/3/1988 Krugersdorp Magistrate's court adjacent to local police station	Murder & attempted murder (Car bomb)	3 people killed (2 SADF personnel & 1 civilian) 20 people injured	Amnesty applicants: Hein Grosskopf (convicted) Mohamed Ichbal Shaik AM7151/97 Aboobaker Ismail AM7109/97	ANC/MK Special Operations
Date unknown, 1988 Springs	Attempted murder	unknown person	Phumelele Masilela AM3146/96	PAC
1987/1988 Mamelodi East	Murder (Placed on a landmine)	'Source 406'	Maj 'Sakkie' Crafford AM5468/97 DJ Kruger AM5233/97	SAP.SB
Date unknown, 1987 5 km's north of Pienaar's River	Murder	Jeffrey Sibiya JB03063/01ERKAT	Capt. Paul Janse v Rensburg v Vuuren AM6528/97 Ioe Mamasela Capt. Jacques Hechter AM2776/96 Sarel du Plessis Crafford AM546/97 Brig. JH Cronje	

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30/11/1987 Hammanskraal Motasi house	Murder	Sgt. Motasi, Police College. Hammanskraal Ms Motasi	Col PJC Loots AM546_/97 Brig IH Cronje Capt Jacques Hechter AM2776/96 Paul v Vuuren AM6528/97 Joe Mamasela	SAP, SB

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10/7 1987 Breslau Rd. Alldays	Murder (ambush)	6 MK members incl: WT Alset JB04421/02PS LM Molot TR Mogashoa	Amnesty applicants: JH Kruger AM4147/96 LM Pretorius AM4366/96 Col. Willem vd Merwe AM4380/96 Sgt. Mathews Sehlwana AM3747/96 NS Coetsee AM4121/96 PA Dreyer AM4128/96 Jan Strydom AM4368/96 AJG Erwee AM4135/96 PTCJ Fourie AM4137/96 PPF Fuchs AM4138/96 FCS Swarts AM4512/96 JP vd Berg AM4367/96	SAP & SADF

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23/8/1987 Daveyton	Murder & Torture	Killed: Caiphus Nyoka JB00285/01ERKWA Tortured: Excellent Mthemba Exodus Nyakane Elson Mnyakeni	re murder: Marais Stander	SAP
July 1987, Wits Command	Murder & attempted murder	1 person killed & 68 military personnel and civilians injured	Amnesty applications: Heinrich J Grosskopf AM5917/97 Aboobaker Ismail AM7109/97 Joseph Mnisi AM4364/97 Colin Mike de Souza (Establish if docket with Paul Fick)	MK/ANC. Special Operations

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7/5/1987 Cosatu House JHB	Attempted murder	2 persons	Amnesty applications: Adriaan Vlok Gen JV vd Merwe Implicated: Brig Willem Schoon Head of C Section Gerrit Erasmus Witwatersrand Security branch divisional head Sgt Bosch head of Vlakplaas technical department	the then NP government & SAP, SB
6/5/1987 Bophutatswana	Murder	Joe Tsele, UDF activist	Brig. Jack Cronje AM2773/96 Capt. Jacques Hechter AM2776/96 Maj. Sarel 'Sakkie' Crafford AM5468/97 Joe Mamasela certain Mbatha	

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Date unknown Motatema police station	Severe assault	Stephen Moganedi JB05134/02NPPTB	De Kock Geld	Lebowa police
6/2/1987 Siyabuswa Murder & Robbery Unit, Moutse, KwaNdebele	Murder (Disappearance in custody)	George Shabangu JB02849/01MPMOU	W/O Eric Magagula Cst. SJ Kritzinger Sgt. A v Schalkwyk Sgt. Sam Mphelo (deceased) Sgt. Dumisani Mahlangu Sgt. Jacob Mthombeni (arresting officers) Note: s29 inquiry conducted & investigative report of TRC has been forwarded to AG for consideration See p 627	KwaNdebele police
January 1987 Alexandra	Murder	11/25 SADF soldiers	Mandla Michael Yende AM5648/97 Thamba Jack Phikwane AM6032/97	PAC
Date unknown 'Lictenburg Battle'	Attempted murder	unknown member of SAP	Louie Nkululeko Dlova AM6596/97	PAC
1986 Sibasa Police Station Venda	Torture	Luluno J Mulaudzi JB01374/02NPVEN	Neseman & Mganga	Venda police

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28/5 1986 Ndzundza royal kraal, KwaNdebele	Murder (police shooting) Kidnapping	2 unknown men 54 youths incl. Johannes Ramahlale	unknown unknown/unnamed Note: Johannes Ramahlala reported matter to police & camp raided (Need to establish if there were any prosecutions)	Embokodo

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20/3/1986 Jouberton	Murder (disappearance in custody)	Ramatula Nicholas Thlapi JB01185/03NW JB01452/03NW	W/O Viljoen Sgt. Makiti Cst. Tseladimitlwa Tshwaedi Majaja Mano (Arresting officers) Note: statement made to LHR by George Mbathu in 1993 Matter under police investigation	SAP
28/2/1986 Rooigrond Central Prison Bophutatswana	Torture & Assault	Samuel Galeboe Thwane JB000361/03NW	Capt. Molale Capt. Mojanaga 9 other unknown police	Bophutatswana police
January 1986 KwaNdebele	Attempted murder & kidnapping	Mr Abel Nkabinde JB02828/01MPWES	Sam & Joseph Zondo	
1/1/1986 Chief Mayise's house KwaNdebele	Murder	Chief Mayise	Mr Sipho Gumede Mr Maboy Zondo	Concerned citizens/ Leandra vigilantes known as Leandra vigilantes

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Early 1986 Atteridgeville, Oupa Masuku's home	Murder (bombing)	Ms Esther Masuku	Josephus DL Coetser AM3758/96 Hechter 1 black policeman	SAP. SB
June 1985 Duduza	Murder (necklace method)	Maki Skhosana JB00289/01ERKWA	unknown persons (Linked to 26/6/1985 incident. Victim suspected of being an informer & being linked to Joe Mamasela referred to as 'Mike')	

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26/6/1985 Duduza East Rand Operation Zero Zero (See vol. 3, p 269 & vol 2, p 628-631)	Murder & attempted murder	Cosas activists killed with modified grenades with a zero-timed delay mechanism: Hosea Lengosane Joseph Mazibuko John Mlangeni Samuel Lekatsa Humphrey Tshabalala Johannes Mazibuko Cedric Dladla 7 people seriously injured	Amnesty applicants: Gen J vd Merwe AM4157/96 (in charge of operation) Brig. Willem Schoon AM4396/96 Brig. Jack Cronje AM2773/96 Sgt. Daniel Nkala AM2460/96 Capt. Roelof Venter AM4382/96 Brig. JLM Delport AM4127/96 Francois Steenkamp AM4383/96 Col JF Kok AM3811/96 LC Prince AM4382/96 Andre Roos AM4392/96 Brig. WAL du Toit AM5184/97 (altered timing device) Maj. Gen. Joep Joubert AM3799/96	SAP, Vlakplaas SADF SA Govt Ministry of Law & Order

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Date unknown Sibasa police station, Venda	Severe assault	Samuel Radamba JB01385/02NPVEN	Venda police	
Date unknown Masisi police station, Venda	Torture	Mufhungo A Denga JB01414/02NPVEN	Venda police	
20/5/1983 Church Street, Pretoria	Murder & Attempted murder (car bomb)	21 people killed & 219 injured (11 of the dead were SADF employees, 2 others were MK operatives & remaining were casualties) see p 665, vol 3, para 511 & p 328, vol 2 para 15 for reference no's	3 amnesty applications: Aboobaker Ismail AM7109/97 Johannes Mnisi AM7096/97 Helena Pastoors AM7289/97	MK: Special Operations
8/6/1982 Bethanie	Murder	Bheki Sam Mchunu Henry Mavella Manyoni Nkosi	unknown business person former police officer	

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15/2/1982 at a certain mining area	Murder & attempted murder	COSAS activists killed: Madikela Ntshingo Matabane Fanyana Nhlapo injured: Zandisile John Musi JB1909/03WR See also s 29 investigative hearing of Joe Mamasela	Christiaan Siebert Rorich AM501/97 detonated the bomb Jan Carel Coetzee AM4120/96 Abraham Grobbelaar AM4143/96 Ephraim Mfalapitsa AM3592/96	
5/2/1982 John Vorster Square, Johannesburg	Murder (death in custody)	Dr Neil Aggett JB00217/01GTSOW CT00410/FLA	William Charles Cecil Smith AM4569/97 re torture Paul Erasmus re illegal search into deceased's home AM3690/96	SAP.SB
5/1/1982 Venda	Assault & Torture	Pastor Ndangeni Petrus Phaswana JB01501/02NPVEN	Capt. Ramaligela Detective Managa	Venda Security Forces

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1981 near Komatipoort	Murder	Isaac Moema aka 'Ace Ramela' an askari	Dirk Coetzee AM0063/96 & other named operatives & superior officers, see amnesty application	SAP. SB
1981 near Komatipoort	Murder	Peter Dlamini KZN/NM/100/NQ an askari Vuyani Mavuso ANC operative	Dirk Coetzee Implicated: Brig. Willem Schoon Gen. Lothar Neethling	SAP. SB
November 1981, Venda	Torture	Pastor Simon Farisani	Ramaligela Managa Nesamari Rambuda	Venda Security Forces
10/5/1981 Bushbuckridge railway station	Murder	Robert Mokoena aka George Sello	Police Note: police statement made re incident	
December 1980. Venda	Assault & Torture	Mbengeni Jonah Ravele JB/01377/02NPVEN	Ramushwana Ramligela	Venda police

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22/11/1977 place unknown	Murder	Robert & Jean-Cora Smit. former government representative at the IMF in Washington & NP parliamentary candidate	Allegations: Jack Widdowson Roy Allen who were named in the 1992 Steyn Report Note: investigations into killings were conducted by members of the East Rand Murder & Robbery squad, alleged that they sought to cover up security force involvement No amnesty applications received	BOSS & SAP Special Task Team
27/10/1971 John Voster Square	Murder (death in custody)	Ahmed Timol JB173/03WR	Col Greyling Capt. Bean Sgt. Rodrigues W/O Cloete Sgt. FJ Ferreira Sgt. MC Pelser Sgt. DL Carter all named at inquest	SAP
28/2/1969 or 10/3/1969 Pretoria Central Prison	Murder (death in custody)	James Thabiso Lenkoe JB00092/01GTSOW	Interrogated by : Maj. IJ Swanepoel	SAP

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Between 21/1/169 & Feb 1969. Silverton Police station	Murder	Nicodemus Kgoathe (died at HF Verwoerd Hospital) JB0013/03NWRUS Inquest held	Name mentioned Maj 'Roor Rus' Swanepoel	SAP
Between 25/2/1969 & 28/2/1969 Silverton Police station		Solomon Modipane (died at HF Verwoerd Hospital) No inquest held		
10/9/1969		Jacob Monnakgotla (charged under Terrorism Act & died night before appeared in court) Note: all involved in local disputes about chiefly powers		

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24/1/1964 Greys Building, JHB	Murder (Death in custody)	Suliman Saloojee JB01711/01ERKWA	interrogators: Capt. 'Rooi Rus' Swanepoel Maj. Brits Sgt. CJ van Zyl Cst. Vd Heever Lt. HC Muller Inquest: apportioned: no blame	SAP,SB Railway police

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Date & Place	Offence(s)	Victim(s)	Perpetrator(s)	Organization
March 1994 Da Gama factory, East London	Murder	unnamed policeman	unnamed, amnesty applications	APLA
Date unknown, 1993 Fort Beaufort	Attempted murder (under police investigation)	Thamsanqa Grootboom EC2361/97ALB Felisizwe Lucky August LC0719/96 Mthetheli Mana LC2356/97ALB Rev Swelandile Kotsele	4 people arrested for possession of weapons. Unclear as to whether people were prosecuted for these cases	
8/11/1993 Umtata, Sigqibo Mpendulo's home (PAC)	Murder	5 unnamed youths, incl. 12 year old	unnamed	SADF

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21/5/1993 Umtata	Murder	Lindile Kula Nkosinathi Tuku Nathaniel Koto	Lungelwa Lupuwana charged AN6371/97 Ntobeko William Matyolo charged AM6078/97 Papama Mgudlwa AM6081/97 Implicated Major General Bantu Holomisa	TDF, Army Intelligence

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1/5/1993 Highgate hotel, East London	Murder (5) Attempted murder	Killed: Deric John Whitfields EC0101/96ELN Boyce Michael Wheeler EC0729/96ELN Injured: Neville Beling EC0167/96 Karl Andrew Weber EC0035/96ELN Doreen Rousseau EC0052/96ELN Nkosinathi Alfred Gontshi EC0196/96ELN	Augustine Mbambo AM2892/96 Dumisani Ncamazana AM2891/96 Note: Highgate hotel given to applicants as a target, see p 89 para 485	APLA

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25/3/1993 Tinis township, Fort Beaufort	Murder	Lata Camagu PASO chairperson at Thublacthu High School	unknown persons No arrests made Note: 3rd April 1993, ANC members named by PAC as being responsible for killing of PAC supporters, but no arrests made In addition, 10 ANC members arrested & tried for public violence & illegal possession of weapons (Need to establish if in connection with the above mentioned cases)	

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22/3/1993 Yellowwoods hotel. Fort Beaufort	Murder	Johan Jerling EC2359/97ALB	Vuyisile Madasi AM6077/97 Lungisa Ntintili AM6539/97 Nkopane Diaho Moneng AM6427/97 Implicated APLA high command for choosing the target incl. Letlapa Mphahlele	APLA
3/12/1992 Queenstown Spur Restaurant	Murder Attempted murder	I es Barnes EC0780/96PI /	unnamed	APL A

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28/11/1992 Golf Club, King William's Town	Murder(4) Attempted murder	4 people killed: Ian MacDonald Gillian & David Davis 17 injured incl. Beth Savage EC0051/96ELN Robert Sandford EC0078/96KWT	Tembelani Tandekile Xundu AM3840/97 Malusi Morrison AM5953/97 Thobela Mlambisa AM7596/97 Lungisa Ntintili AM6539 97 Implicated: Letlapa, Director of operations, case pending outcome	APLA
21/10/1992 Seymour, Ciskei	Murder	Sister Janet Mahonga Community leader & ANC Women's League activist (EL hearings)	2 unknown men Inquest: Members of the Ciskei police, charges withdrawn, lack of evidence	Ciskei Police
22/9/1992 Upper Gqumashe, Alice	Murder	Ndondiphela Masetu EC0481/96CCK	Zukile Mkhapela AM6438/96 Ludumo Matsi AM6439/96	ANC

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7/9/1992 Bisho	Murder (Bisho massacre)	30 people killed	Vakele Archbald Mkosana AM4458/96 Mzamile Thomas Gonya AM7882/97 case pending outcome	CDF
August 1992 Tendergate Hewu	Murder	Thembelizwe Dywashe EC0164/96CCK	Mr Lumko Nkolisela Mrola & other ADM members, arrested & released No case	ADM
Mid 1991 Johannesburg to Transkei	Kidnapping	Vulindlela Mbotoli	Rainer Maria Moringer AM0434/96	TDF MI
27/1/1991 between Stutterheim & King William's Town 28/1/1991 Gubevu village	Murder	Col. Onward Guzana, ex-CDF member Lt. Gen. Charles X Sebe	Lt. Col. Anton Niewoudt (amnesty applicant) Clive Brink (amnesty applicant) others, implicated, not applied for amnesty Note. civil case by Niewoudt vs Min of Defence, Pretoria High Court	SADF, Ciskei Intelligence Services/International Researchers

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22/11/1990 Umtata, Ncibe Military base & Transkei government buildings	Murder Attempted murder	3 TDF members 33 TDF members injured	17 people convicted, except amnesty applicants incl. Jan Anton Niewoudt AM3813/96 withdrawn Eugene de Kock AM0066/96 Daniel Lionel Snyman AM3766/96 Leon William John Flores Nicholaas Johannes Vermeulen AM4358/96 Willem Albertus Nortje AM3764/96 Marthinus David Ras jnr. AM5183/96 Sydwell Mzwamadoda Ntisana	TDF (17 dissendents) Vlakplaas SADF SADF & TDF

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22/11/1990 Umtata	Murder	Craig Duli	Following people arrested & appeared in court 1997- Maj. Kolekile Mangcotywa Lt Tobias Tgxola Maj. Advocate Sobhuwa Maj. Lungisa Fikeni Check amnesty applications	TDI
February 1988 Umtata	Murder	Lizo Macanda aka MK Gift aka Thembinkosi Gladman Mgibe	Transkei & South African Police admitted involvement in inquest. no one charged	Transkei Police. SAP
12/1/1988 Nqamakwe, Transkei	Kidnapping Attempted murder Murder	Sithembele Zokwe EC0018/96STK	Two Transkei police arrested & escaped	Transkei police
25/8/1987 KwaNobuhle Uitenhage	Murder	Luvuyo Mpambani	known to witness, Thando Gene Mpambani Ngwila (Uitenhage hearings)	AmaAfrika Municipal police
17/7/1987 Phakamisa Location East London	Murder	Andile Rweqana (East London Hearings)	unnamed members of the Ciskei security forces known to the deponent	Ciskei police Ciskei Defence Force

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17/7/1987 Phakamisa Location East London	Murder	Andile Rweqana (East London Hearings)	unnamed members of the Ciskei security forces known to the deponent	Ciskei police Ciskei Defence Force
3/7/1987 PE, Veeplaas township	Murder	Mattys Stols	8 people charged No conviction (2nd PE hearings)	unknown
January 1987 Ladybrand	Murder	4 ANC cell members incl Mbulelo Ngono EC0330/96PLZ EC0329/96STK EC0224/96UTA	Lesizi Michael Jantjie AM7109/97 Anthony Jagga AM7106/97 Colin Anthony Pakenham AM7163/97	SAP
29/7/1986 Veeplaas, Port Elizabeth	Murder Attempted murder	Nontsikelelo Dlanjwa Wendy Sizeka Ramathe	young man known to victim (Uitenhage hearings)	
27/7/1986 Grahamstown	Murder	Mick Fikile Mphehlo (EL hearings)	unknown persons No trial, but investigations	unknown
1/7/1986 KwaNobuhle Uitenhage	Torture & severe ill-treatment	Victoria Nondzuzu Makinana-Vena	certain Gerber, currently head of Crimestop, Uitenhage	SAP SB
January 1986 Duncan Village East London	Murder	Nofokile Dikana Zameka Dikana	2 men (charged, 1 died before the trial) No prosecution	

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27/6/1985 Olifantshoek pass, outside PE	Kidnapping & murder	Matthew Goniwe EC0080/96NWC Sparrow Mkhonto EC0029/96NWC Port Calata EC0028/96NWC Sicelo Mhlawuli EC0079/96NWC	Maj. Gen Nick Janse van Rensburg AM3919/96 Maj GJ Lotz AM3921/96 Lt. Col Eric Taylor AM3917/96 Col. Harold Snyman AM3918/96 Maj. Hermanus Barend Du Plessis AM4384/96 Eugene de Kock AM0066/96 Capt. JM 'Sakkie' van Zyl AM5637/97	SAP, SB & CCB

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11/5/1985 Ben Schoeman airport & Post Chalmers	Kidnapping & murder	PEBCO 3: Sipho Hashe EC0003/96PLZ Champion Galela EC0005/96PLZ Qaqawuli Godolozi EC0004/96PLZ	Maj. Herman Barend du Plessis AM4384/96 Maj. GJ Lotz AM3921/96 Capt. Gideon Niewoudt AM3920/96 W/O Johannes Koole AM3748/96	SAP.SB
exact date unknown, 1985 PE	Kidnapping Murder	Aubrey Jacobs Fulani (policeman)	unnamed but known to victim. Nokuzola Carol Anne Fulani (1st PE hearings)	unknown

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26/6/1981 Maseru Jeffreys Bay Komatipoort	Kidnapping Torture Murder	Sizwe Kondile EC0021/96STK	Dirk Johannes Coetzee AM0063/96 Nicolaas Johannes Janse v Rensburg AM3919/96 Gerrit Nicholas Erasmus AM4134/96 Hermanus Barend du Plessis AM4384/96 Johannes Gottfried Raath AM4397/96	SAP SB, Vlakplaas Unit
1980 Sanlam Centre	Torture & Severe Assault & ill Treatment	Zubeida Jaffer, journalist gave substantial coverage to people killed in 1980 violence	Capt. du Plessis (assault) & others	SAP.SB
10/7/1978 Sanlam Building, PE	Murder (death in custody)	Lungile Tabalaza EC0002/96PLZ	Maj. PR de Jongh Lt. Verceuil Sgt. PJ Nel Cst. Mene Inquest held	SAP SB
5/8/1976 Kei Road Police station	Murder (death in custody)	Mapetla Mohapi EC0007/96PLZ	unknown	

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Date & Place	Offence(s)	Victim(s)	Perpetrator(s)	Organisation

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11/12/1993 Heidelberg Tavern. Observatory	Murder	Jose Cerqueira Rolande Palmer CT00415 Lindy-Anne Fourie CT02703 Bernadette Langford CT00415	Humphrey L Gqomfa AM0949/96 granted Vuysile B Madasi AM6077/97 granted Theo T Mabusela AM5731/97 Nkosinathi M Siyolo AM6139/97 granted Richard M Dala AM6138/97 Monwabisi Jantjie Sibeko Maxeba Gave orders: Sichumiso Nonxuba Letlapa Mphahlele Bulelani Sipho Xuma	PAC/APLA

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27/8/1993 Beaufort West, shooting of Translux bus	Attempted murder	8 people injured	Thembinkosi Henge AM6137/97 Sichumiso Nonxuba	PAC/APLA

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25/7/1993 St. James Church, Kenilworth	Murder & attempted murder	11 people killed & 56 injured: Statements received Killed: Guy Cooper Javens CT00620 Richard Oliver O'Kill CT03029 Myrtle Joan Smith CT03029 Wesley Harker (13) Gerard Dennis Harker Denise Gordon CT01124 Marita Maria Ackerman CT02922 Oleg Karamijn Andrey Katyi Valuev Pavel	Convicted & granted amnesty: Gcinikaya Makoma AM0164/96 Mkhumbuzi AM6140/97 Mlambisa AM7596/97 Implicated & not charged: Mr Letlapa Mphahele, who applied for amnesty, but did not attend the amnesty hearing. Note: his amnesty application does not clearly state for which offence amnesty is sought Sichumiso Nonxuba	APLA/PAC

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		Valentin Varaska severely injured: Paul Williams CT00618 Martin Bagley		
25/5/1993 Kimberley Bophutatswana Consulate	Murder	Izakiel Mokone CT00141	Walter Smiles Commander: Lawrence Mbatha	NAC/MK
6/12/1992 Khayelitsha railway station	Murder & attempted murder	1 guard shot dead & another wounded	Andile Shicheka AM5939/97 cites others who were involved	PAC/APLA
25/10/1990	Murder & attempted murder	Mpumelelo Manityi Dyantyi CT03708 Melford Dyantyi	3 men incl. Michael Gubayo	Lingelethu West Council
22/2/1990 Gugulethu	Murder	Samuel Mzuga Baloi from Welkom KZN/ZJ/111/WE	Louis (deceased) & others (askaris) see Cst. Bambatha's affidavit, 1995 to Minister of Safety & Security (deceased)	SAP

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1989/1990 date & place unknown	Murder	7 people	people associated with the Lingelethu West town council see statements: Gwiliza CT01339 Gobingca CT08605 9 Lingelethu West town councillors arrested & charged for murder & 6 counts of attempted murder. Charges dropped 2 years later.	
23/7/1989 Athlone Magistrates Court behind public toilets	Murder	Coline Williams Robert Waterwitch. Ashley Kriel unit	Geoffrey Brown Aristedes Spannelis aka Shane Oliver aka Perry aka Ian	NIS. informant DCC. SADF. Western Province Command

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	Assault & Torture	Statements made by BMW members: Mohammed Fatied Ferhelst CT00666 Bradley Barrow CT013215 Abubaker 'Whitey' Williams CT00185 Colin de Souza CT00520 Fuad Hartzenberg CT01107 Ismael Damon CT00297 Hercules Benjamin Booysen CT00296 Brian Peter Barends CT00453 Sandra & Jacques Adonis CT01110	Unrest Investigation Unit members: Capt. Louis v Brakel Sgt. Ilmar Pikker Capt Strydom Sgt JA Todd	SAP

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		Cleoton Darryl Visagie CT00885		
October 1988 Culemborg	Severe assault	Robert Nana Maliti CT00133	Benzien (Establish if applied for amnesty for this incident)	SAP, SB Culemborg
27/9/1988 Gugulethu	Murder	Mthetheledi Goina ANC operative	Lucky 'Agrippa' Madubula David Musimeke Inquest 27/8/1988	Askaris
5/7/1988 Gugulethu	Murder	Nkululeko 'Solly' Mutsi Anthony Fransch member of Bonteheuwel Military Wing CT00302 CT03204	Scociatti Sgt Roslee	SAP

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9/7/1987 Athlone. Kriel's home	Murder	Ashley Kriel CT00307 BMW activist	Benzien AM5314/96 amnesty granted Note: operational planning done. Athlone police station prior Inquest: no one criminally responsible	SAP.SB
15/3/1987 Faure Cape Town	Murder	Dubeni	W/O JH Nel Sgt. WR Bellingan Note: Inquest held	Western Cape Security Branch
14/3/1987 New Crossroads Cape Town	Murder	Pietersen	Members of the Unrest Unit Note: Inquest held	
Date unknown. 1987 Worcester	Assault & Torture	Group of security detainees: Xolile Dyabooi CT00232 Monwabisi Magoqi CT00772 Mary Ngemntu CT00404	W/O Lucas v Loggerenberg Note. numerous charges vs W/O v Loggerenberg. Sgt H MacDonald & Lt Gerrit Ntewoudt by detainees over several years No prosecution. AG declined to prosecute	SAP

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Emergency 1987, Gugulethu police station	Torture & Assault	William 'Keff' Thomas	Officer Nortie	SAP
September 1987	Attempted murder & severe ill-treatment	Bongani Jonas	David Matamele Musimeke (askari) Cst. Patrick Siyali AM7997/97 W/O Barnard	SAP, Riot Unit
14/3/1987 Nyanga Cape Town	Murder	Zola Michael 'Jabulani' Dubeni EC2653/97UTA MK operative	W/O JL Nel Sgt. WR Bellingan (see if amnesty applicant in this incident) Inquest held Note: TRC recommends further investigation p 455 TRC report Vol 3	SAP,SB & Vlakplaas
February 1987 Brackenfell & Bishop Lavis police station	Torture & Assault Attempted murder	Qasim Williams CT01109	Capt v Brakel Capt Strydom Sgt. Todd Colin de Souza (withdrew amnesty application)	SAP BMW

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12/6/1986 Transvaal Rd police station, Barkley West, Northern Cape	Assault	David Mabeka CT04407	police, charge laid by victim & victim threatened by perpetrators	SAP
9,10,11 June 1986, KTC	Murder & attempted murder	65 people killed incl. ITN cameraman, George De'Ath, died 10 June 1986 Statements made to TRC 10 statements re killings Also video camera footage. TRC offices	Witdoeke State endorsement as well· WP JMC Development Board members, Ricky Schelhase & Graham Lawrence Local security forces incl. Brig. Strydom (Michael Bellingan's statement to TRC) Statement stating that the violence orchestrated by the police	Witdoeke State structures incl SAP
25/5/1986 Mitchellsplain	Murder	Moegsien Abrahams CT01123	Colin de Souza AM5377/97	Bonteheuwel military wing

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29/1/1985-1988 Kimberley police station	Assault Assault Torture Torture	Thembani Jacobs James (UDF member)	unknown sergeant CID offices, unknown Mr Gavin Toyman Hendrick Niewoudt & Capt vd Cloff	SAP
Date unknown Mosselbay	Torture (sexual) & assault	Zanele Zingxondo CT00860	incl. Capt vd Merwe	SAP
Date unknown Brackenfell police station 1986	Severe assault	Ebrahim Hercules CT01539	Sgt. Pikker Sgt. Todd	SAP Unrest Investigation Unit
Date unknown 1986 Zolani, Ashton	Attempted murder	Ntando Pringle Mrubata CT00130	certain Pani & others	Amasolomzi
Date unknown 1986 Zolani, Ashton	Severe assault	Sipho Sixishi CT00755	certain Matroos	SAP
Date unknown under state of emergency, 1986	Torture	Rodney Mtyobile CT04503	Mr Mochesane	SAP
Date unknown, 1986 Mosselbay	Assault & torture	Patrick Mzathi (14 years) CT06108	unknown policemen incl Sgt. Maritz	SAP
After May & June Witdoeke attacks, KTC	Severe assault	Hercules Benjamin Booysen CT00296	WO Barnard & others	SAP. Unrest Unit

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26/3/1986 near Crossroads	Murder & attempted murder (Trojan Horse operation)	killed Lennox Thabang Maphalane CT00706 Eric Heynes CT00824 Goodman Bongani Dastile Several injured	Listed some of individuals involved in inquest	

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25/5/1986 Crossroads informal prison	Kidnapping & murder	Kidnapped & killed: Vuyani Dyaboza CT00730 Lukhanyiso Finye CT00730 Kidnapped, young woman unnamed	Ngxobongwana arrested and released on bail on instruction of his senior, the then Divisional Criminal Investigations Officer unknown members of the Witdoeke (See Leonard Knipe's testimony at the KTC hearings)	Witdoeke
17-21/5/1986 Nyanga Bush, Nyanga Extension & Portland Cement	Murder & attempted murder	38 people killed many injured	Members of witdoeke Note: covert & official endorsement of & support of witdoeke. Documentary evidence links WP JMC, WP Command, SADF, Senior personnel at provincial level SSC Note: no arrests made	

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31/12 1985 Upington	Murder	Elliot Mbulelo Jonga CT01417/UP	Nicholas Makandile 'Oupa' Links AM5923	Municipal police
3/3/1986 George	Murder	Nkosinathi Hlazo Oudtshoorn activist	Capt. GP Marx & others	SAP
2/11/1985 Worcester	Murder	Cecil Roos Tamsanqua v Staden CT00132	Cst. Michael Phillip Luff inquest finding. Case reopened AM3814/96	SAP
21/9/1985 Worcester	Attempted murder	Andile Feni CT08402 & 2 others	policeman in Zwelithemba	SAP
21/12/1985 Phillipstown	Murder	Sophie Butele CT00513	Silingiso Tshemese	SAP
16/10/1985 Crossroads 'Trojan Horse' Operation	Murder	Goodman Mengxane Mali CT00723 Mabhoti Alfred Vetnam	Col. Pieter Janse v Rensburg (WP Riot squad Head) Cmdt. Salmon Pienaar (SADF)	SAP. Riot Unit
	Attempted murder	2 toddlers injured	Lt Douw Vermeulen (Commander of SARP) 10 unknown members of SARP	SADF SARP

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3/3/1986 corner of Gugulethu NY1 & NY111	Murder Gugulethu 7	Mandla Simon Mxinwa C10070 Zanisile Zenith Mjobo CT00116 Zola Alfred Swelani Godfrey Jabulani Miya CT00818 Christopher Piet CT00100 Themba Mlifi Zabonke John Konile CT00108 CT03054	Amnesty applicant & matter heard, establish finding Wilhelm Riaan 'Balletjies' Bellingan AM5283/97 Thapelo Mbelo AM3785/96 Xola Frank 'Jimmy' Mbane AM8066/97 Implicated: Joe Coetzer Gladstone Moss Eric 'Shakes' Maluleke Liebenberg Other police officers at the scene W/O Barnard W/O McMaster Maj. Johan Kleyn Dolf Odendaal Stephanus Brits Cpt. Charles Brazelle	SAP. SB Western Cape Vlakplaas, SB

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1977 Date unknown Caledon Square police station	Torture	Joseph Ndabeziña CT03031 Toto Mzwandile Ntsobi CT03097	Swarts & Greeff Spyker v Wyk	SAP SB
1/8/1977 Tygerberg hospital, Cape Town	Murder/Culpable homocide (attributed to assault & torture)	Elijah Loza, trade unionist & ANC activist died in Tygerberg hospital three weeks later after 65 days in detention	unknown Note: some names appear in HRV investigation file of interrogators	

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15/10/1985 Athlone 'Trojan Horse' Operation	Murder	Michael Cheslyn Miranda (11) CT00478 CT00472 Shaun Magmoed (16) CT00472 Jonathan Claasen CT00475	same as 16/10/1985	same as 16/10/1985
29/8/1985 Bellville South house, Bellville	Murder & attempted murder (Trojan Horse operation)	killed: Sarah van Wyk CT03201 4 women injured incl. Monica Daniels, arm amputated CT00151	Cst. E Villet W/O P Kruger Cpt. Ockert v Schalkwyk (orders)	SAP Riot Unit
1985 day of Pollsmoor march, Paarl	Murder	Adri Faas CT03207 CT00434	Lt Col WH Oosthuizen. used private firearm Witness: Capt. Clayton	SAP
22/1/1985 Beaufort West	Murder	Mandlenkosi William 'Tshaka' Kratshi CT00563 CT00570	Cst. De Villiers	SAP
1979 Transvaal Rd police station, Kimberley	Assault	Matthews Teme CT00650	Security police officers incl. Bennet Mochesane	SAP

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22/11/1993 Pongola	Murder	Michael Mcetywa KZN/IID/313/EM	Emmanuel Mavuso AM7921/92 Mdu Msibi IFP leadership Piet Retief Piet Retief SB members (implicated by Msibi, Pongola CR 120-11-93) see p. 285	IFP SAP SB
8/10/1993 Richmond	Murder	Zmokwakhe Sibongiseni Mfana Phungula (Richmond SDU commander) MLA Mhlongo	Magoda SDU members Killed by an informal 'people's court' CR41-10-93	SDU ANC
October 1993. Georgetown	Murder	Julius Mkhize (newly appointed chair of Richmond ANC branch) KZN/NNN/043/PM	SDU members (CR12-10-93)	
November 1992. Madadeni township. outside Newcastle	Murder	Prof. Hlalanathi Sibankulu KZN/MR/166/NC KZN/MDU/999/NC	KZP involvement (TRC investigation) Note: Evidence not conclusive. Further investigations?	

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Date & Place	Offence(s)	Victim(s)	Perpetrator(s)	Organisation
14/2/1994 Crazy Beat Disco Club. Newcastle	Murder & Attempted murder	Gerbrecht van Wyk killed & several injured	convicted: Bongani Golden Malevu AM0293/96 Andile Shiceka AM5939/97 Walter Falibango Thanda AM5784/97 allegations made are that they were sent by their commanders. Need to establish names & whether applied for amnesty or not	PAC, APLA
29/12/1993 Richmond	Murder	Mnandi Phoswa	Bob Ndlovu & others	

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19/5/1992 Richards Bay	Murder	April Lahwe KZN/NG/006/EM (shop steward, union affiliated to COSATU & ANC member)	Gcina Mkhize also implicates: Major Langeni (orders) Mayor BB Biyela Romeo Mbuso Mbambo AM4598/97 Zweli Dlamini AM3685/96	IFP
March 1992 K Section. KwaMashu. Durban	Rape Assault	Doris Ngubane KZN/FS/226/DN	4 members of Amasinyora gang incl. deceased, Justice Nkwanyana (KZP member) Note: victim tried to lay charge at the KwaMashu police station, but policeman refused to take statement.	Linked to IFP

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8/11/1992 Nqutu KwaZulu, homesteads under Chief Molefe's jurisdiction, North Coast	Murder	3 people, incl. Molefe's senior induna	group of unknown armed men 2 people arrested, incl. brother of 1 of deceased	unknown
27/10/1992 outside Ixopo	Murder Attempted murder	Reggie Hadebe KZN/SELF/135/DN ANC Natal Midlands Deputy Chairperson Shakes Cele John Jeffries	Bongani Sithole (see Luthuli's amnesty application) Richard Sibusiso 'Sosha' Mbhele AM4018/96 late Chief X Mkhize certain white man with "neat red moustache" 3 unnamed KZP members Local Self Protection Unit Commander	IFP
9/6/1992 Imbali, PMB	Murder	S'khumbuzo Mgwenya (Chair Imbali ANC branch)	Abdul Awethu & 2 others charges dropped, state witnesses did not want to testify (p.219)	IFP

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21/1/1991 Greytown	Murder	Goodwill Mbuso aka Neville Sikhakhane KZN/MR/011/DN	Amnesty applicants: Eugene de Kock convicted AM0066/96 Larry Hanton AM4076/96 JA Steyn AM453/97 Willie Nortje AM3746/96 ARC Taylor deceased AM4077/96 David "Duiwel" Brits AM3745/96 JJ 'Blackie' Swart AM3750/96 Not applied & implicated Mr Engelbrecht, commander of C Section	SAP SB incl Vlakplaas

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8/2/1992. PMB	Murder	S'khumbuzo Ngwenya (Mbatha) Chair, Imbali ANC branch & PACSA fieldworker	Arrested & charges dropped: Phikelele Ndlovu (Imbali mayor) Abdul Awethu (dep. Mayor) No prosecution	
17/11/1991 exact place unknown Natal Midlands	Murder	Rosemary Ngcobo (ANC member)	Nelson Shabangu (amnesty applicant) Riot Unit members Note: Riot unit members were charged and acquitted	SAP. Riot Unit
12/2/1991 Durnacol mines. Dannhauser	Murder (Clashes between Xhosas & Zulus)	Justice Masiba KZN/NNN/026/NC	other miners. unnamed Note: I/O in the matter was Sgt. Komandu No prosecution	

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14/7/1990 Durban	Murder	Mbuso Shabalala KZN/NNN/138/PS Charles Ndaba KZN/NN/076/DN (Involved in Operation Vula)	Amnesty applicants: HJP Botha AM453/97 Sam du Preez AM4130/96 CA vd Westhuizen AM4388/96 L Wasserman AM4508/96 KZN/NNN/138/PS	Durban Security Branch
25/3/1990 - 31/3/1990 lower Vulindlela 7. Edendale valleys, south of PMB	Murder Attempted murder			Inkatha

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9/10/1990 Duffs Road near KwaMashu & Innanda. attack on Putco bus	Murder & Attempted murder	2 unknown persons many others injured (numbers unknown)	Amnesty applicants: Eugene Marais AM0054/96 David Botha AM0057/96 Adriaan Smuts AM0056/96 KZN/SC/01-02	AWB
Date unknown. Umlazi. poisoning of water system by adding cyanide	unclear as to whether people were poisoned or not	unknown	Amnesty applicant Allan Nolte AM2501/96	IFP
7/8/1990 Lamontville. Durban	Murder	Austin Zwane KZN/NN/006/DN	4 KZP members (led by Siphiwe Mvuyane, deceased)	KZP
2/8/1990 Esikhawini	Murder	Dr Henry Vika Luthuli	Cst. Thembinkosi Dube see KZP investigation & inquest findings, 1996	SAP, Vlakplaas

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27/3/1990 Payiphini, Mpumuza	Murder (revenge attack)	1 person killed	unknown persons	UDF
9/3/1990 KwaMakhutha, Durban	Murder	Raphael & Winnie Mkhize	Cst. Patrick Mbambo Wellington Mncwango Mohande Whu Cyril Ngema Note: arrested, not clear if any prosecutions	KZP

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28/3/1990 Elandskop (upper Vulindlela) at Gezubuso, KwaShange & KwaMnyandu	Murder	35 people killed KwaShange 15 people killed (see footnote 15, p.261, Vol. 3, Ch. 3	David Ntombela Chief Shayabantu Zondi Induna Guvuza Khanyile Lolo Lombo & Other unknown armed persons special constables, see amnesty application of Philemon Madlala AM3432/96 Members of the Riot Unit. Fired on ANC without provocation, see William Harrington AM0173/96 Omision, incl. Cst Nelson Shabangu AM3676/96 No prosecution	IFP Special Constables
27/3/1990 Lower Edendale Valley	unclear if persons killed	residents, Lower Edendale Valley	unknown IFP members Nhlanhla Philemon Madlala AM3432/96	IFP special constables

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12/1988 Trust Feed Massacre. New Hanover	Murder & Attempted Murder	11 people killed, 2 people wounded (see p.198 & 199 of TRC report)	Implicated persons not charged & not applied for amnesty: Maj. Deon Terreblanche (deceased) David Ntombela Gabela Brig. Marx (then Head of CID in Natal) 2 unknown IFP members Cst. Willem de Wet Capt. Kritzinger Gen. Vd Westhuizen Col. Langenhoven Gen. Ronnie vd Westhuizen	SAP IFP

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6.1.1990 Mbava, Swayimane Wartburg area	Murder Note: 2 inquests held in 1991 & 1995	Vusi Ngcobo Bonowakhe Gasa KZN/HG/922/NY (UDF activists)	acquitted. Muzi Hlophe Peter Smith People below not prosecuted as Tim McNally declined Abraham Shoba, unknown person. Maj Joseph van Zyl (I.O., accessory) implicated in cover up. Robert Mzimela (secretary of Kwazulu Legislature) Z. Mkhize Maj Leonard Langeni	SAP KZP KwaZulu government officials. IFP
Mid-1989. KwaMashu	Murder	certain Jomo. UDF supporter	Bheki Mvubu & others arrested, but no court case	AmaSinyora
20/5/1989 Lindelani, Durban	Kidnapping & Assault	Sibusiso Nkabinde KZN/FS/130/DN	Thomas Tshabalala & others	IFP

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October 1988 Elandskop PMB	Murder	Phila Portia Ndwandwe aka MK Zandile KZN/nn/018/DN	Amnesty applicants: Lt. Sam du Preez AM4130/96 Sgt. Lawrence Wasserman AM4508/96 Col. Andy Taylor AM4077/96 deceased JA Steyn AM453/97 JA Vorster AM4390/96 HJP Botha AM453/97	Durban SB Members
30/7/1988 Sobantu PMB	Murder	Mxolisi Penwell Khumalo aka MK Mubhi No inquest	Sgt. Simon Makhaye Thulani Kleinbooi Zimu Mzolo	PMB & Greytown Security Branch

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November 1988. Farm at Verulam	Kidnapping & Murder	Phumezo Nxiweni EC246/96WTK	Amnesty applicants: HJ Botha AM453/97 JA Steyn AM453/97 JA Vorster AM4390/96 Lt. Sam Du Preez AM4130/96 Col. ARC Taylor AM4077/96 deceased C vd Westhuizen AM4388/96 Sgt. LG Wasserman AM4508/96	SAP SB

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15/10/1987 Clermont 10/2/1988	Attempted Murder Murder KZN/MM/992/DN	Pearl Tshabalala (Vuka Tshabalala's Wife)	Jamile (orders) Daluxolo Luthuli (amnesty applicant) Msizi Hlophe AM1779/96 (granted amnesty) 4 Caprivi trainees incl. Alex Sosha Khumalo David Zweli Dlamini Note: Perps involved in 10/2/1988 incident? Need to establish	IFP
9/10/1987 KwaMncane. Zondi Store	Murder	Maqhikila Angelica Mkhize Petronella Mkhize	David Ntombela & 5 others Inquest, but no criminal case	IFP

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18/1/1988 'Summertime' unit 1. South Mpumalanga	Murder Attempted Murder	9 people killed incl. Mfanafuthi Gasa Kinathi Mabhida Musa Khoza Thomas Mncwabe Thomas's brother certain 'Rolla' approx 200 people injured	Daluxolo Luthuli (orders) AM4075/96 Not applied for amnesty Phumlani Xolani Mshengu S'bu Bhengu Other Caprivi trainees Note: attack registered at Hammarsdale police station, CR184/01/88 No prosecution (p 226)	IFP
30/12/1987 Imbali,PMB	Murder Attempted Murder	10 people killed incl. Busisiwe Paulina Mbeje Many injured incl Bongiwe Mbeje, Simangaliso Mkhatshwa & Sibongile Mabuza	Amnesty applicants: Alex Sosha Khumalo AM4027/96 Daluxolo Luthuli AM4075/96 Zweli Dlamini AM3685/96	IFP

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9/5/1987 Clermont, Durban	Murder	Zazi Khuzwayo KZN/MM/997/DN	Jamile (orders) convicted of 2 counts of murder & 1 attempted murder Daluxolo Luthuli (amnesty applicant) Sbu Bhengu Hlakaniphile Jamile Msizi Hlophe (granted amnesty, 1996) Caprivi trainees: Phumlani Xolani Mshengu Alex Sosha Khumalo AM4027/96 Vela Mchunu	HP

July 1987 Elandskop, Natal	Murder	Dion Charles Cele aka Mzimela	Amnesty applicants: Sgt. LG Wasserman AM4508/96 Col. Andy Taylor AM4077/96 HJP Botha AM453/97 JA Vorster AM4390/96 JJS Labuschagne AM5005/97 AE Verwey AM5018/97	SAP SB

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18 2 1987	Kidnapping & murder	Stanley Bhila KZN/NJ/004/DN	Amnesty applicants: Col. Andy Taylor (gave orders) AM4077/96 deceased Frank McCarter AM4063/96 Adrian Rosslee AM4378/96 Sgt. LG Wasserman AM4508/96 Izak Daniel Bosch AM3765/96	Durban Security Branch & Vlakplaas unit, SAP
Exact date unknown, 1987	Attempted murder	Hansford Shangase KZN/PMB/210/PM	Toti Zulu Wasela Awethu aka Sean Hoosen Awethu No prosecution	IFP KZP

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April 1987 Clermont, Durban	Attempted Murder	Injured: Cornelius Sikhakane Johannes Sibongumusa Luthuli Note: perps instructed to kill them incl. Khayelihle Ndlovu Nkosinathi Sithole Themba Msimango (3 not injured)	Jamile (orders) convicted on 2 counts of murder & 1 attempted murder Msizi Hlophe AM1779/96, granted amnesty, 1996 Not convicted: 2 unknown persons Note: TRC report mentions that 2 caprivi trainees implicated in 1991 trial who absconded. Zweli Dlamini Vela Mchunu	IFP

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7 9/1986 Quarry Road. Durban	Murder	Blessing Mabaso Thabane Memela Percival Luvuyo Mghobozi Mbongeni Zondi	3 amnesty applications for defeating the ends of justice (role not furnished by applicants) JA Steyn AM453/97 LG Wasserman AM4508/96 MC Botha AM7560/97 KZN/NN/002/DN Note: inquest found police justified	SAP SB
May/June 1986 Chesterville	Murder	Chesterville 4: Russel Mngomezulu Muntuwenkosi Dlamini Russel Mthembu Sandile Khawula Note: inquest held	Amnesty applicants: Willie Nortje AM3764/96 Izak Daniel Bosch AM3765/96 Eugene de Kock AM0066/96	

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5/12/1986 Mphomphimeni near Howick, Midlands	Kidnapping Assault Murder Attempted murder	4 prominent MAWU members: Phineas Sibiya KZN/SW/001/PN (deceased) Micca Sibiya (deceased) Simon Ngubane KZN/NN/117/PM (deceased) Flomena Mnikathi KZN/NN/117/PM (survived)	Formal inquest (Howick Inquest 13/88) finding: 9 known persons responsible incl. Vela Mchunu, a Caprivi trainee (absconded from testifying at the inquest) No prosecution (p 239)	I. P KZP

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20/11/1981 Umlazi stadium Durban	Murder	Griffiths Mxenge	convicted & amnesty applicants: Dirk Coetzee Almond Nofomela David Tshikilange Joe Mamasela (state witness for TVL AG, not applied for amnesty) Brig. Vd Hoven (instructor) Willem Schoon (informed of planned operation) AM5006/97	Security Branch, Section C
April 1980 Jozini Northern Natal	Murder	Oupa Ronald Mndondo aka MK Scorpion	Gert Schoon AM5006/97 Schalk Visser AM5000/97 Donald Gold AM3686/96 Des Carr AM5008/97 Johan Martin van Zyl aka Sakkie AM5637/97	SAP,SB PMB

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Date & place unknown 1986	Attempted murder	Vusumzo Khambule KZN/NNN/290/PM	Dika Awetha No prosecution	IFP
September 1985 & 1988. Lindelani	Kidnapping & Assault	Victor Madele	Thomas Tshabalala Report made to police KZP & SAP, see p 216	IFP
8/8/1985 Umlazi Cinema, Umlazi, Durban (memorial service of Victoria Mxenge)	Murder Attempted murder	17 people killed 20 people killed	Winnington Sabelo (deceased) Thomas Tshabalala KZN/NNN/229/DN unknown IFP members SAP & SADF members, omission	IFP SADF SAP
13/5/1984 Mobil Oil Refinery	Murder	4 insurgents 3 bystanders	unknown Note. Aboobaker Ismail's amnesty application	ANC?
Date unknown	Murder	Philemon Khanyile	angry crowd members of the Riot Unit, incl. Frank Bennetts AM4059/96	A-Team (vigilante group)

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5/8/1977 Brighton Beach police station, Durban	Murder	Hoosen Haniajee Inquest (suicide)	Capt James Taylor Capt. Du toit see statement of Mohun Deva Gopal, made statement to TRC	SAP SB
1976 Island Rock Sudwana Bay	Torture	Joseph Nduli Cleopas Ndlovu	Col. ARC Taylor, deceased AM4077/96 & others	SAP SB Riot Unit

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Date unknown. Elandskop	Kidnapping & murder	Bhekayena Raymond Mkhwanazi KZN/FS/121/DN	Amnesty applicants: Lt.Col. JA Vorster AM4390/96 Col. ARC Taylor Deceased AM4077/96 S. Du Preez AM4230/96 LG Wasserman AM4508/96	SAP,SB
8/1/1978 Bellair, Durban	Murder	Richard Turner KZN/KP/001/DN	Martin Dolincheck (denies it & implicates Phil Freeman, deceased) See S29 transcripts: Brig. Christiaan Earle Maj. Christoffel Groenewald Eugene de Kock & other documents possessed by TRC	BOSS (Bureau of State Security)

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TRC matters Update (including payments to beneficiaries): DoJ&CD and NPA briefing (with Deputy Minister)

Justice and Constitutional Development

17 September 2024

Chairperson: Mr X Nqola (ANC)

Meeting Summary

Video

The Department of Justice and Constitutional (DoJ & CD) and the National Prosecuting Authority (NPA) updated the Committee on the progress of processing the 300 cases referred by the Truth and Reconciliation Commission (TRC)

The Committee heard that since Parliament approved reparations to TRC identified victims in the form of a once off R30 000 grant, of the 21 676 persons identified as victims, 17 428 have received payment. Thus far million has been spent on the interim individual grants and R497 798 781 has been spent on the final once off individual grants. Even though the Committee was pleased that many victims had received their grant allocation it questioned why the department had not yet paid grants to the remaining 4248 beneficiaries. It encouraged both the department and NPA to fast track the tracing of victims

The Committee was pleased that 180 of the 477 remains of persons who disappeared in political circumstances between 1960 and 1994 have been exhumed, handed over to the families and reburied by the Missing P Task Team established by the NPA in 2010. However, the Committee wondered if the department was doing enough to commemorate these persons and others who suffered at the hands of the Apartheid regime and educate the public on the sacrifices they made for the liberation of the country

While the Committee acknowledged the enormous complexity and difficulty associated with investigating and prosecuting TRC cases, it was concerned by the slow progress made in processing matters, which had del the families of those who suffered gross human rights violations obtaining some sort of closure

In his opening remarks to the Committee, the Deputy Minister of Justice and Constitutional Development admitted that despite the significant amount of work done since the TRC submitted its report, the department not say that it has finalised all of the tasks, nor could it say that the progress has been made fast enough. A directive has since been given by the Ministry to the relevant officials in the department to resolve the matte speedily

Some Committee Members believed that the starting point of the TRC's investigations should not have been 1960, as it excluded many others who suffered under the colonial and Apartheid regimes before then. Thes Members also argued that special courts should have been put in place to specifically adjudicate on these matters, considering the judicial system's backlogs and lack of human resources. These courts would be ad hoc given specified time periods to process all the cases

The NPA told the Committee that a TRC component was established in 2021 to prioritise and drive progress on TRC matters in collaboration with the Hawks. The NPA recently applied for permanent posts to be create the component for prosecutors who will only focus on processing TRC cases. The Committee welcomed this as a positive step in the NPA finalising the matters by the 2026 deadline

Meeting report

The Chairperson welcomed everyone to the meeting. Thereafter, he said the purpose of the meeting was for the Committee to receive a briefing from the department and NPA on the progress of the TRC-related. In t the Committee was also set to receive the legal opinion it requested from the Parliamentary Legal Service on the Protection of State Information Bill. However, he suggested that this item be postponed to another day asked if his suggestion was in order

Mr O Mathafa (ANC) said it was in order

Adv B Mkhwebane (EFF) also said it was in order

The Chairperson asked if any apologies were received

Mr Vhonani Ramaano (Committee Secretary) mentioned that no apologies were received

Adv Mkhwebane asked if the Committee support staff could begin drafting an action plan to combat the crisis of statutory rape of young girls in the country

The Chairperson noted the suggestion and pointed out that the Speaker had tasked the relevant committees to draft separate action plans

Afterwards, he invited the Deputy Minister (DM) to make his opening remarks

Opening remarks by the Deputy Minister

Mr Andries Nel (Deputy Minister of Justice & CD) tabled apologies on behalf of the Minister and Director General (DG) of the department who are attending the BRICS (Brazil, Russia, India, China, South Africa) Ministers Justice meeting

Thereafter, he said the department was aware that it had been entrusted with one of the most painful tasks arising out of some of the darkest chapters of the country's history, giving effect to the recommendations of TRC Commission as outlined in the Act, and those of the TRC report

Although it has been difficult, the department has gotten tremendous work done since the TRC submitted its report. In carrying out its work, the department always remained mindful of the fact that it is dealing with individuals who have experienced some of the most horrible forms of human rights abuses. These were the very same actions that led to Apartheid being declared as a crime against humanity. Even though there has progress, the department could not say that it has finalised the tasks, nor could it say that the progress has been made fast enough

At this stage, the Ministry has indicated to the relevant department officials that the matters must be resolved speedily. It has committed to working with that team and other Cabinet colleagues who share responsibili parts of the work, in particular those that relate to individual and community reparations

In some instances, the Ministry has not been as fast as it would have liked in processing those matters, much of which was due to the involvement of other departments, like Education, Health, Human Settlements, an Social Development. The department is looking for ways to improve its coordination with these departments

In its briefing, the NPA will communicate on the prosecution of Apartheid era crimes, the attempts being made to hold and bring to account those responsible for the perpetration of those horrible crimes, and also the work done by the Missing Persons Task Team (MPTT) in locating the remains of those cruelly murdered by the Apartheid regime. It will also elaborate on the work in Zambia and Zimbabwe to exhume and prepare the remains of liberation struggle veterans for repatriation back to the country

Ms Kalayvani Pillay (Deputy Director General: Legislative Development and Law Reform at the DoJ & CD) told the Committee that the department's TRC Unit was focused on implementing the TRC recommendations. Th is working closely with the legislative development branch, also in the department, on developing the draft regulations for housing people identified as TRC victims and implementing the recommendations approved b Parliament

The department has several issues to resolve before finalising the regulations. However, it has concluded several regulations related to the repatriation of the bodies of those killed outside of the country

Briefing by the DoJ & CD on the progress made on TRC matters

Adv Shireen Said (Deputy Director General: Constitutional Development at the DoJ & CD) and Ms Lufuno Mmbadi (Senior Manager for the TRC Unit at the DoJ & CD) took the Committee through the presentation

Adv Said began by indicating that Parliament approved reparations to TRC identified victims through a once off grant of R30 000, medical benefits and other forms of social assistance, symbols and monuments, rehabilitation and communities. Subsequently, regulations were put in place for the once off grant, exhumations, reburial or symbolic burial of deceased victims, reparation, basic education reparation, and higher edu assistance reparation

Ms Mmbadi said the TRC identified 21 676 persons as victims, 17 428 of whom applied for and received the once off grant of R30 000. Thus far, R53 million has been spent on the interim individual grants, and R497 79 has been spent on the final once off individual grants

After the regulations on exhumations were published in 2010, the NPA established an MPTT to conduct investigations into the 477 cases of persons who disappeared in political circumstances between 1960 and 1994 date, 180 exhumed remains have been handed over and reburied

The department has not yet finalised the development of the draft regulations on housing, community rehabilitation and special health services for victims

After the presentation, the Chairperson invited the National Director of Public Prosecutions (NDPP) to provide an overview of the NPA's presentation

Overview by the NDPP on the NPA's presentation

Adv Shamila Batohi (NDPP) stated that the NPA has, for the past few years, tried to bring a level of justice and accountability about the atrocities committed during the Apartheid years and to help many families begin road to healing. Even though it has been a difficult and challenging process, the NPA was pleased to see significant progress made in dealing with the unspeakable acts and crimes of gross human rights violations com under a veil of secrecy during the Apartheid era

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The NPA has adopted a multi-pronged approach, including prosecutions and inquests to bring justice and accountability. In cases where there is new evidence, the NPA has re-opened the inquests, where inquests hav been held, the Authority has recommended that they be to the Minister.

The final aspect of bringing about accountability and justice for the families has been carried out by the MPTT, which has made significant strides in tracing, locating and returning the remains of many the activists and victims who died or disappeared in mysterious political circumstances between 1960 and 1994.

The Authority has been working very closely with the Hawks, and it established a dedicated capacity in 2021 to prioritise the TRC matters. The teams adopt a very hands-on approach to the investigations, which is bear fruit.

There have been two key projects. The Gallows exhumation project seeks to recover the remains of political prisoners who were hanged at the Gallows and hand them to their families. The second project is the exile repatriation project currently underway in Zimbabwe and Zambia. This project focuses on the exhumation and repatriation of the remains of many exiles.

Even where all leads are exhausted, and the Authority cannot prosecute, open an inquest or recover remains, it tries to provide some degree of closure to the families by informing them that it tried to explore all ave n ensure justice and accountability, she said.

Briefing by the NPA on the progress made on TRC matters

Adv Rodney de Kock (Deputy National Director of Public Prosecutions: National Prosecutions) and Ms Madeleine Fullard (Head: Missing Persons Task Team at the NPA) took the Committee through the presentation.

Adv de Kock mentioned that a TRC component was established in the NPA in 2021 to prioritise and drive progress on TRC matters in collaboration with the Directorate for Priority Crime Investigation (DPCI/Hawks). Sin September 2021, 104 new investigations emerging from the TRC have been reopened, with 126 cases currently under investigation. Due to the slow progress in processing matters, the NPA and Hawks have increased joint accountability sessions. In addition, the NPA hired contract prosecutors dedicated solely to TRC matters.

Families led by the Apartheid Era Victims Family Group (AVFG) approached the NPA to engage with prosecutors and investigative officers to support their progress in establishing trust. Following these engagements, th NDPP issued a directive that prosecutors should actively engage with families and keep them updated on the progress of matters.

Some challenges in processing matters are the destruction of files and documents as part of a deliberate policy to conceal information and the fact that many of the witnesses/accused/suspects are either very old or deceased.

Ms Fullard said the TRC recommended that a task team be established in the NPA to continue to trace the fate and whereabouts of those who disappeared in political circumstances and to recover their remains wher possible. Up to this point, the MPTT has recovered the remains of 180 individuals inside the country.

The MPTT has two projects that focus on groups that faced specific forms of political repression and deaths: The Gallows Exhumation Project and the Exile Repatriation Project. The gallows exhumation project aims to recover and return the remains of political prisoners who were sentenced to death and executed on the gallows between 1960 and 1990. Only the remains of 9 hanged political prisoners need to be recovered. Where, exile repatriation project aims to exhume, prepare and repatriate the remains of those who died in exile back into the country.

Adv Batohi mentioned that the NPA appointed Adv Ntsebeza, Senior Counsel (SC), in October 2022 to review whether the measures it has adopted to deal with TRC matters are adequate, in line with the remarks of th Gauteng High Court full bench in the 2019 Rodriguez judgement. By appointing Adv Ntsebeza SC to review and assess the internal measures objectively, the NPA submitted itself to external scrutiny. This move also se a public reaffirmation of the NPA's commitment to upholding its constitutional mandate by prosecuting without fear, favour or prejudice and doing whatever it can to ensure that those responsible for the atrocities du the Apartheid era are held to account.

Adv Ntsebeza, SC, submitted his report in June 2023, which is available on the NPA's website. A copy was shared with the previous chairperson of the Committee and the former Minister of Justice & CD. The report fou the measures adopted and implemented by the NPA to deal with TRC matters—namely, the structure and the checks and balances used—are largely adequate. The report further found that the NPA has abided by th recommendations.

The Chairperson opened the floor for discussion.

Discussion

Adv G Breytenbach (DA) acknowledged the enormous complexity and difficulty associated with investigating and prosecuting TRC cases, and she thanked the MPTT for the work it has done so far.

After that, she posed a series of questions, such as whether the Priority Crimes Litigation Unit (PCLU) had made any progress in the prosecution of TRC matters between 2003 and 2017, what the cause of delay was in prosecuting the TRC matters between that period; whether any consequences had been taken against those in the PCLU for failure to prosecute any of the cases; what the challenges were in accessing classified inform why they were there in the first place, and how the Committee could assist in resolving them; what the prospects were of assigning judges on an urgent basis to the matters, and what arrangements were in place to a to the serious lack of capacity on the bench.

She said time is the greatest enemy of these matters, as the accused individuals and potential witnesses may die, or witnesses' abilities to recollect events may diminish with age. Nevertheless, she was hopeful that pr would be made, as the matters appeared to be micromanaged.

In her second set of questions, she asked for comment on whether the self-imposed deadline to finalise the matters by 2026 and whether there was political interference between 2003 and 2017, what had been done renew the contracts of the prosecutors prosecuting TRC matters, which are set to expire this year; on whether the NPA has followed the court recommendations to improve the availability of evidence, and if not, why; the reasons for the recent postponement of the Cradock Four matter until next year, what the factors leading to the postponement were, and whether they could have been dealt with by the NPA before the hearing o September 2024.

The long postponements of cases did not assist anyone and only served to traumatise the families involved further. While she noted the NPA's statements that it had engaged members of the Cradock 4 families, she s that in her engagements with them, they indicated that the Authority was not engaging with them during the sessions but instead providing briefs.

Mr T Tshotetsi (ANC) congratulated the NPA for having successfully overturned the judgements of the court, which wrongly found that, in some cases, the cause of death was suicide and not murder. He asked if the NI planned to conduct judicial inquiries that sought to overturn other incorrect court judgements and, if so, what the total number was.

The presentations indicated that 477 matters had been handed over to the MPTT, and he wondered how many of them had still not been finalised. The inquest on Boikie Tlapi was particularly interesting to him, whos family asked the Committee to ask the NPA whether it was looking into his disappearance. He also asked whether the NPA kept the families informed on the status of the matters.

To him, it seemed that private prosecutions were finalised much more speedily than those prosecuted by the NPA – as was the case with the Ahmed Timol case – and he asked if his view was correct and, if so, what th reasons were for this difference. Due to the high costs, not all families can access private prosecutions.

In addition, he asked if there were still political prisoners in the country.

Mr D Klopper (DA) felt that little was being done to process the matters given the repeated postponements of cases since the first TRC report was submitted to Former President Nelson Mandela. All the families wante closure; they had to wait sometime to get that. Furthermore, the longer it took to finalise the matters, the higher the likelihood of witnesses either dying or forgetting some of the details in the cases, preventing victim their loved ones from obtaining justice. Nevertheless, he applauded the MPTT for its commitment to complete its work in one year and encouraged the NPA to follow its lead.

Afterwards, he asked what consequences would be implemented if the 2026 deadline was not met, how many projects related to the new community rehabilitation approach had been rolled out, how they would be f and monitored, and who would be responsible for their monitoring; whether the NPA and its provincial Directors of Public Prosecutions (DPP) had partnered with the State Security Agency (SSA) to investigate TRC mat and for a progress update on inquests involving Dr Hoosen Haffejee and Imam Haron. In Dr Haffejee's case, the court recommended that the NPA consider instituting criminal charges. In the case of Imam Haron, the ordered that certain individuals involved in his death be referred to the Western Cape DPP and that the medical practitioners be referred to the medical council.

Mr Mathafa acknowledged the good work being done by the department and NPA on these matters. He was also pleased by the DM's admission that the pace of administering reparations has been slow due to the lac regulations. He advised that the department should look into what other issues may have contributed to the slow progress to prevent further delays. Moreover, he proposed that the Ministry consider asking the Presi establish an inter-ministerial committee to better coordinate the DoJ & CD and the departments it is working with on the TRC matters.

The presentations clearly showed the good work done by the TRC to reveal the true nature of the Apartheid system's cruelty and move the country towards forgiveness and reconciliation. However, it appeared that or people on the street did not have the same appreciation. As such, he asked if the department had thought of initiatives to educate South Africans, especially the younger generation, on the TRC's work and the history apartheid.

Many reports suggest that crimes similar to those committed during Apartheid were now being perpetrated by private individuals, like the incident in Limpopo where two black women were killed and fed to pigs. Such *crimes illustrated the slow progress in bringing about national reconciliation. He asked the department if it has thought about implementing programmes aimed at fostering national reconciliation – such as an o rg oin;* national dialogue – and the promotion of healing amongst communities that were divided as a result of Apartheid. The findings of the TRC could be the starting point in communicating these efforts to society.

He then posed several questions, including why there was a difference in the cases formally communicated to the NPA by the TRC requiring prosecution against the 126 cases currently under investigation, if any psychosocial support had been provided to victims if any plans were in place to honour victims; what impact the lack of resources has had on the finalisation of cases; how the expenditure line items on the repatriatio would be funded and what mechanisms were in place to ensure they are accounted for; whether the department has a tracking mechanism to monitor and report on the progress of cases, and if so, whether timeline in place for reporting, whether the NPA had implemented the recommendations from Adv Ntsebeza's report that were related to the Rodrigues judgement, and how far it was in doing so, which stakeholders were unif the NPA to its accountability sessions, and if the department also conducted accountability sessions.

He encouraged the NPA to continue its good progress in its accountability sessions with the Hawks.

Ms N Motaung (ANC) acknowledged why the NPA delayed some of its investigations. She asked the department how it dealt with cases where the accused is over 80 years of age and in cases where witnesses are afra unwilling to testify.

Mr S Nomvalo (MK) mentioned that there has been a disruption in the evidence regarding some TRC matters. Many families have lost hope due to the delays, while many perpetrators have still not faced the highest pu their misconduct. The question that should be asked, he said, is how to reinstate confidence in the people who still want justice. In his view, the TRC should have looked into atrocities committed before 1960 so that al victims who suffered were accounted for. In addition, he argued that special courts to adjudicate specifically on these matters should have been established, considering the backlogs and lack of human resources in traditional courts. These courts would be ad-hoc in nature and would be given specified time periods to process all the cases.

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Clear timeframes had to be established and communicated to the victims' families so that they would not begin to lose confidence in the NPA's ability to finalise the matters.

He asked for clarity on whether the department had finished building houses for the victims in need or had only identified the beneficiaries for this project.

To fast-track the tracing of victims, the department had to partner with the South African Police Services (SAPS). Together, they could place registers in police stations for victims to make themselves known. He asked v equipment was used to trace down victims and whether it was effective.

Adv Mkhwebane asked questions on what measures were in place to assist the communities who lived in the former KwaNdebele homeland and were terrorised by a vigilante group called Imbokodo in 1986; whether department worked with non-governmental organisations (NGO) like Khulumani Support Group (KSG); how often the department and NPA communicated with victims; the details of Section 10 of the Witness Protectic the role the Committee can play in the fast-tracking of these matters; the number of individuals in the MPTT who can speak the country's multiple official languages; whether the contracts of the prosecutors assigned matters would be renewed; how far the department was in finalising the payment of grants to the remaining 4248 victims; why the NPA's presentation only highlighted 126 cases under investigation identified perpetra when the TRC report identified 300 perpetrators; why the NPA had only prioritised 126 cases, what criteria was used, and for the Committee to be provided a spreadsheet on each of the cases; and why the NPA could access all of the TRC's records, given that the department was the custodian of them.

Parliament had a duty to ensure that the NPA had access to all records so that all matters could be dealt with speedily.

Ms Pillay explained how the line items are accounted for. The department has a ring-fenced allocation called the President's Fund, which is made of money donated for the TRC reparations. The money is accounted fo has its own audited financial statements.

Regarding the mechanisms used to trace victims, she said the department's constitutional development legislation branch is working on developing policies and finalising regulations, with deadlines set for the latter. F instance, the housing regulations must be signed off before the end of this financial year.

She added that the department is awaiting further information on the community rehabilitation programme.

Adv Said explained that the constitutional development unit comprised three chief directors dealing with constitutional implementation, social justice and participatory democracy, international mutual legal assistance extraditions. The constitutional values inform the work of the third branch of human rights, equality, good governance, and accountability. All matters relating to community healing, promoting social cohesion, toleran non-discrimination fall under the constitutional implementation unit.

The interface between all the units was significant in the attempts to look into crimes committed in Apartheid, as well as addressing issues of discrimination, inequalities and tolerance. The social justice chief directora drafted a national action plan for racism, intolerance, and xenophobia, which is based on the World Conference on Racism Conference's recommendations. The plan has a rapid response mechanism, highlights the in of intolerance in the country, and is made up of external stakeholders – including Chapter 9 institutions – and meets regularly.

The department also has a project that seeks to legally empower communities. Many have been found to be legally illiterate due to the historical actions of the Apartheid government regarding their constitutional and human rights. Community advice officers around the country have been supported in spreading awareness of these rights, and the department hopes to intensify these efforts in the next five years.

The conference on human rights held earlier this year looked at the mechanisms put in place by government departments to protect the constitutional rights of citizens. One recommendation that came up repeatedly the need to improve the attitude and mechanisms used to resolve discrimination-related disputes. After going through many cases adjudicated by the equality courts, the department noted that communities could nc identify when they were being discriminated against.

The department is considering how best to work with communities to promote social cohesion, whether through awareness and engagement programmes or dialogues. These programmes will complement the annua court competition the department currently holds in collaboration with the Department of Basic Education in high schools, where students can engage with constitutional-related issues and better understand their rig

A series of dialogues have been held this month as part of the department's programmes in the build-up to Heritage Day, with others planned for November. She said the discussions in these dialogues will assist the department in developing its indicators.

Ms Mmbadi indicated that the President's fund will fund the community reparation projects. The regulations will clarify how the projects will be managed and who will be responsible for doing so.

On whether psychosocial support is given to victims, she outlined that the regulations make provisions for psychosocial support. Before the exhumation and handing over of bodies, the department requests the Depa of Social Development (DSD) to provide the families with psychosocial support.

Regarding whether the department has honoured the victims, she stated that this function belonged to the Department of Sports, Arts and Culture (DSAC), not the DoJ & CD. The DSAC does so through the changing of names and the creation of new monuments. The repatriation programme intends to restore the human dignity that the different TRC-identified victims lost as a result of the gross human rights violations committed u the Apartheid government.

She confirmed that the department had identified the beneficiaries for the housing project.

Regarding the questions related to the payment of the individual grants of R30 000, she mentioned that the remaining beneficiaries referred to those who decided not to receive the individual grant. Some beneficiarie unaware of the grants as they did not expect to be paid for their contribution to the country's liberation, while others could not be traced. Nevertheless, the Promotion of National Unity and Reconciliation Act allowed who had yet to receive their grant to apply for them at any time.

On the questions related to the community rehabilitation programme, she explained that the department can only rehabilitate 18 of the 128 identified communities due to limited funds. Only 3 or 4 communities have rehabilitated, and work will only begin on the remaining 14 or 15 once the regulations have been published.

She confirmed whether the department is working with the KSG and whether it collaborates with the group, especially when it conducts community outreach programmes on the education reparations it offers. Durin Khulumani Galela Campaign, representatives from the KSG could engage with the former Minister of Justice and the current DG. One of the issues they raised during the engagement was that the TRC followed a close approach, meaning that those not identified were not entitled to reparations. After the engagement, the previous Ministry requested those who the TRC unit had identified to receive reparations to submit their names that the department could verify if they had received them. The department found that those who submitted their names had received their reparations.

The TRC defined a victim as a person who had suffered gross human rights violations in the past. All people not defined as such by the TRC fell outside of the department's mandate.

Regarding the proposal to expand the TRC mandate to include crimes committed before 1960, she said it was for Parliament to decide whether the TRC process should be reopened and broadened to include victims v may have suffered from atrocities before 1960.

On how often the department communicated with victims or their families, she indicated that the department readily communicates with victims and their loved ones, mainly through WhatsApp, direct phone calls anc outreach programmes.

Adv Batohi, on the delays in processing the matters, said the NPA has acknowledged publicly that there have been unacceptable delays in providing accountability and justice for victims and survivors of atrocities com during the Apartheid era. Despite the challenge, the Authority is trying its best to get the cases moving, but it has struggled as not much was done before 2018 – which raised serious questions.

Adv Ntsebeza was appointed by the NPA to review the structures and effectiveness of its TRC component, following the findings in the 2019 Rodrigues Judgement that there was political interference in the work of the prosecutions and related matters between 2003 and 2007, she outlined.

In his report, Adv Ntsebeza indicated that he did not have sufficient time to look into the matter and recommended a commission of inquiry. In the course of the Rodriguez case, Adv Pikoli and other members of the N deposed to affidavits, which spoke to what they referred to as interference in the work of the NPA in its ability to investigate and prosecute matters properly. The NPA is doing what it can to ensure no further delays, notwithstanding the challenges.

When asked why private prosecutions were finalised more speedily than ones done by the state, she assumed that the question referred to private legal representations as opposed to private prosecutions, as she wa aware of any inquest being privately prosecuted. When she took office, legal representatives of families and NGOs placed much pressure on the NPA to open inquests on issues.

The NPA's approach has been to assist all families that cannot afford legal representation. One way it has done so is by asking that a joint inquest be held, as was seen in the Dipale and Haffejee cases. As those cases h bigger public profile, an impression was created that they were being prioritised over others.

Regarding whether the contracts of the contract prosecutors would be extended, she said that even though the contracts can only be for 12 months, the NPA was granted an exception to appoint contract prosecutors deal specifically with TRC matters for three years. The NPA recently applied for the new posts to be permanent as it anticipated that the processing of these cases may take longer than expected. The prosecutors can b absorbed after the TRC matters are resolved. The department has yet to give an outcome regarding the application.

Ms Fullard, on how many of the 447 matters involving individuals reported missing in the TRC report had been finalised, highlighted that the 180 individuals whose remains have been recovered were not on that list b the list did not include victims who arose out of the amnesty process, like Pebco 3 and the Mamelodi 10. The fact that the amnesty cases are not reflected on the list has more to do with the timing of the release of the report.

Some people on the list of the 447 relate to larger cases, like the case of Richard Lentsela whose family reported him missing to the TRC. Through its work, the MPTT established that he had been shot dead along with other uMkhonto we Sizwe cadres near the border of Botswana. Their remains were recovered in a small village near Rustenburg and were riddled with bullets. The bodies of any individual found to have been killed in same incident as someone identified on the TRC list must be recovered.

Regarding Boikie Tlhapi, she explained that the MPTT dealt with two types of cases. One is clandestine/covert abductions and disappearances. In those instances, the fate and whereabouts of the missing person or de are known only to a small group of perpetrators. The only cases in that category where it has managed to recover remains are cases where the perpetrators applied for amnesty, as was done in the cases of the Mame and Pebco 3 – the MPTT would not have been able to locate the burned remains of the Pebco 3 without the amnesty application which revealed that they had been abducted and taken to Cradock.

In those clandestine/covert abductions, the MPTT's capacity to recover remains depends on the availability of information from amnesty applications. There was no such application in the case of Boikie Tlhapi.

The second category of cases the MPTT deals with are ones where people were killed in the public domain in a skirmish or an incident that was not clandestine. A lot of the remains recovered have been of combatants inside the country in clashes with the police.

On what is being done to memorialise TRC victims, she said the MPTT tries to ensure that the names of TRC victims, and those still alive, appear on the Wall of Remembrance at Freedom Park in the City of Tshwane. Pc prisoners executed on the gallows are memorialised at the Gallows Museum at Kgosi Mampuru Prison, which she believes is one of the most outstanding museums worldwide and needed more publicity.

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As part of its exile repatriation project, the MPTT has met with the South African Local Government Association to discuss the possibility of municipalities memorialising deceased exiles whose bodies have been repatr by renaming streets and public buildings.

On who the MPTT has partnered to trace the remains, she indicated that the MPTT works with the SAPS and Department of Health, both of which house forensic pathology facilities, mortuary books, and registers, all c which are fundamental to identifying unidentified bodies that have been brought to the mortuary at a particular time. In addition, the MPTT works with the municipalities, especially their cemetery departments and th Department of Home Affairs.

The MPTT also uses residual security police documents found in the national archives, like the security police photo album, which contains 7,000 photographs and information about people in exile.

She mentioned that the MPTT incorporates different spiritual, religious, and cultural practices in its work to communicate with families across language and cultural differences. The team is multilingual and can engag different communities.

Adv de Kock pointed out that the DPPs are responsible for the operational management of the TRC cases.

Regarding the total number of inquests underway, he said the NPA has 25 inquests at various stages of preparation, which are either on the court rolls or have been requested to be reopened. The hearing of an inque depends on the availability of judges, which will be checked by the NPA's head office in collaboration with the DPP of a particular jurisdiction.

In response to the question of whether special courts are needed, he pointed out that the majority of the inquests will be dealt with in the high courts, so each gets the necessary attention.

On why private prosecutions were done more speedily than public ones, he underlined that there were 0 prosecuted TRC matters, as the mandate to deal with these matters rests with the state, which the NPA repres all criminal proceedings. Furthermore, all the matters fall within the mandate of the investigative authorities (the Hawks) and the prosecuting authority. The NPA does work with private practitioners and held a meetin them in January of this year. Where family members of victims choose to be represented by private legal practitioners, the NPA will offer to assist.

Regarding the concerns raised around the timelines, he said there are common themes throughout the presentation: one, the identification of all the cases that need critical attention; two, that there must be account in terms of both the investigation and prosecution of the matters; three, that there is accountability in terms of monitoring and evaluation which happens monthly; and four, that in each of the cases, an action plan is developed with specific timelines. Thus, the NPA is confident that the measures put in place will do justice to all of the work that has to be done, and it will adhere strictly to the timeframes.

While the work is ongoing, the NPA could not provide a fixed timeline for resolving the matters as new cases are added from time to time, he explained.

On whether the contracts of the prosecutors of TRC cases in the NPA would be renewed, he mentioned that the prosecutors would be permanently appointed. Even if the prosecutors are promoted from their positior can still be retained to complete cases worked on in the TRC. The NPA has asked for an extension of the contracts and to hire additional prosecutors for the contract. The latter will depend on the creation of the perm capacity requested.

On witness protection, he highlighted that the presentation reflects the NPA's plan to host a 2-day workshop on 07 November, with all the relevant officials involved in TRC work expected to be present. A strategy will l developed to address concerns regarding witness protection at the workshop. The NPA does have an internal witness protection unit where many witnesses are held under witness protection.

Regarding whether the scope of the inquests should extend before 1960, he explained that Parliament decided to set the period from 1960 to 1994. The TRC did not specify the total number of referrals. The NPA has g through all the volumes of information provided by the TRC work to identify which matters the TRC did not make any finding on amnesty and where outstanding investigations were required. He stressed that there wa list of 300 cases of perpetrators referred to the NPA.

The current total number of matters dealt with by the NPA since 2021 is 156, with 126 currently under investigation.

On the NPA's ability to engage with victims of different language groups, he indicated that 8 of the 10 DPPs are multilingual. The NPA personnel are in line with the country's equity profile and demographics.

He asked the Eastern Cape DPP to answer the question on the Cradock 4 inquest.

Adv Barry Madolo (DPP, Eastern Cape Division of the NPA) stated that the inquest was postponed after an agreement was reached between all the parties involved before the hearing on 02 September until 02 June 20 This agreement was reached after a delay in fees paid to counsel representing former SAPS and SSA officials and a request made by a member of the Goniwe family for the state to pay his legal representation.

Adv de Kock, on the classified information, mentioned that this was flagged as a practical challenge and no assistance was needed from the Committee. Classified pieces of information have, from time to time, been declassified by the relevant department in collaboration with the SSA. A meeting has been set up between the NPA and SSA from 02 to 03 October to address the outstanding issues.

Touching on the comments related to the Ntsebeza report recommendations, he highlighted some of the key recommendations: the continuation of the accountability sessions; the TRC component must play a critical the investigation of the matters in collaboration with the SAPS, which is being done; improved the alignment of the work of the MPTT and TRC component (the NPA has closed the gaps that existed between the two); ti sharing of information between the MPTT and the NPA's investigative team, which has been followed up on; SAPS legal representation for accused appearing in courts (the NPA has addressed a letter to the National Commissioner of SAPS and it believes that the matter has been resolved); the payment of SAPS expert witness fees, which has been resolved; data management in all the TRC investigations and prosecutions (the NPA working on a system to upload the progress of each matter).

Adv Batohi reminded the Committee that Adv Ntsebeza's report found that the processes, structures, and systems put in place were largely adequate. She thanked the Committee for acknowledging the complexity an difficulties of these issues and for offering to assist where it could.

Deputy Minister Nel said he had a few brief points to make. First, he thanked the Committee for the constructive engagement on the topic. The questions demonstrated a Parliament at work and a Parliament fulfilling oversight obligations.

Two, he thanked the department and NPA for their work so far.

Three, he told the Committee that the former DM of Justice, Mr John Jeffery is listed by the TRC as a victim of gross human rights violations, having narrowly escaped with his life in an ambush in KwaZulu-Natal during t height of the violence, but he declined to accept reparations.

Fourth, he indicated that Members raised fundamental policy matters that would be taken to the Minister. The Ministry undertook to engage further with the Committee on issues like the proposal to expand the scop before 1960, the closed list, the establishment of special courts, the alleged political interference in the prosecution process – which he claimed not to be aware of or been a part of – and how to ensure issues of racisr sexism as experienced in Apartheid never rear their head again. The national plan of action against racism and related intolerance and the forthcoming national dialogue will be an appropriate platform to discuss the he felt.

He felt the need for tighter coordination and collaboration between the relevant departments and authorities working on these cases was clear. The department will explore the proposal of an Inter-Ministerial commit

Five, he said international cooperation between the MPTT and other countries like Argentina – which had a similar history of individuals being kidnapped, tortured and killed – highlighted the essence of what internati olidarity was all about.

Adv Mkhwebane asked the department to submit a spreadsheet of all the cases it is dealing with and a report on what happened to the alleged vigilante group Imbokodo, which operated in KwaNdebele.

To her, the department and NPA had forgotten about the 2026 deadline and were not showing enough initiative in processing the matters. Nevertheless, she acknowledged the efforts made to create permanent struc

The Chairperson asked that these questions be answered in writing.

Adv Batohi assured the Committee that the NPA would provide the information.

The Chairperson thanked the department and NPA for their engagement and expressed his satisfaction that the department still fulfilled its obligations without the Minister and DG.

He said the committee will monitor the progress of the matters and play a supportive role, where it can, to ensure that the 2026 deadline is met. Government departments needed more collaboration to carry out the exhumation and repatriation programme.

He announced that a meeting had been scheduled for Friday, including the relevant committee secretaries, to begin discussions on the action plan to combat statutory rape.

The meeting was adjourned.

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SUID-AFRIKAANSE POLISIEDIENS

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3 OCTOBER 2016

Mr James Ekron
SAHA

Dear Sir

DECISION ON REQUEST FOR ACCESS TO A RECORD: **GENERAL IZAK JOHANNES ENGELBRECHT**
(Section 25 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000))

If the request has been granted, proceed at A.
If the request is granted, but deferred, proceed at B
If a record cannot be found or does not exist, proceed at C.
If the request is refused, proceed at D.
If the request has in part been granted, and in part been refused, A and D must been completed.
If the Service refuses to confirm or deny the existence of the record, proceed at E.

Your request for access to a record was considered and the following decision has been taken:

A. **Request for access to the record is granted**

Indicate below whether access to the record is granted in full or only in part
If access to the record is only granted in part, complete D below and state the reason for the partial refusal and the section of the Act relied upon to refuse access to a particular part of the record.

You have been granted full* / partial* access to the record. Before access will however be allowed, an access fee/ reproduction fee * may be payable. This fee is determined by the form in which access is granted. (See below)
* *Delete which is not applicable*

If you believe that you qualify for exemption from the payment of the prescribed fee, submit your reasons together with this Notice to the deputy information officer whose particulars appear above. The deputy information officer will inform you whether you qualify for exemption from paying the relevant fee or not.

The access fee or reproduction fee payable is .....The fee may be paid at your nearest police station or financial office of the South African Police Service (take this form with you when making such payment), or make an electronic payment into the South African Police Service bank account of which the bank details are: **ABSA Bank, Pretoria, Branch Code 632005, Account Number: 4054522787, Cheque Account** (the reference number on the top right side of this form must be used as the relevant reference number). The receipt that you receive must be submitted to the deputy information officer concerned as proof that you have paid the relevant fee. Only after the deputy information officer has received the receipt, your request will be granted.

Form of Access to record

Mark the appropriate box with an "X" to indicate the form in which the record will be provided to the requester
If access to the record cannot be provided in the manner in which it was requested, complete below.

As you requested, the record will be provided to you, in the manner marked with an "X" below.

X	copy of written or printed record (A4-pages)		copy of A4-page on computer or in electronic or machine readable
	copy of video cassette		transcription of video cassette
	copy of audio cassette		transcription of audio cassettes
	copy of photographs		copy of stiffy
	copy of compact disk		

It is not practically possible to give you access to the record in the form that you requested. Access will however be provided

in the following manner:_____

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The representations that you have made on why access to the requested record should not be deferred, were considered* / no representations were received from you* and it was decided that access to the record will not be granted before the publication or submission of the record. Access to the record will be granted on _____ / / 20 _____.

* *Delete which is not applicable*

DD MM YEAR

C. The record requested cannot be found or does not exist

	Mark with "X"
The record that you requested, cannot be found.	X
The record that you requested, does not exist.	

In view of the above, it is therefore impossible to grant access to the record that you requested. Attached hereto you will find an affidavit or statement on affirmation, giving full account of all the steps taken to find the record, or to determine whether the record exists, or not. If the record is found after you have received this Notice, your request will be considered and you will be informed of the outcome of your request for access.

D. Request for access is refused

The reason(s) for refusal and the section of the Act which provides for such refusal, must be stated below
If access to a record is partially granted, this section must be completed concerning the part of the record to which access is refused.

Your request for access to a record has been refused. The section relied upon for the refusal is indicated in the table below:

Section of the Act relied upon		Mark with "X"
Sec 34:	Record may infringe the privacy of a third party who is a natural person	
Sec 35:	Request relates to certain records of the South African Revenue Service	
Sec 36:	Record may relates to commercial information of third party	
Sec 37:	Record relates to confidential information, and protection of certain other confidential information, of a third party	
Sec 38:	Record may endanger the safety of individuals and cause damage to property	
Sec 39:	Record relates to police dockets in bail proceedings, and may prejudice law enforcement and legal proceedings	
Sec 40:	Request relates to records that are privileged from production in legal proceedings	
Sec 41:	Request may cause prejudice to the defence, security or international relations of Republic	
Sec 42:	Request may cause prejudice to the economic interests and financial welfare of the Republic and commercial activities of the South African Police Service	
Sec 43:	Request relates to research information of a third party and, research information of the South African Police Service	
Sec 44:	Request may cause prejudice to the effective functioning of the South African Police Service	
Sec 45:	The work involved in processing the request would substantially and unreasonably divert the resources of the Service*, or the request is manifestly frivolous or vexatious* ***(* delete which is not applicable)***	

E. Refusal to confirm or deny the existence of the record

The South African Police Service refuses, in terms of section 39(3) of the Act, to confirm or deny the existence of the record that was requested, for the following reason:

Protection of bail proceedings: section 39(1)(a)		Protection of law enforcement: section 39(1)(b)	

Note to all requesters:
You may, within 60 days, lodge an internal appeal against the access fee payable, the form or manner in which the record will be made available, or against the refusal of the request, whichever is applicable to your request. If you want to lodge an appeal, you must complete a Notice of Internal Appeal-form. A Notice of Internal Appeal-form may be obtained from any police station. Such Notice must be submitted to the office of the deputy information officer mentioned above. Within 180 days after being informed of the outcome of an internal appeal, you are entitled to lodge an application to court for appropriate relief.

Kind regards

S. IYER
LIEUTENANT COLONEL

Signature

LT COLONEL S. IYER
Name and rank of deputy information officer

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Sarojadevi IYER
States under oath in English,

I am an Indian female with identity number 660224 0084 084. I reside at 96 Vink Street, Pretoria West, Pretoria. I am a Lieutenant Colonel in the South African Police Service with force number 0622550-1. I am stationed at the Office of the National Deputy Information Officer, Head Office, Pretoria

I am one of the Information Officers and serve under the command of the National Deputy Information Officer Colonel Amelda Crooks. On 17 August 2016, I received a file with file reference number 25/7/12/1(2141) from my commander for further intervention. It contained a request for access to records from Mr James Ekron of the South African History Archives. The request was for access to records relating to charges brought against a General Izak Johannes Engelbrecht between 1 January 1990 to 31 December 2005.

On 18 August 2016 I forwarded the request via E-Mail to the relevant line Managers via the Divisional Deputy Information Officers ie Colonel Kobus Smit at our Division Detectives Services and Captain Makgoba Mokgadi at Division Crime Intelligence.

On 22 August I received an e-mail response from Colonel Kobus Smit which contained a response from Major General Johnson of Division Detective Services. Major General Johnson stated that his office has no knowledge or records of any investigations against General Izak Johannes Engelbrecht. He also requested that my office forward this request for information to the head of the DPCI. On 23 August 2016, I forwarded the request to Warrant Officer Mushi Ntlhodi who is the Deputy Information Officer at DPCI.

On 9 September 2016, I received an e-mail response from Warrant Officer Mushi Ntlhodi. He stated that he searched through every record at DPCI and no records relating to General Engelbrecgt could be found. He also stated that even senior Managers at DPCI do not have any knowledge of the General. On 30 September 2016, I received an e-mail response from Captain Makgoba Mokgadi of Division Crime Intelligence. She stated that she received feedback from their Multi-Dimensional Section Covert Intelligence stating that they do not have any records relating to General Engelbrecht or cases against him.

I know and understand the contents of this statement.
I have no objections to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

Iyer
.....
S. IYER

I certify that the above statement was taken by me and that the deponent has acknowledged that she knows and understands the contents of this statement.
This statement was sworn to before me and the deponent's signature was placed thereon in my presence.

At.....PRETORIA.....on.....3 October 2016 .....at.....09:30.....

W.E. CAROLISEN
CAPTAIN
KAPTEIN
.....
SIGNATURE: COMMISSIONER OF OATHS

WINNIFRED ELSA CAROLISEN.....
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

SAPS .Office of the National Deputy Information Officer : Wachthuis Building : Pretorious Street Pretoria .....
BUSINESS ADDRESS/STREET ADDRESS

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PRIORITY CRIMES LITIGATION UNIT (PCLU)

1. INTRODUCTION

The Priority Crimes Litigation Unit (PCLU) was created by Presidential proclamation[1] on 23 March 2003 and is located in the office of the National Director of Public Prosecutions. This unit has no investigative capacity and is reliant on SAPS and the DSO in this regard.

Mandate:
To manage and direct investigations and prosecutions relating to the following matters:

- ***Criminal prosecutions arising from the Rome Statute***; [Implementation of the Rome Statute of the International Criminal Court Act, Act No 27 0f 2002] This relates to the serious crimes of:
  - ***a.*** Genocide,
  - ***b.*** Crimes against humanity and
  - ***c.*** War crimes.

- ***Crimes against the State, including national and international terrorism***; [Inter alia prosecutions under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No 33 of 2004 - the POCDATARA Act]

- Contraventions of:
  - ***The Regulation of Foreign Military Assistance Act***; [Act No 15 of 1998]
  - ***Non-Proliferation of Weapons of Mass Destruction A***ct (nuclear, chemical and biological warfare proliferation); [Act No 87 of 1993]
  - ***The National Conventional Arms Control Act***; [Act No 41 of 2002]
  - **The Nuclear Energy Act** [Act No 46 of 1999]
  - **The Intelligence Services Act** [Act No 65 of 2002]

- Matters emanating from the **TRC process**:
  - Prosecutions
  - Missing persons

- Any other priority crimes as determined by the National Director.

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[1] Cf attached copy of Presidential Mandate.
http://www.npa.gov.za/UploadedFiles/About_PCLU_signedoff.doc

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2. FOCUS AREAS

The unit's focus areas are:

(i) NUCLEAR NON-PROLIFERATION

(ii) NON-PROLIFERATION OF CHEMICAL AND BIOLOGICAL WARFARE AGENTS

The PCLU instituted a prosecution for this category of offence. The matter was finalized with a plea of guilty and a fine of R100 000 was imposed on the corporate entity prosecuted. Further dockets relating to controlled chemicals of Crest and Amla were decided by this Unit.

(iii) FOREIGN MILITARY ASSISTANCE

- In response to the arrest of South African citizens in Zimbabwe and Equatorial Guinea, the PCLU managed and directed an investigation into the involvement of other role players. This led to the arrest of three South African citizens and a UK citizen (Mark Thatcher). All four pleaded guilty in terms of section 105A of the Criminal Procedure Act.

- Following the release of the South African citizens detained in Zimbabwe in connection with the *coup* in Equatorial Guinea, eleven of them were arrested in South Africa and charged with contravention of section 3(b) of the Regulation of Foreign Military Assistance Act, No 15 of 1988. Two of the said accused pleaded guilty and were sentenced. The trial of the remaining nine accused is due to proceed in February 2007. It is anticipated that the outstanding prosecutions relating to the Equatorial Guinea attempted *coup d'etat* will be finalized in 2007.

- A matter of concern to Government was the participation of South African citizens acting as security guards in the conflict in Iraq. A number of enquiries conducted by SAPS were evaluated by the PCLU, but it was found that such conduct did not fall within the ambit of the existing FMA legislation. The PCLU prepared a detailed opinion recommending an amendment of the Act, which was submitted to all relevant role players.

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- Government accepted the need to amend the Foreign Military Assistance legislation in order to take effective action in Iraq. A revised Act was placed before the Defence Portfolio Committee. However, the Minister of Defence recognized that the Act still contained several shortcomings.

- It is hoped that the revised legislation will shortly come into effect, since the PCLU would like to address Government's concerns relating to the number of South Africans performing security services in Iraq.

(iv) NATIONAL AND INTERNATIONAL TERRORISM

The PCLU closely interacted with State departments having an interest in such affairs. In several matters, the PCLU furnished opinions to SAPS, NIA and DFA. Although no prosecutions arose from such interventions, the PCLU's involvement meant that the matters were properly attended to.

(v) STATUTE OF ROME

A number of enquiries were carried out at the request of the International Criminal Court and a complaint relating to the seizure of farms in Zimbabwe was investigated. No prosecutions arising from the Statute of Rome were instituted.

(vi) CONVENTIONAL ARMS

- After a lengthy trial in the Regional Court, Germiston, a former employee of an arms manufacturer was acquitted on charges of supplying his company's technology to a foreign state's military structure. The charges related to highly technical contraventions of the Armscor Act, the Protection of Information Act, the Copyright Act and theft. The court found that the instrumentation that was built, did not comply with a specific military standard (as required by the Act) and that the accused did not have the required knowledge of unlawfulness relating to these specialized legislation.

- A number of complex and intricate dockets pertaining to alleged irregularities committed at Armscor and the Directorate of Conventional Arms Control Committee were submitted to the unit for decision. A number of these matters are under investigation.

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(vii) MATTERS IMPACTING ON STATE SECURITY

- The PCLU offers opinions and other advice to various State departments on matters impacting on State security and other sensitive matters. The PCLU also addressed a standing committee of the United Nations' Security Council as far as the country's capacity to prosecute international terrorism.

(viii) TRC PROSECUTIONS

- The PCLU conducted an audit of around 300 cases which had been submitted by the DSO, DPP's and SAPS in 1999 in terms of a direction by the then NDPP. 167 of these cases were finalized on the basis that no prosecutions could be instituted.

- As a result of various representations received, the PCLU has identified five cases, which potentially can be prosecuted, as well as approximately 10 other cases warranting investigation. The following steps must be taken:

  (i) The representatives of the State departments which are required to assist the PCLU in the execution of its duties must be identified and involve themselves in the process;

  (ii) The issue of the investigations must be resolved with SAPS and the DSO and thereafter the necessary investigations completed;

  (iii) The close involvement of the process by Justice is necessary in cases where prosecutions are instituted where amnesty was refused, since the applicants may take the validity of the refusal to grant amnesty on review to the High Court;

3. MISSING PERSONS

Due to the fact that the President had in 2003 directed the NDPP to give attention to the cases of some 500 persons who had been reported missing by the TRC, a small Task Team was established to evaluate the TRC report and to identify cases for investigation. Approximately 150 cases were identified for immediate investigation.

- Investigations and Exhumations

  Investigations commenced into 150 missing persons that were identified as priority cases in an audit, with the aim of obtaining (a) information as to the fate of the missing person and (b) locating, exhuming and identifying human remains where possible.

  Thus far the burial sites of thirty-two persons were located and these human remains were exhumed. Forensic analysis was conducted and identities confirmed in twelve cases. The remaining twenty are still undergoing DNA testing.

- Handover of remains and reburials

  Five identified remains were handed to the affected families at a special national ceremony in July 2005 at Freedom Park. Reburials have taken place in all of these cases, with these families receiving assistance from the Department of Justice and Constitutional Development towards reburial costs. Further handovers will take place during 2006.

- Memorialisation

  A key component of the work on Missing Persons is ensuring the necessary connection with existing structures engaged in memorialisation processes. Liaison with structures such as the South African Heritage Resource Agency (SAHRA), Freedom Park, and the SANDF was established to address matters such as tombstones for those exhumed and reburied. The outcome of Missing Persons investigations will be closely coordinated with other related bodies working on memorialisation, monuments and tombstones.

- International expertise

  A partnership was built with the Argentine Forensic Anthropology Team (EAAF), the world leaders in this work, in order to ensure that missing persons' work in South Africa is in line with best international practices as developed by *inter alia* the UN and International Committee of the Red Cross (ICRC) in such human rights cases.

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- Local capacity building

  Local South African experts and several post-graduate students in the fields of archaeology, anthropology and anatomy were also drawn into the work on a collaborative basis with the Argentine team, building local capacity.

- DNA analysis

  A partnership was established with the Human Identification Laboratory (HID) at the University of the Western Cape (UWC) for DNA analysis work. This lab is developing specialization in "ancient DNA" work, which works with difficult cases of old and damaged bone material, as is the norm in missing persons' exhumations. The development of the capacity to conduct mitochondrial DNA tests (as opposed to only nuclear DNA tests) will be an important contribution to capacity building in Africa.

- Partnerships with civil society

  The Missing Persons Task Team developed excellent working relationships with civil society groups and NGO's working in the field of missing persons and disappearances, including the Center for the Study of Violence and Reconciliation (CSVR) and Khulumani Support Group (KSG).

- Namibia

  After the November 2005 discoveries of mass graves in Namibia, the Namibian President requested the assistance of South African expertise. The Missing Persons Task Team sent a delegation to review the situation and make recommendations accordingly. The Namibian authorities warmly received the delegation's report and recommendations. The report included the offer of assistance to Namibia in the form of establishing a national co-ordination structure, as well as research, investigation and DNA analysis support. As a key role player in the past Namibian conflict, South Africa has a particular historical responsibility in this regard.

  Assistance to the Namibian authorities will form a key component of the work of the Missing Persons Task Team in future. This will take the form of research, investigation and co-ordination assistance, pending the approval of the relevant South African government structures.

- Cases outside the South African borders

  While thus far investigations and exhumations have focused on cases inside South Africa's borders, groundwork will be laid for the examining of cases of South African persons missing outside the countries borders.

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- Integration with the new TRC Unit established in the Department of Justice and Constitutional Development

  As these missing persons investigations are the result of the TRC's recommendations, the Missing Persons' Task Team serves on the Steering committee of this new TRC Unit.

- Co-operation with other Government Departments

  Missing Persons investigations require the co-operation of other Departments such as Home Affairs, Foreign Affairs and Health. Protocols with these Departments will be required via the Minister of Justice and Constitutional Development. In particular, the initial collaboration with certain SAPS investigations will be strengthened and formalized.

The PCLU strives to maintain a high standard of efficiency in dealing with complex matters emanating from its mandate and which impact on the Rome Statute and State security.

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Presentation to Portfolio Committee on Justice and Constitutional Development

Progress on TRC Cases



National Prosecuting Authority
South Africa

17 September 2024

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Noteworthy Developments

FIRST CONVICTION WITH EVIDENCE POST 2021



KZN – 8 November 2023

STATE versus Wesley Matiri Madonsela

GUILTY = MURDER

SENTENCE = Ten Years Imprisonment

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Noteworthy Developments (cont.)

Name of the Matter- Finalised with a decision	30 matters finalised
Re-opened inquest of Mr Ernest Dipale	Original court finding of suicide by hanging overturned.
Re-opened inquest of Dr Hoosen Mia Haffejee	Original finding of suicide by hanging overturned.
Re-opened inquest of Mr Abdullah Haron	Original finding of death resulting from a fall downstairs, overturned.
Inquest: Mr Zama Sokhulu	Proceedings finalised, matter referred to NPA for decision.
Re-opened inquest of Dr Neil Aggett	Original finding of suicide by handing overturned.

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Noteworthy Developments (cont.)

Name of the Matter on the Criminal Court Roll	Date of hearing
S v Mfalapitsa and another (COSAS Four)	20 November 2024-Trial
S v Coetzee and another (Ms Simelane)	14-18 October 2024 for further evidence in the s 77(3) application.
S v Marais and three others (Mr Nyoka)	Trial date-August 2024
S v Botha and others	12 November 2024-State attorney-legal representation
S v Botha and others	12 November 2024-State attorney-legal representation
S v Schoon and others	7 November 2024-state attorney-legal representation

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Noteworthy Inquests

Name of the Matter	
Cradock Four	Inquest-re-opened-2-20 June 2025-challenge with legal representation
Chief Albert Luthuli	Inquest re-opened-awaiting appointment of judge
Mr Griffiths Mxenge	Inquest re-opened-awaiting appointment of judge
Dr Rick Turner	Inquest to be held-Judge to be appointed
Highgate Hotel	Inquest to be held-27 January to 7 February 2025
Mr Booi Mantyi	Re-opened inquest-Judge to be appointed
Mr Moss Morudi	Inquest to be held-Judge to be appointed
Northcrest Five	Inquest to be held-Judge to be appointed

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Noteworthy Inquests (cont.)

Name of the Matter	
Mr Oupa Ronald Madondo	Inquest proceedings underway-5 and 6 November 2024
Mr Mthunsi Vlemeseni Njakazi	Inquest proceedings underway-August 2024
Messrs Nzuza and Ramotlo	Inquest to be held-shortage of capacity
Mr Vusumuzi Meshack Msani	Inquest to be held-shortage of capacity
Mr Vusumuzi Mbatha	**Inquest to be held-shortage of capacity**
Mr Tutu Shezi	Inquest to be held-shortage of capacity
Messrs Charles Ndaba and Mbuso Shabalala	Inquest to be held-shortage of capacity

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Noteworthy Inquests (cont.)

Name of the Matter	
Mr Bhekani Sibusiso Mbokazi	Inquest to be held
INDICTMENTS	
Indictments to be served pending verification of addresses of perpetrators	3
MEMORANDA FOR INQUESTS AND RE-OPENING OF INQUESTS UNDERWAY	10

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CHILE | MEMORY

OPINION

CHILE'S 'PINOCHET CASES' AT 25: AN ONGOING SEA CHANGE

BY CATH COLLINS FOR JUSTICE INFO

It is 25 years since former Chilean dictator Augusto Pinochet was arrested in London on October 16, 1998. This was a defining moment in the development of international justice. It was also a defining moment for Chile's justice system. Professor Cath Collins highlights a part of the story that is less known: how Pinochet's arrest triggered a slow but profound change in the will and capacity of domestic courts to respond to victims' long quest for justice. Perhaps more now than ever.

SHARE REPUBLISH



Demonstrators celebrate the arrest of Augusto Pinochet in October 1998. 25 years later, the Chilean justice system is more active than ever in the trials of perpetrators of dictatorship crimes. AFP via Getty Images

The year 2024 marked the 50th anniversary of Chile's violent military coup, which ushered in 17 years of harsh dictatorship and cast a shadow over the hopes and dreams of a prosperous democratic socialist society. The year also marks a quarter of a century since Pinochet's cases at home and abroad galvanised Chile's previously dormant national courts. These began to either embrace justice or maze reluctantly, with support for the former dictator and his henchmen. Perhaps surprisingly, the story is...

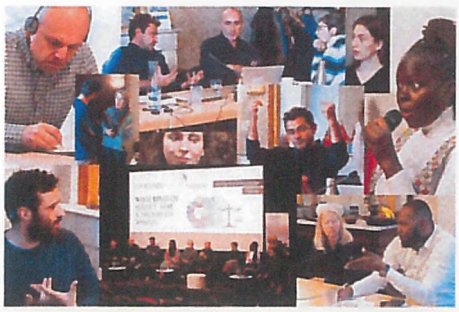
Two and a half decades on, Chile's rather quiet, yet cumulative experience of prosecuting atrocity crimes before domestic courts deserves more attention than it is often afforded. In perfect, and above all slow, as subsequent justice has been, since 1998 Chile's courts have resolved hundreds of cases of dictatorship era killings, disappearances, and torture, and sent dozens of perpetrators to jail. They have also begun – more recently – to grapple with sexual violence, and claim-making spurred by historical convictions of political prisoners, and the duty to comply with Inter-American Court jurisprudence. In so doing, they demonstrate the perhaps underplayed potential of domestic justice systems as a [transitional justice] venue. Chile's judges are today grappling not only with matters of innocence and guilt, but also with [pertinent questions] in the areas of truth, reparations, and guarantees of non-repetition.

As far as [criminal justice] is concerned, as of July 2023, Chile's Supreme Court had handed down verdicts in more than 530 cases for [human rights violations] against humanity. Another 1,000 cases were still under investigation or awaiting resolution before lower courts. 284 former regime agents were in prison for their crimes, with dozens more – by this year alone – escaping justice only through the [legal] [mechanisms] provided by Decree-Law 2.191. Some of the investigations pre[dating] these developments stretch right back to January 1978 – when the first criminal complaints against former dictator Augusto Pinochet were brought by victims and relatives associations.

OK READ MORE

A WINDOW ONTO JUSTICE INFO'S EDITORIAL TEAM

A slideshow of our correspondents' meeting in Geneva in November 2023



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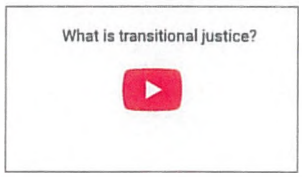
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WHAT IS TRANSITIONAL JUSTICE?

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MEMORY - RELATED ARTICLES



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A RECORD NUMBER OF CONVICTIONS IN THE PAST YEAR

Pinochet's arrest in the United Kingdom on October 16 1998 on an international arrest warrant requested by Spain turned the trickle of justice activity into a flood. Many cases have rumbled on ever since, but this year – no doubt with the approaching anniversary in mind – the Supreme Court has acted more decisively than before to shepherd investigations through the system at a less glacial pace. A record 67 Supreme Court criminal case verdicts have been handed down in the past 12 months. They include the largest single set of convictions ever ratified – 59 former secret police agents sentenced to jail terms at one go – and the culmination of some cases with a high international profile. In August 2024 seven former military officers were imprisoned for their part in the 1973 torture and murder of iconic folk singer Victor Jara. One of those responsible, now trapped of his adopted US citizenship, was arrested in Florida in early October as a prelude to deportation.

The road to justice has not been easy, with early obstacles including excessively lenient sentencing and a reluctance to allow cases involving survivors to go ahead. Defendants' strategies have evolved from invoking amnesty to flatly denying involvement to delaying tactics that allow perpetrators to plead age-related infirmities or benefits. Today, however, the proportion of dead or disappeared victims for whom a case has been successfully concluded is at just over 34% and rising, while new cases are being generated all the time. Many are triggered by women survivors' determined to force greater acknowledgment of the sexual violence to which they were subjected as political prisoners. Judges for their part have learnt to disapply amnesty and statutes of limitation on crimes against humanity. They have digested the Rome Statute – the founding treaty of the International Criminal Court (ICC) – and other aspects of modern international criminal justice doctrine, and invoke these to supplement the deficiencies of the domestic criminal code. Specialised detective police and forensic personnel designated to work these cases have gone on to deploy their new skills in other areas of rights protection. The criminal responsibility of corporate actors, or at least of civilians, is beginning to be addressed through prosecution of business owners who denounced union leaders or doctors brought in by the secret police to practise torture.

TURNING COURTS INTO A VENUE FOR REPARATIONS

Today, however, the real novelty in the use of the courts lies in the diversification of the legal recourse being used. Civil rather than criminal justice is the fastest-growing area of activity, with hundreds of civil claims brought in recent times by relatives of survivors. Some are placed as part of a criminal investigation, others as standalone actions against the State. Over time, this use of civil law accrues advantages over the diminishing returns obtained from criminal prosecution of (now elderly, individual) perpetrators. It better points out the systemic, structural nature of the harms, bringing State responsibility

Along the way, Chile's courts have become perhaps uniquely progressive in declaring civil suits entirely compatible with receipt of administrative reparations – meaning relatives and survivors are eligible for both – and in waiving statutes of limitation and other legal obstacles for civil as well as criminal proceedings. This in effect turns the courts into a venue for reparations, something that international criminal justice has always struggled to achieve. The ICC, for instance, has only [illegible]

"DE-PINOCHETISATION" IN TIMES OF RISING RIGHT-WING APOLOGIA

The courts have also become a place where the right to truth and guarantees of non-repetition are exercised. A growing wave of denialism has been partly combated through Supreme Court injunctions. A recent one ordered a far-right parliamentarian to retract and remove a slanderous social media video; others have obliged mainstream media outlets to publish front-page retractions of official propaganda lies that they obediently gave voice to during the regime.

Survivors wanting to bring civil claims or to have their kidnappers and torturers prosecuted have also resorted to the courts to challenge secrecy provisions around truth commission archives. They won, first, the right to declassify their own case records, and then, the promise of legislation that will make the whole archive accessible to investigative magistrates. Via the Inter-American Court of Human Rights survivors also won the right to have their own long-ago convictions for treason or terror offences imposed by military courts finally dissolved and expunged from the record by the Supreme Court. One survivor, now a human rights lawyer, has brought repeated injunctions to de-Pinochetise public space, forcing the removal of a statue to a [illegible] member and the expunging from military training textbooks of homage to him, and to notorious secret police chief Manuel Contreras.

In a country beset, like many of its neighbours, by a rising tide of right-wing apologists for the authoritarian past, the courts are not a simple or sufficient answer to the challenges of changing hearts and minds. They are, however, persistently a belated but heartening and creditable role in producing and upholding judicial truths that underwrite the transitional justice agenda across its multiple dimensions.

RECOMMENDED READING





CATH COLLINS

Cath Collins is Professor of Transitional Justice at Ulster University, Northern Ireland and Director of the Transitional Justice Observatory of the Universidad Diego Portales, Santiago de Chile, where she was previously Associate Professor of Politics. The Observatory maps current justice, truth and memory developments in Chile over the Pinochet-era dictatorship and most recently has been supporting and monitoring the launch of the country's first National Search Plan for the Disappeared. Prof. Collins' recent academic publications include 'Pinochet's Accomplices: perpetration, complicity and institutional culpability' with Francisco Pinatos and Francisco Ugas, in Bird et al. (2023) 'Perpetration and Complicity Under Nazism and Beyond' (London: Bloomsbury), 'An Innovative Response to Disappearances: Non-judicial Search for the Disappeared in Asia and Latin America' (2022, ed. GIJTR/DPLF) and a background paper to the recent update of the UN Secretary-General's Guidelines on Transitional Justice (published October 2023).

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STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality.
Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring.

It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated.

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

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When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls.

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle…Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness…Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures…The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors, who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law.

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy.

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In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Mpumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

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Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once-off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty.
A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations.
Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society.

Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be.

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend

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themselves to employment in criminal activity.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African
Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to make a contribution to this Fund. Most of the resources that have

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been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

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Office of the National Director of Public Prosecutions

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25 February 2004

A/INV/5/03/TRC

Imtiaz Cajee
P O Box 1888
GARSFONTEIN EAST
0060

Dear Sir

INVESTIGATION INTO TIMOL CASE

I acknowledge receipt of your fax of 18 February 2004 and have to inform you hat the case is registered under the above reference number. Last year investigations were conducted into the allegations that former security branch officer Rodrigues head confessed to his daughter who in turn informed IVOR POWELL.

The investigations produced negative results. I confirm that you furnish me with the following documents:

i) Extract Bizos' book
ii) Article Powell
iii) TRC transcripts
iv) INPUT Detainee
v) Photographs

The testimony of a detainee who was held out of the window was not included.

I would be grateful if you would furnish me with a copy of it as well as any other relevant material, which you may have. The case will again be considered the light thereof.

Kind regards

RC MACADAM
DEPUTY HEAD: PCLU

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REPORT
AMNESTY TASK TEAM

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REPORT: AMNESTY TASK TEAM

1. Background

1.1 A Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

"1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.

2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

3. Bearing the above-mentioned in mind, whether legislative enactments are required.".

1.2 The Task Team comprises the following members:

Deon Rudman (Chairperson):		Department of Justice and Constitutional Development
Yvonne Mabule	:	National Intelligence Agency
Vincent Mogotloane	:	National Intelligence Agency
Gerhard Nel		National Prosecuting Authority
Lungisa Dyosi		National Prosecuting Authority
Ray Lalla	:	South African Police Service
Joy Rathebe		Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are—

- individuals who were misled by their leadership to treat the process with disdain;
- others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
- others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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(c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.".

(d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.".

(e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.".

(f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.".

(g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."

(h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts."

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(i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.".

(j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.".

(k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.".

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

(a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

(b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should be the following:

(a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard

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(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

(i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;

(ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

(c) To—

- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
- gather intelligence information;
- investigate the matter;
- consult victims.

(d) To consider the following factors when carrying out its mandate:

(i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".

(ii) The following specific criteria:

- Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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437

- Whether a prosecution can be instituted on the strength of adequate evidence.
- Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- Whether the offence in question is serious.
- Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- Whether the prosecution will lead to the traumatisation of victims and conflicts in areas where reconciliation has already taken place.
- The degree of co-operation on the part of the alleged offender.
- The credibility of the alleged offender.
- The alleged offender's sensitivity to the need for restitution.
- The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation
- The degree of indoctrination to which the alleged offender was subjected.
- The extent to which the alleged offender carried out instructions or perceived instructions.
- The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

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- The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- Whether the alleged offender fully disclosed the alleged offences.
- The views of the NPA.
- If the accused is in custody, the views of the presiding judge or magistrate.
- Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- Any further criteria, which the Task Team might deem necessary.

(e) To consider—

(i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;

(ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;

(iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child stealing; rape; or the crime of genocide, crimes

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against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

(iv) the possibility of diversion in the case of juvenile offenders;

(v) possible arrangements settling the matter out of court;

(vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

(a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.

(b) The possibility of the institution of private prosecutions.

(c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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446

(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

IN THE HIGH COURT OF SOUTH AFRICA

(Transvaal Provincial Division)

Case Number: 32709/07

In the matter between:

NKADIMENG, THEMBISILE PHUMELELE	First Applicant
GONIWE, NYAMEKA	Second Applicant
MHLAULI, NOMBUYISELO NOLITA	Third Applicant
MKHONTO, SINDISWA ELIZABETH	Fourth Applicant
CALATA, NOMONDE	Fifth Applicant
KHULUMANI SUPPORT GROUP	Sixth Applicant
CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	Seventh Applicant
INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	Eighth Applicant

and

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THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE MINISTER OF JUSTICE	Second Respondent
ERIC ALEXANDER TAYLOR	Third Respondent
GERHARDUS JOHANNES LOTZ	Fourth Respondent
JOHAN MARTIN VAN ZYL	Fifth Respondent
HERMANUS BAREND DU PLESSIS	Sixth Respondent
WILLEM HELM COETZEE	Seventh Respondent
ANTON PRETORIUS	Eighth Respondent
FREDERICK BARNARD MONG	Ninth Respondent
MSEBENZI TIMOTHY RADEBE	Tenth Respondent

AFFIDAVIT

I, the undersigned,

DESMOND MPILO TUTU

do hereby make oath and state:

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1. I was formerly the Chairperson of the Truth and Reconciliation Commission ("the TRC" or "the Commission") constituted in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act"). Between 1986 and 1996 I was the Anglican Archbishop of Cape Town. I was the General Secretary of the South African Council of Churches between 1978 and 1985.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are, to the best of my knowledge and belief, both true and correct.

3. I have read the affidavit of Alexander Lionel Boraine deposed to in this matter on 6 November 2007 and confirm that: -

3.1 the contents thereof are true and correct insofar as they relate to the objects, purpose, operation and findings of the TRC and its report; and

3.2 I agree with the submissions and views contained therein in relation to the effect of the amendments to the national prosecution policy that are challenged in this litigation.

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4. In particular, I confirm that it is my view that:

4.1 The amendments to the prosecution policy represent a betrayal of all those who participated in good faith in the TRC process. They completely undermine the very basis of the TRC which provided a truth for amnesty formula for a specific and limited time period.

4.2 The amended policy will stand as a betrayal of victims who have been waiting for the prosecutions of those who failed to apply for amnesty or who were denied amnesty. The failure of the State to act against perpetrators of the past has added considerably to the trauma of victims. The affording of a further and open-ended special dispensation to perpetrators to permit them to escape justice adds insult to the injuries endured by victims.

4.3 The amended policy is a betrayal of those perpetrators who came forward in good faith to apply for amnesty during the operation of the TRC. Above all, it stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past.

4.4 The amended policy is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in

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dealing with crimes of the past. In 2007 there is no place for the TRC's amnesty criteria in South Africa's prosecution policy.

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DEPONENT

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at JOHANNESBURG on this the 23RD day of NOVEMBER 2007, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

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Office of the National Director of Public Prosecutions

The National Prosecuting Authority of South Africa
Igunya Jikelele Labashutshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

31 January 2013

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Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 29 January 2013 and at the outset express my extreme sympathy for the suffering you and your family have experienced due to the unresolved disappearance of your sister. The purpose of my communicating with you is to explain fully all the relevant facts relating to your sister's disappearance so as to allay your criticisms levelled at the PCLU. Your case has and will continue to receive diligent attention by the NPA. As will be explained hereunder, it is not possible to hold an inquest prior to the conclusion of the outstanding investigations, which must be conducted by the DPCI.

2. Although your sister disappeared in September 1983, the first information identifying suspects was only received by SAPS in 1996.

3. When the TRC was established, SAPS elected to put on hold all investigations where amnesty application had been lodged. Your sister's matter was one such case.

4. The judgment of the Amnesty Committee was only released in May 2001.

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5. When the PCLU was established in 2003, the National Director referred all TRC cases to it.

6. It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases.

7. Your application to have the provisions (which you state constituted a second amnesty process) set aside, resulted in the Court declaring the whole guidelines unconstitutional, including the mechanisms creating structures for the investigation of such cases.

8. When the President established the Ginwala Commission, SAPS declined to further investigate the matters, pending the conclusion of the Commission. One of the matters falling within the terms of reference of the Commission was the manner in which TRC cases were dealt with by the NPA.

9. The dissolution of the DSO, the establishment of the DPCI and the redefining of the mandate of the detective service did unfortunately hamper efforts to have your case investigated.

10. In early 2010, Adv Macadam was appointed by the Acting National Director to take over all the matters and to liaise directly with the DPCI, following an agreement reached between the NPA and General Dramat.

11. I enclose a copy of Adv Macadam's letter of 25 March 2010, addressed to the Unit Commander of the DPCI, who had been mandated to investigate TRC cases. As emerges from the letter, Adv Macadam did specifically request that the issue of prosecuting Detective Inspector Radebe be investigated. As is also clear from the letter, the NPA at that stage merely had a duplicate docket and it was obviously essential that the original docket and other evidence be located.

12. Captain Masegela was appointed to investigate the matter and in late 2010 submitted a docket to Adv Macadam. I enclose a copy of a letter, dated 27 October 2010, written by Adv Macadam to Captain Masegela, requesting an extensive number of all-embracing investigations. Yet again, the role of Detective Inspector Radebe was emphasised. As is evident from the investigations requested, your sister's case had obviously not been fully investigated, either by the TRC or by SAPS. It is also clear that it would not be possible to quickly finalise the investigation, because of the issues required to be canvassed.

13. It is correct that the PCLU declined to institute a prosecution on the Customary International Law crime of torture and on a

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charge of attempting to defeat the ends of justice. The two letters, written by Adv Macadam, however demonstrate that the request that consideration be given to the prosecution of Detective Inspector Radebe, was acceded to.

14. It is the view of John Dugard, one of the world's leading experts in the field of International Law, that international crimes require domestic legislation before they can become enforceable in South Africa. The Constitutional Court, in the *Wouter Basson* matter, also specifically refrained from directing that he be charged for Geneva Convention crimes and in fact limited his potential prosecution only to offences under the Riotous Assemblies Act. The domestic Rome Statute, which criminalises certain international crimes, specifically prohibits prosecutions for such offences committed prior to the enactment of the Statute. The Torture Convention Bill also makes no provision for retrospective criminalisation. The PCLU's decision not to institute a prosecution on a charge of torture was correct. Only a charge of assault with intent to do grievous bodily harm could have been considered, but such crime had prescribed in 2003.

15. The person who alleged that he had been influenced to change his version was deceased even prior to the amnesty hearing. The tape recordings were lost while in police custody. There could therefore be no basis for a prosecution and in addition, charges of defeating the ends of justice would have prescribed in 2006.

16. The docket was not submitted to the PCLU in July 2011 under cover of a report, let alone one as required in terms of Section 4 of the Inquests Act. In fact, the docket was re-submitted with a substantial number of the original investigations not having been conducted and no evidence establishing that your sister was murdered.

Report referred to in the letter

→ Whole of above in the 2010 letter

17. Rather than requesting that the outstanding investigations be conducted at that stage, Adv Macadam explored a number of other options, aimed at trying to establish that your sister was in fact murdered by the Security Branch:

17.1 In a statement, dated May 2011, the original investigating officer indicated that he had been instructed to hand over the docket to Captain Holmes so that it could be part of an investigation against General Engelbrecht. The original docket when located contained no statements taken by Captain Holmes and it was established that he had passed away many years previously. A perusal of the D'Oliveira material failed to reveal any record of investigations conducted by him into your sister's case. It was established that an investigation into General Engelbrecht was conducted, but that the Director of

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Public Prosecutions: Pretoria declined to prosecute and the National Director concurred with this decision. That investigation contained no evidence referring to your sister's disappearance and murder.

17.2 A matter completely overlooked by both the TRC and SAPS was the claim by three of the suspects that bombings of two power stations and a railway line and the arrest of Justice Ngidi confirmed their version. After an extensive search, the dockets relating to the bombings were located and in fact found to contain evidence which would have been materially relevant at the time of the amnesty application. It was however further established that a separate committee of the TRC granted the persons involved in the bombings amnesty. The docket relating to Justice Ngidi could not be located; however, other evidence was obtained which indicated that he was arrested at a different time as alleged by the suspects.

17.3 The discovery of this additional evidence led Adv Macadam to conclude that your sister may have been in fact murdered on the farm. He requested the Missing Persons' Task Team (MPTT) to look into the possibility of conducting an exhumation. A senior international forensic anthropologist however advised that an exploration of the farm should only take place in spring before the summer re-growth of vegetation, but when the ground was again moist after spring rains.

17.4 As an interim measure, the MPTT commenced inspecting mortuary records with the aim of locating cases which matched the description of your sister. This has led to a process of retrieving various inquest records relating to unidentified persons. Once all the records have been obtained, they will be placed before Adv Macadam in order for him to decide whether any of them relate to your sister.

17.5 Although the exploration of the farm was conducted in October 2012, the report from the MPTT was only made available on 25 January 2013. This was because the MPTT explored every possible option which could lead to the identification of the burial site. All these options however were too of no avail and the MPTT has concluded that no exhumation is feasible in the absence of clear evidence as to a specific burial site.

18. The docket was only resubmitted to the PCLU late last week, again containing no further statements, save for the report of the MPTT. The allegation that Ms Fullard advised you to approach the suspects is disputed by her. In any event, I would not

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authorise any such conduct, as this would not be conducive to the interests of justice.

19. The docket has been carefully perused by Adv Macadam and a Senior State Advocate and is in the process of being re-submitted to the investigating officer with an instruction that all outstanding investigations be concluded without further delay.

20. Only after the matter has fully been investigated can Adv Macadam, in consultation with the relevant Directors of Public Prosecutions, make a properly informed recommendation as to whether a prosecution can be instituted or not. The decision rests with me.

21. The placing of the existing statements before a Magistrate would not serve any useful purpose, because the Magistrate would be constrained not to hold an inquest until the matter has been properly investigated

22. Insofar as you request that the inquest be held in the High Court is concerned, the Inquests Act requires that the Minister approach the Judge President of the relevant division to appoint a Judge. I cannot request the Minister to exercise these powers in the absence of a fully investigated case.

23. As the evidence currently stands, there is confusion as to where your sister was last seen alive and consequently Section 6(3) of the Inquests Act may apply, which requires that the Minister appoint a specially designated Magistrate. This provision also could not be invoked in the absence of a fully investigated case.

24. Insofar as you also request the appointment of a special prosecutor in consultation with your family, I am of the view that this would impede on the independence of the NPA, because in certain cases, the Courts have set aside appointments of prosecutors where there is a connection to the complainant.

25. I trust that the above reassures you that the matter is receiving proper attention. You will be informed when the matter has been investigated and a decision taken. In the event of the decision being taken to hold an inquest, the various provisions of the Inquests Act will be invoked to ensure that it will be a formal one.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

   (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

   (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

   (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

   (b) The constitutional right to life.
   (c) The non-prescriptivity of the crime of murder.

   (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

   (e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See ***Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC***).

   (f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

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(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See ***The State v Wouter Basson CCT 30/03.)***.

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

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(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Service.

   (c) The Department of Justice & Constitutional Development.

   (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

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8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

   (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

   (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

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(i) The motive of the person who committed the act, commission or offence.

(ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

(iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

(iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

(aa) for personal gain; or

(bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

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(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

http://www.pmg.org.za/docs/2005/060117advnel.doc

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Annual Report

National Prosecuting Authority



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Adv Vusumzi Patrick Pikoli
National Director of Public Prosecutions

"The objective of this drive, themed "Prosecutors without boundaries", is to strengthen co-operation to deal more effectively with trans-national crime"

The National Director and his delegation attended the Heads of Prosecuting Authorities Conference (HOPAC) during September 2005, where a paper was delivered on the Legal Liability of Prosecutors. This bi-annual conference was an ideal opportunity for Heads of Prosecuting Authorities to meet and share information on the running of their respective Prosecuting Services as well as to consider ways to ensure more effective co-operation in dealing with trans-national organised crime.

The National Director and a delegation of two senior members of the National Prosecution Service (NPS), attended the Second World Summit of Attorneys-General, Prosecutors-General and Chief Prosecutors in Dohar, Qatar in November 2005, where a paper was also delivered on behalf of South Africa. This gave the National Director and his delegation an opportunity to engage with their counterparts on matters of mutual concern, as well as to share best practice and experiences.

The National Director also hosted a meeting with a senior member of the International Criminal Court (ICC). This meeting dealt with the relationship between the NPA, South Africa and the ICC. A request has been made to send Prosecutors to the ICC to develop skills to prosecute crimes of human rights abuses. This issue is currently being dealt with.

Guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994

In his statement to the National Houses of Parliament and the Nation on 15 April 2003 the President, among others, gave Government's response to the final Report of the Truth and Reconciliation Commission (TRC) regarding the handling of cases arising from conflicts of the past which were committed prior to 11 May 1994.

The essential features are the following:

- It was recognised that not all persons availed themselves of the TRC process for a variety of reasons ranging from undue influence to a deliberate rejection of the process.
- A continuation of the amnesty process cannot be considered as this would constitute a suspension of victims' rights and would fly in the face of the TRC process. The question as to the prosecution or not of persons who did not take part in the TRC process, is left in the hands of the prosecuting authority, as is normal practice.
- As part of the normal process and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth and who wish to enter into agreements that are standard in the normal execution of justice and are accommodated in our legislation.
- Following Government's response to the final Report of the TRC, and because it is important for the prosecuting authority to deal with these matters on a uniform basis in terms of specifically defined criteria, the National Director, with the concurrence of the Minister for Justice and Constitutional Development and after consultation with the various Directors of Public Prosecutions issued prosecution policy and policy directives in terms of section 179(5)(a) and (b) of the Constitution regarding the handling of such cases arising from conflicts of the past. This prosecution policy and policy directives, which must be observed in the prosecution process, were tabled in Parliament towards the end of 2005 and came into operation on 1 December 2005. During January and February 2006 the NPA briefed the Portfolio Committee on Justice and Constitutional Development and the Committee on Security and Constitutional Affairs of the National Council of Provinces regarding the contents of these directives. I am sad to report, as at the time of writing this report, that not much has been achieved in this regard despite all the attempts that have been made in taking this matter forward.

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NSSD: REPORT To Portfolio Committee: By Dr Silas Ramaite SC

- SCCU – ADV SC JORDAAN SC
- WPU – D ADAM
- SOCA – ADV T MAJOKWENI
- PCLU – ADV AR ACKERMANN SC

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PRIORITY CRIMES LITIGATION UNIT

ADV ANTON ACKERMANN SC

HEAD: PCLU

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PERFORMANCE AGAINST TARGETS: 2004 / 2005

1. TRC Prosecutions

- Audit of 300 cases on hand in NPA structures.
- Closure of 167 cases. No grounds for prosecution.
- Prosecutions instituted in *S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others*.
- Further prosecutions put on hold in November 2004 pending the formulation of guidelines.
- Assistance provided to reconvene Motherwell amnesty hearing.
- Constitutional Court grants State leave to appeal in *S v Wouter Basson*.

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PERFORMANCE AGAINST TARGETS: 2005 / 2006

1. TRC Prosecutions

- Failure to finalise guidelines results in no further prosecutions being instituted.
- Late 2005 Constitutional Court sets aside TPD and SCA rulings in respect of jurisdiction for conspiracies for external crimes in *S v Wouter Basson*.

2. Missing Persons

- Remains of 23 victims located and exhumed. Forensic analysis in progress to confirm identities.
- Official hand-over of remains of five victims at special national ceremony.
- Financial assistance provided to families.
- Liaison with stakeholders *re* memorialisation.
- Partnership with Argentine forensic anthropology team.

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Response to media reports about the South African Human Rights Commission's findings on presidential pardons

5 January 2007

The Ministry of Justice and Constitutional Development would like to respond to the media reports about the findings of the South African Human Rights Commission (SAHRC) in relation to Inkatha Freedom Party's (IFP) complaint about the processing of presidential pardons for alleged political prisoners.

Firstly, we would like to point that Minister Mabandla has as yet not received any official report with regards to its deliberations, findings, and basis of the findings from the SAHRC. What the Minister has received is a letter from a Legal Practitioner at the SAHRC advising her of the findings. We have requested the report, and it is only after its receipt that the Minister will be in a position to respond fully.

Minister Mabandla has on numerous occasions indicated that this is one of the most difficult and sensitive post Truth and Reconciliation Commission (TRC) matters. It is for this reason that from the beginning she has fully liaised with all the political parties and other interested parties in an attempt bring final closure to this matter. In response to Parliamentary questions and to the SA Commission request for information, Minister Mabandla indicated that the matter of presidential pardons for prisoners, who allege that their offences were politically motivated, is a complex matter that has no legal precedent and therefore one that requires a political solution. Some of the complexities that the Minister referred to in her response to a question on this matter are:

1. Some of the applicants failed to utilise the TRC processes that were available to them because their political parties did not support the TRC
2. Some of the applicants plead ignorance to the TRC processes
3. Offences that some of the applicants are alleged to have committed took place after the cut off date for TRC amnesty applications

It is because of these complexities their political nature and sensitivities that the Minister deemed it fit to solicit the collective wisdom of Cabinet in dealing with the matter, and not incompetence of any sort.

For more information, please contact:
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5 January 2007

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Last Modified Fri, 05 Jan 2007 15 50 00 SAST

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MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
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6 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR 9/2/07
NATIONAL PROSECUTING AUTHORITY

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VPP 3

news24 archives
Breaking News First

Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan

Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoli, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

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Johan Wagener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

Beeld

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The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

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2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

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Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament and is binding on the prosecuting authority.

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

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(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;

(ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;

(iv) such agreements should be in accordance with the NPA's prosecution mandate; and

(v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid, (See *The State v Wouter Basson CCT 30/03.*).[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

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3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU "shall be assisted in the execution of its duties" by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

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mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as Annexures "C" and "D", respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken,".
- "In my view a comprehensive report...should be discussed by the Directors-General".

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- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "In the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

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5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

16.02.2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

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PMG PARLIAMENTARY MONITORING GROUP

Special Investigations Unit, Asset Forfeiture Unit, Priority Crimes Litigation Unit Witness Protection Unit, Directorate of Spec

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Justice and Correctional Services

03 May 2007

Meeting Summary

A summary of this committee meeting is not yet available

Meeting report

JUSTICE AND CONSTITUTIONAL DEVELOPMENT CONSTITUTIONAL COMMITTEE
3 May 2007
SPECIAL INVESTIGATIONS UNIT, ASSET FORFEITURE UNIT, PRIORITY CRIMES LITIGATION UNIT WITNESS PROTECTION UNIT, DIRECTORATE OF SPECIAL OPERATIONS: ANNUAL REPORTS & BUDGETS

Chairperson: Ms F Chohan-Khota (ANC)

Documents handed out:
Special Investigations Unit presentation
Seizing Criminal Assets to fight Crime: Asset Forfeiture Unit presentation
Priority Crimes Litigation Unit Report
Witness Protection Unit Report
Directorate of Special Operations Report (handed out 2 May)
Directorate of Special Operations presentation
Specialised Commercial Crime Unit presentation
Specialised Commercial Crime Unit

Audio Recording of the Meeting

SUMMARY
Various units of the National Prosecuting Authority briefed the Committee on their work in 2006 /2007

The Special Investigations Unit worked with departments to assist them in implementing better systems to deal effectively with the threats of corruption. The staff and project profiles were tabled and explained. Projects involving Departments of Social Development, Transport, Housing, Correctional Services and the Special Pensions Fund were detailed. Achievements included savings of R231 million, prevention of future losses of R1.8 billion, and cash recovery of R14 million. A completely clean audit report was achieved. It had excellent relationships with other departments and investigators. Challenges included the need for legislative amendments to deal with litigation, streal the proclamation process and coping with rapid growth.

The Asset Forfeiture Unit had largely exceeded its targets. It had placed R760 million under restraint. The Criminal Assets Recovery Account had received payments of about R120 million. Most of the funding was used to fight cr but other payouts assisted victims of crime. The Unit had obtained 34 judgements and several important principles had been affirmed. Some of the urgent matters were tabled and explained. Because the Unit did not do its own investigations or prosecutions it was vital to establish good relationships.
Questions by members related to the profile of the units, the vacancy rates, how money seized would be used, the reactive nature of the Units' work, the need to establish shelters for domestic violence in Northern Cape, the curr situation in regard to Special Pensions, disciplinary hearings against public servants committing fraud, and the need to keep the focus of departments funding the Special Investigations Unit.

The Priority Crimes Litigation Unit described its scope and function. The work of the Missing Persons Task Team was outlined. Prosecutions involving nuclear non proliferation, chemical and biological non proliferation and merce activities were tabled and explained. Challenges included the need for adequate and skilled staff, better office space and the need to address delays in Truth and Reconciliation Hearing prosecutions. Security issues were also cr

The Witness Protection Unit had a supplementary mandate to transform, redesign and modernise and set standards in relation to protection of witnesses and enhancement of criminal justice. It hoped to enhance confidence in th criminal justice system and the programme and to achieve effective administration and financial management, and an integrated law enforcement approach. Protection should be effective as a tool in combating crime. The achievements and performance for the current cycle were tabled. No witnesses were threatened, harmed or assassinated in the past six years and there had been only 3% voluntary walk-offs. The cycle time had dropped. There 90% conviction rate for the accused. It currently handled 229 witnesses and 268 related persons.

Questions were asked on the delays in prosecuting the Truth and Reconciliation (TRC) matters, the cost of protecting witnesses, whether the Units own staff were protected, the reasons why there would not be prosecutions in th Rashid matter, destruction of documents relating to disappearances, the reasons for voluntary walk-offs from the protection programme and the role played by South Africa internationally.

The Directorate of Special Operations (Scorpions) targeted criminals who organised and profited from crime. It used a multi disciplinary and success driven approach. Its key activities and impacts were tabled. The conviction rat above 80%. The value of assets placed under restraint was R550 million. R50 million had been directed to the victims of organised crime. Drugs valued at over R1 billion had been seized over the last year. Explanations and upd were given on some of the major cases being handled. Cybercrime and drug trafficking posed the largest threats. A dedicated administration was set up in October 2006. Challenges included the need to increase effectiveness in investigating and prosecuting organised crime, the need to work on creating jurisprudence on the Prevention of Organised Crime Act, and also to create law around the Monitoring Act. There was a need to match job demand wit expertise and to fill 825 posts in the financial year. The Directorate was currently standardising best practice and would be writing a practice manual, investigating appointing Internal Counsel, setting research-based measuremer indicators and establishing a training academy.

The Committee expressed its concerns with the insinuations that the Directorate was unable to prosecute senior politicians, which undermined the integrity of the Directorate, and enquired as to any undue pressure. Further conc were expressed at the focus on high profile cases, stressing the need also to prioritise low profile cases. Clarification was sought on single line jurisdiction, treatment of victims of crime, developments in the LeisureNet and Kebb matters, and in the Criminal Laws (Sexual Offences) Amendment Bill and Child Justice Bill.

MINUTES
Special Investigations Unit (SIU) Briefing
Mr Willie Hofmeyr, Head, Special Investigations Unit, outlined the mandate and functions of the SIU, which was set up to investigate corruption and maladministration, not necessarily involving criminal offences. The primary purp was to enable the State to recover money lost because of unlawful action. It was important both to address any direct financial loss, and to amend the systems to prevent future losses. SIU was increasingly involved in working w departments to assist them in implementing better systems. Dealing effectively with corruption was vital for departments, which faced combined threats of fraud, corruption and maladministration extending across several differen areas. This varied from opportunistic corruption or more organised exploitation of systemic gaps. Often the problems were detected only when there was an escalating loss. This was further compounded by the large number of c role players.

Effective steps to dealing with corruption therefore required integrated solutions, including forensic investigations, litigation, systemic improvements and removing corrupt officials. The SIU mandate allowed for integrated forensic solutions but it would also use other institutions.

One of the key challenges was to build sufficient capacity to deal with fraud, corruption and malacministration. There was still outsourcing to the private sector, but there was increased recognition that SIU could ensure effective, and delivered value for money. This was reflected in a significant increase in the budget from National Treasury (NT). The budget for the current year stood at R139.7 million. An important driver had been the money received fro departments who paid the SIU to conduct the investigations, and this was currently budgeted for R84.2 million. During the following three years the trend would be reversed as SIU should not become too dependent on this fundi budget would rise to R270 million by 2009/10.

The focus of the SIU had been to increase the number of people available to deal with investigations, and staff currently stood at 550. SIU had also expanded to have an effective national presence, other than in Northern Cape a North West Province.

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Mr Falek Davids, Deputy Head, SIU, presented the project profile of the SIU, noting that it had expanded significantly. Many investigations commenced on request of a particular department and across a broad range of frauduler activity. The investigations ranged from isolated and focused fraud to widespread systemic fraud. Provincial departments would also ask SIU to deal with corruption matters. At present there were 88 investigations ongoing, rangi one that could take only a few months to a major investigation involving 200 investigators that could take three years or more. There were 14 proclaimed investigations, which would require accessing of special powers. Forty we regionally based. They involved 19 departments.

Service level agreements had recently been completed with the North West Province, in terms of which a steering committee would be established to screen all forensic investigations. This was a model finding favour also in othe provinces.

Mr Davids then tabled a number of the projects. The investigation into the Department of Social Development was still the largest investigation, having commenced in 2005. SIU had recommended that over 21 000 public servant were receiving grants illegally, should be removed from the grant system. Around 60 000 irregular beneficiaries had been identified and a further 500 000 might require audit. Cash recoveries amounted to R26 million, actual savi R213 million, and preventative savings to R1.8 billion. 4 677 disciplinary hearings were prepared, and 2 215 of the 2 675 prosecutions had resulted in convictions.
The investigations had raised awareness of the problem, and this in turn led to strong deterrence. It was important that SIU had been able to identify systemic gaps and the Department had been quick to correct them.

SIU was also investigating the Department of Transport. Over 30 000 non-compliant licences had been identified. 55 Driving Licence Testing Centres (DLTCs) had been audited. A number of forged foreign conversions had also l identified. Challenges included systems and process gaps at the driving licence centres, accessing information on foreign licenses and the cumbersome process of cancellations.

The Special Pensions Fund investigation focused on unlawful payment of special pensions to disentitled beneficiaries and the conduct of some board members that may have contributed to the problem. SIU was currently auditir beneficiaries. Challenges here included lack of compliance with the provisions of the Special Pensions Act, political sensitivity and concerns over integrity of officials.

The ongoing investigation into the Department of Correctional Services had focused in the past on medical aid. The current focus was on procurement matters, pharmacy procurement and asset management. Seventeen matters cumulative value of around R1.1 billion were being investigated. SIU had achieved recovery of R6.9 million in one matter, five criminal referrals for collusion, and thirteen systemic recommendations had been made. SIU still requ new and wider proclamation over the investigation. Procurement was time consuming and complex and access to information was difficult.

SIU was also focusing on subsidy fraud in the Department of Housing. The Minister had asked for expansion into a national investigation. The focus areas would include abuse of the housing subsidy system, the non-delivery on contracts, conveyancing fraud and conduct by officials. The Department of Housing was funding 50 staff to investigate and SIU was funding 21 staff.

Mr Davids tabled and highlighted some of the high level achievements. The savings had been R231 million, and prevention of future loss amounted to R1.8 billion. Cash recoveries were at R14 million. The target for 2007/08 was billion.

Mr Davids was pleased to announce that SIU had achieved a completely clean Auditor General's report, and a strong management chain assured the objectives. The Organisational Development process had started late in 200€ project profile had expanded significantly, so it was important to build a unit more responsive to the different forensic challenges. Implementation of the targets would commence in June.

Mr Hofmeyr detailed the overall challenges. SIU had achieved rapid growth and had taken responsibility to ensure that all matters, although perhaps not strictly in the mandate, were taken forward. It had been successful in achie good relationships with the National Prosecuting Authority (NPA) and the South African Police Service (SAPS). The SIU might require some assistance from this Committee with the Special Pensions Investigation as there were sensitivities, and Mr Hofmeyr asked that any problems and complaints to be referred back to the SIU. Because of the huge scale of the Social Grants Investigation around R1 million social grants might be removed. There had be need to make some tough decisions and there were difficulties in recovering the cash from those who had received grants illegally. The process of recovery took substantial time and resources, and so SIU had had to make their rather to get people off the payment system, and only then to try to recover the cash.

SIU would be needing legislative amendments to deal with litigation issues. The proclamation process was still cumbersome and time consuming, and it could take six months to acquire a signed proclamation. The requirements Premier to sign a letter of consent for provincial investigations gave rise to many delays. SIU was investigating other possibilities.

Mr Hofmeyr concluded that SIU had had a good year and had achieved good successes while coping with the challenges of rapid growth. It had managed to lay the foundation for a more effective and larger SIU in future.

Asset Forfeiture Unit (AFU) Briefing
Mr Willie Hofmeyr, Head, AFU, stated that the Asset Forfeiture Unit had two overall objectives; to increase the volume of cases, and to do test cases and create legal precedents that allowed for the effective use of the law. It was important to get binding appeal court judgments to determine what the law meant.

The AFU had exceeded its targets over the last couple of years. In the last year it had taken on 253 new cases, and had completed 243 cases. Monetary seizures in this year resulted in R760 million being placed under restraint. value of completed cases was slightly below target. Targets had not been met to pay funds into the Criminal Assets Recovery Account (CARA), largely due to the application for leave to appeal in the Schalk matter.

One of the most important ongoing matters was the David King case, where the scale of litigation was huge, involving England, Wales, Guernsey and South Africa. Mr King had publicly declared his intention to drag out the case next ten years, and perhaps a mechanism needed to be found to try to get litigation ancillary to the criminal trial to be heard in the same forum. There did not seem to be an easy answer to the delays under the current system. Fi important matters were the Delport matter, involving Revenue Services and customs fraud of about R350 million, where R80 million had been placed under restraint, the largest figure so far in the AFU's history. The Schalk case ongoing.

The Criminal Assets Recovery Account (CARA) had received payments of about R120 million, and around R47 million could be paid out in the year. Most of the funds were used to fight crime, but other payouts assisted victims c crime.

In terms of developing the law, AFU had obtained 31 judgments in the High Court, which probably reflected the fact that the law was becoming more settled. There were two Constitutional Court judgments and four in the Supren Court of Appeal 81% of the cases had been successful. Mr Hofmeyr clarified that the litigation often went to ancillary issues. Overall the success rate in Supreme Court of Appeal was 67%. About 203 judgments had been given t There had been a significant change of attitude in the courts in the last four years and AFU had won far more cases, as the law became more settled and more effective. Both the Constitutional Court and the Supreme Court of A had affirmed several important principles.

The important judgments in the last year were tabled and the main principles established in each case were explained. There was still no definition of organised crime, and the Mohunram case might still cause difficulties. Other principles had been more clearly established.

Mr Hofmeyr noted that the SIU did not do its own investigations or prosecutions and it was therefore key to establish good relationships with other bodies. Around 90% of cases, representing about 30% of cases, emanated from and about 8%, representing 67% of value, from the Department of Special Operations (DSO/Scorpions). Other investigations had emanated from SARS, direct referrals from prosecutors in the National Prosecution Service (NPS Reserve Bank, Marine and Coastal Management and the Financial Intelligence Centre.

Challenges included the need to expand capacity sufficiently to deal with all the cases currently in court.
The budget would need to be expanded almost eight-fold.

Discussion
Mr L Joubert (DA) commented that the report was encouraging. He asked about the profile of the SIU.

Mr Hofmeyr said that vacancies were a problem, but not so much as in other units of the National Prosecuting Authority because departments would pay for funding of investigations. Finding the right skills was a challenge. Abou of staff were investigators and others included lawyers, accountants and analysts. SIU tried not to recruit too much from other law enforcement agencies. There was an ambitious training programme that would be training 120 tra SIU had managed to find a mechanism to speed up the process of recruitment, although this was still time consuming.

The Chairperson pointed out that one of SIU's focus areas was to train people in other departments and she asked for further details on this.

Mr Hofmeyr confirmed that SIU would, during the course of investigation, be able to isolate lack of systems and skills. Part of Operation Consolidate was to work with dysfunctional municipalities to train their staff and ensure that could do the jobs properly.

Mr Joubert asked for an explanation on how the money would be used in asset seizure, as in the last year R345 million had been seized but only about R20 million had gone to CARA.

Mr Hofmeyr explained that assets were first frozen, and then later forfeited. Many of the large cases were heavily litigated for years. About 1 100 cases had been initiated and about 800 finalised, but R700 million were assets fro year, which may only be forfeited years down the line. Around 550 million had been acquired. The court could order direct payments to victims, and the balance would then go to CARA. Around R120 million had been paid over to this year. Other money was in the pipeline but there were processes still to be followed before that would end up in CARA.

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Imam G Solomon (ANC) congratulated the Unit on its successes. He noted that the future savings were also past losses to the Government. He noted that many matters had only reached SIU when the corruption and fraud was entrenched, so that there had already been significant losses. He asked whether SIU was allowed to monitor or have spot checks over certain programmes where there was potential for large-scale corruption.

Mr Hofmeyr agreed that there were often huge losses in the past and SIU tried to help with them. Its role at the moment was mainly reactive. Where there were cooperation agreements with Departments, a more proactive role c played and it was possible to see where high risk areas lay. It had also spoken pro-actively to certain departments where SIU had a sense that there was a problem but it could not force departments to agree. The monitoring role more for the Auditor General (AG) to undertake. SIU was interested in firming up the relationship between AG, the Standing Committee on Public Accounts (SCOPA) and other law enforcement bodies.

Imam Solomon commented that there were no shelters for domestic violence in the Northern Cape.

Mr Hofmeyr noted that Thutuzela centres were budgeted for in the next few years in these areas.

Mr J Sibanyone (ANC) asked whether the loopholes in the Department of Transport had yet been closed.

Mr Davids replied that in four key areas there were constraints to service delivery, involving insufficient skills, resources and infrastructure problems, and methods and procedures creating a blockage in the system. SIU had recommended that minimum requirements should be established at 55 centres, and those centres not complying should be reviewed and their licence to operate reassessed. Some of the DLTCs would be investigated in the next months. The MEC for Transport in Western Cape was keen to pilot a process to look at blockages and change the processes. This would be a useful pilot to assess over the next few months.

Mr Hofmeyr added that the National Department of Transport could make guidelines but did not have operational control as provinces or municipalities ran the centres. The National Department could only close centres down as ultimate sanction, but had no capacity to enforce best practice.

Mr Sibanyone asked for an indication of the current situation in relation to special pensions. He asked whether the delays that had given rise to complaints were linked to the comments on the frauds.

Mr Hofmeyr said that the Board was currently being very cautious. 8 000 applications were submitted in December, just before the cut off date, and although these might have been legitimate claims that had somehow not been k In the last ten years, there were suspicions that many could be fraudulent. It was known that criminal syndicates were in possession of party stamps to endorse the applications. This was not directly the issue of SIU, but Special Pensions had asked for help with the initial screening.

Mr Davids added that because of the strict criteria many of the applications had not initially complied but SIU was not necessarily aware of widespread delays. He mentioned that there was provision under Section 7 that an appli previously turned down could be re-submitted if new evidence came to light. However, in resubmissions it frequently happened that the new evidence differed radically from that supporting the original request. Since the Special Pensions could involve one off cash payments of up to R1 million rand, the Special Pensions administration was cautious that all information must be thoroughly verified.

Mr L Landers (ANC) referred to the people who had fraudulently received benefits being removed from the system, as asked whether they were also removed from office as public servants. He asked if the SIU was satisfied with outcome of the disciplinary hearings. He felt it was undesirable to have public servants who had been convicted of fraud to be permitted still to stay in office and earn salaries, or to be re-employed as public servants in other partments.

Mr Hofmeyr said that departments were assisted with the disciplinary enquiry and investigators from the SIU could give evidence, and had also provided help in training presiding officers. However the Bargaining Council agreem required the departments to do the prosecution themselves, and not to import prosecutors or presiding officers. Removing incorrect grants and payments from the systems was of concern to many departments. Social grants wer major issue and the numbers were huge. Around 20 000 civil servants could face civil proceedings. Mr Hofmeyr stressed that not all cases involved fraud. Many people had initially been entitled to a grant but subsequently becar employed, and may not have been aware that they should have been removed from the system. There were a number of grey areas. The scale of the problems and the need to establish uniform principles had slowed the investi

The Chairperson noted that government was committed to fighting corruption and the presence of the SIU in itself was an important element of its success. The real success would be when correct systems were in pace when SI completed its work in departments. She suggested that during the next report it would be useful for SIU to highlight exiting policies, to note what had been monitored over the last few years, and to state whether it had found recu of the same issues, or development of other matters.

The Chairperson expressed her concern that pre investigations should maintain the same elements of cooperation. It was important not to undermine the good relationships and profile of the SIU.

The Chairperson also noted that SIU had stated that it relied on project funding from departments, and would like to reduce that reliance. She commented that the fact of departments putting money or resources into investigation an indication that they were committed to taking matters seriously, and commented that if they were not to pay there was a danger that they might lose focus and commitment. She hoped that discussions with Treasury would be in mind. Finally she congratulated the SIU on its completely clean Auditor General's report.

Priority Crimes Litigation Unit (PCLU) Briefing
Dr Silas Ramaite, Deputy National Director of Public Prosecutions, NPA reported that the PCLU was established in 2003 by Presidential Proclamation. It was not an investigative unit but relied for its investigations on SAPS and I gave guidance to investigators in the drafting of legal processes. Its cases were very complex and would not succeed without a multi disciplinary approach. It was actively involved with numerous stakeholders and mutual legal assistance and extradition. It engaged in proposing legislative amendments, conducted legal research and furnished legal opinions and provided assistance to directors of public prosecutions. The Missing Persons Task Team wa established to investigate disappearances between the 1960s and 1996. It was aligned with the Ministry of Justice's Truth and Reconciliation Commission (TRC) unit. Its strategic focus areas were investigative capacity, prosecut efficiency, engagement with stakeholders and research and training. It was intended to be a short-term process.

The prosecutions relating to nuclear non-proliferation, and chemical and biological non-proliferation were tabled and explained. Further cases involved mercenary activities. The Unit had also attended a conference on counter te in Namibia. Assistance had been provided to the Czech Republic relating to international arms smuggling, and another involving export of military vehicles to conflict regions in Africa. Matters investigated under the Statute of Ro were tabled and explained. Other matters involved civil litigation, and assistance to a foreign law enforcement agency on human trafficking. Research had been done and opinions had been given to the Director of Public Prosecu and there had been follow up on the TRC prosecutions. A number of exhumations had been carried out.

Major challenges included the need for adequate staff to attend to all cases, inadequate office space, and delays with TRC prosecutions. The PCLU was a small unit consisting of around six advocates. Staff challenges included eaching away of highly experienced prosecutors. Security issues were critical. Challenges still existed in respect to missing persons outside South Africa, and some cases had not been referred to the TRC. The Unit was operat ffectively, however, within the budgetary constraints, and was able to given attention to its work and to prioritise where necessary.

Witness Protection Unit (WPU) Briefing
Dr Silas Ramaite, Deputy National Director, Public Prosecutions reported that the Witness Protection Unit was mandated to act under the Witness Protection Act. Its supplementary mandate was to transform, redesign and mode and set standards in relation to protection of witnesses and enhancement of criminal justice.

The detailed role of the WPU was tabled but not discussed. Dr Ramaite reported that the strategic direction was to transform, redesign and modernise witness protection. Weaknesses in the past that led to endangering of witnes had been corrected. The Unit planned to enhance confidence. In the criminal justice system and the programme and to achieve effective administration and financial management, and an integrated law enforcement approach. T protection should be effective as a tool in combating crime. It also sought to reduce witness grievances, to reduce the numbers of witnesses leaving the programme, and to reduce the cycle times. The achievements and perform for the current cycle were tabled. There had been increased confidence in witness protection, and it was clear that witness protection had ensured the successful arrest, prosecution and conviction of a number of accused person WPU was setting the best world standards in the redesigning process and was acclaimed for its operating model as well as its forms.

Dr Ramaite noted that no witnesses were threatened, harmed or assassinated in the past six years. There had been significant reduction of grievances and there had been only 3% voluntary walk-offs. The cycle time had droppe two years due to phasing in of the After-care and resettlement strategy. There was a 90% conviction rate for those accused.

WPU had achieved clean audit reports over the past five years from the AG. Its protection was acknowledged as an effective tool and assistance had been given to a number of other African countries. There was a close relation with the International Criminal Court. WPU had a high level of training in cooperation with Justice College, and played a major role in developing international best practice guidelines. Advanced training on Witness Protection wa offered by Free State University.

The total number of persons on the programme was 229 witnesses and 268 related persons. The challenges were included in the presentation slides, but were not discussed.

Discussion
Mr Joubert asked what was causing the delay in prosecutions of the TRC and when these might be finalised.

Adv Anton Ackermann, Special Director: NPA, replied that in October 1998 the TRC had recommended prosecutions. A Human Rights division was established in the NPA to evaluate the cases and to prosecute. When the DSO created in January 2001 the Human Rights Division was disbanded, and its work was transferred to the DSO. Adv Ackermann, when joining the NPA, was given a mandate in March 2003 to declare priority crimes. All 400 TRC prosecutions had been immediately declared as priority crimes. In April 2003 the President had stated that there would be no further amnesty processes, and ruled that prosecutions would be instituted and that a number of agen

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must assist in the prosecutions. Adv Ackermann personally declined to prosecute 92 cases. Sixteen were identified for investigation and potential prosecution. On 9 November 2004 Adv Ackermann was stopped when trying to a three security policemen and charge them with poisoning of identified people. Dr Ramaite had instructed him not to proceed with the arrest, but rather to formulate guidelines how prosecutions should be conducted. This formulat took two years. In early 2006 the guidelines were approved. They did not make provision for a committee, but stated that in the execution of the prosecution duties other agencies must assist. A Task Team was established, and a number of meetings were held. Adv Ackermann commented that it was unfortunate that to date no meaningful results had been achieved from these meetings. The Annual Report of 2006 also noted on page 4 that not much had achieved, despite all the attempts to take this matter forward. He maintained that the PCLU was not the cause of the delays and he suggested that perhaps the National Director of Public Prosecutions should comment further.

Adv Vusi Pikoli, National Director of Public Prosecutions, added that this was a politically sensitive issue. The legal processes must solve the problem. Whenever there was an attempt to charge members of the former Police Ser there was political intervention, and effectively the NPA was being held to ransom by the former generals. On the other side the families of the victims were pressing for prosecution. The guidelines were not universally accepted a some NGOs, including Legal Resources Centre, wished to challenge the constitutionality of the guidelines. There were ongoing discussions as to how best to proceed. The President, in addressing parliament, indicated clearly th matters would be dealt with, and so this was an ongoing matter.

The Chairperson stated that she was aware of some efforts from the Department of Justice. She asked that Adv Pikoli provide the Committee with a full report on the events to date in writing, so that the Committee could try to as this clearly went beyond just the one case cited by Adv. Ackermann. It was undesirable that these problems should still be delaying matters.

Mr Joubert asked about the cost of protecting witnesses.

Mr Dawood Adam, Head, Witness Protection Unit, commented that witness protection was expensive. Each programme must be measured on its own merits and circumstances and different factors would impact. The cost of one witness being protected over a year had amounted to R145 000. The cost of protecting the Boeremag witnessas, without taking accommodation into account, had been in excess of R5 million. Factors taken into consideration co include salary replacement. Another case had required protection for 23 witnesses, involving accommodation in three safe houses.

Imam Solomon noted that the security seemed to focus only on the witnesses being protected and asked if protection was also given to officials of the NPA who were responsible for this Unit.

Mr Adam replied that unfortunately South Africa was not yet geared to protection of officials. International best practice and guidelines had suggested that corporate identity documents should be provided. Security was a challeng certain matters were under discussion to ensure that the covert status of the unit was maintained.

Mr Landers asked why the DPP had declined to prosecute in the Kalji Rashid matter.

Adv Ackermann responded that this was because the full High Court bench had ruled that the deportation was legal. He had studied the documents carefully and the matter had been discussed with the International Criminal Co including the implications of the Rome Statute. This was not necessarily done in every deportation matter, but now that the Court had ruled on the matter it was closed.

Mr Landers asked which departments had been problematic in assisting with the prosecution of TRC cases. He also commented that destruction of documents by SAPS, Municipalities, magistrates' courts and municipalities in re missing persons should be sanctioned.

dv Ackermann responded that all inquest dockets were to be destroyed after a certain time, and the destruction was following this principle. However, there had been a circular issued in 1994 to try to halt the destruction of evid

The Chairperson asked for specific information on problematic cases to be forwarded to the Committee, so that it could try to assist.

Adv C Johnson (ANC) asked why the voluntary walk-offs were happening and what was being done to prevent them.

Imam Solomon noted that the witnesses would be from diverse cultural and social backgrounds, and this made it important for the Unit to take cognisance of their special circumstances. He asked if the walk-offs had arisen as a of the difficulties in culture.

Mr Adam responded that around 80% of witnesses related to protection under section 204. Some had come into the programme but had changed their mind after giving statements, and disappeared. Some of the walk offs result individuals being traumatised by and not able to cope with removal from all support services. He agreed that there were diversity and cultural issues but every attempt was made to try to keep the witnesses in the programme. Wi the witnesses failed to keep to the terms of the programme, the appropriate steps were taken.

Adv Johnson asked if support was being given to TRC victims and families in going though the prosecutions.

Mr Adam replied that various NGOs were assisting with support to families.

Adv Johnson asked for what was happening in Rwanda.

Adv Ackermann replied that he had written an opinion on the matter and had expressed the view that it was not possible to prosecute in South Africa.

Imam Solomon noted that the achievements listed included cooperation to Netherlands, Germany and United Kingdom. He asked for specifics of what assistance was given.

Dr Ramaite said that South Africa had been instrumental in drafting guidelines, and stated that Europol relied on South Africa to assist in Africa in terms of legislation, operational models and training standards. South Africa was developing the PCLU to keep pace with the metamorphosis of organised crime, and would continuously monitor this. It had given support to Kenya, Mozambique, Angola and Namibia, and would be addressing them on how to e establish a unit.

The Chairperson asked that all investigations pending must be concluded expeditiously, which would be in the best interests of all concerned.

Directorate of Special Operations (DSO / Scorpions): Briefing

dvocate Leonard McCarthy, Head, Scorpions, stated that this had been a year of averages, balance and learning. The DSO was intended to target criminals who organised and profited from crime. It used a multi disciplinary an uccess driven approach to deal with cases more effectively. The strategy was to mark down the impact of, and to drive up the disruptive effect on organised crime.

The key activities and impacts were tabled. Adv McCarthy noted that the conviction rate was above 80%. The value of assets placed under restraint was R550 million, and there were 41 cases, from which R64 million was destin CARA. DSO had directed R50 million to the victims of organised crime. Drugs valued at over R1 billion had been seized over the last year. A comparative performance analysis was given over the last three years. Although the n of investigations had dropped, the conviction rate had been firm and assets under restraint had risen. 20% of cases finalised involved plea-bargaining, about 20% were medium-rated and the rest were massive cases. That must borne in mind when measuring the statistics. The Fidentia case should not have been allowed to happen; it showed a lack of checks and balances in the system. The Schaik and Yengeni appeals were major successes as they endorsed the strategy of the investigations.

In relation to the travel fraud, 37 of the 40 Members of Parliament had pleaded guilty. One charge had been withdrawn for humanitarian reasons and the other two were facing charges in the Regional Court. Adv McCarthy stated there had been rumours of involvement of 250 people, but the lists referred to only outlined the transactions used as part of the bigger investigations and did not pinpoint the transactions. There had been complaints by some tha Executive had been given a clean bill of health. Thorough investigations had been done and insufficient evidence was available to warrant prosecutions. He asked that the prosecutors now be given a proper chance to do their w

Adv McCarthy detailed some of the matters currently being handled by DSO. Mr Rautenbach was a fugitive of justice. The DSO was ready to prosecute on numerous charges and had applied for his extradition. The NDLC invest had shown how an intricate web of corruption involving seven countries could be created. This matter was still to be decided. In the Shaik cases none of the benefits or loans were reflected in local or foreign tax or disclosure rec and this was important as around the world prosecuting authorities were focusing more on disclosure records. In the Yield case, the prosecutors had been asked to write a report on how they had worked with mutual legal assista and to detail the excellent cooperation. The drug cases illustrated that the major drug dealers were outside South Africa, and that drug trafficking was the biggest organised crime threat in South Africa and around the world. Cybe was another huge threat, as evidenced by the recent scam targeting bank customers, which resulted in around 25% of all bank clients being persuaded to give their details to an international syndicate. The challenge for law enforcement was to use technology to trace the physical location of criminals. The DSO had managed to give measurable results. Details were also given in brief of the Kebble matter.

Adv McCarthy noted that several national and international partnerships and agreements were also in place. It was impossible for DSO to make impact unless it had sound relations with international agencies. The internal busin was tabled. There were currently 475 staff, of which 121 were unfunded until last year. 142 positions were created on 20 November, and the challenge would now lie in filling those positions. 825 positions should be filled by the e the financial year. Details were given of the gender and racial breakdown.

A dedicated administration for DSO was set up on 26 October 2006. Treasury had approved a separate bank account and estimate of national expenditure for DSO funds. The main spending drivers were compensation, goods a services and capital assets. 30% of the goods and services budget was spent on professional services, which basically involved forensic companies and lawyers. This was rather high but necessary in light of the capacity constra 40 staff had been lost during the course of the last year, and 36 new staff appointed, and the turnover of 8% was well within the norms.

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Challenges included the need to increase effectiveness in investigating and prosecuting organised crime the need to work on creating jurisprudence on the Prevention of Organised Crime Act, and also to create law around the Monitoring Act Not enough had yet been done to maximise international assistance A major challenge would lie in matching job demand with expertise Some of the solutions proposed included standardisation of best practice a writing a practice manual DSO would like to set up its own internal Counsel capacity Agent evidence drug smuggling racketeering and trials had been successfully worked on in the last year DSO hoped to be able to set resea based impact measurement indicators Adv McCarthy noted that the decision by Cabinet was in the process of implementation and he hoped that there would be a single line of command and the jurisdictional sanctity of Chapte should be retained The new posts would be filled and DSO would be establishing a training academy

Discussion

Mr Joubert asked out why DSO had chosen the name Red Cross for the drug-finding operation

Adv McCarthy replied that there was no special significance to the name Red Cross and investigators would often deliberately choose a name that was totally unrelated to the subject matter to preserve confidentiality This partic name came about as DSO wanted the people involved in drug trafficking to feel the effects of their actions

Adv Johnson referred to the newly created 146 posts and asked if these posts added to the civil litigation establishment

Mr Adnan Mopp Regional Head DSO replied that the civil litigation would be accommodated under the 142 posts and also under the 158 posts especially earmarked for this purpose

Mr Joubert was curious as to how Mr Kebble had operated and achieved what he had done before the investigations

Mr Mopp replied that the trial results were still awaited He noted that so far three main points could thus far be isolated the use of false brokerage notes how boardroom corruption could be constructed and lastly the lack of due diligence in certain areas of the corporate world in South Africa He added that a workshop audit had revealed tremendous vigour and positive attitude in the DSO which was clearly maturing well

Imam Solomon asked the DSO to further explain the meaning of the single line of jurisdiction

Mr Mopp replied that he did not want to pre-empt the position but presently the operational decisions were taken under one line of command This was a model that the world was adopting so the view in the DSO was supporting model

Imam Solomon noted that the mandate of the DSO appeared to target the high profile cases He did not agree with this approach since this implied that the problems of people in the communities were being marginalised He sa there were significant problems with gangs in townships

The Chairperson agreed that gangs in townships were not receiving sufficient profile or attention She was of the opinion that these should be prioritised as this would enable politicians to discuss the issues in an effort to better l all people Most importantly this would show that the institutions created by government were not only for high profile issues but also for those in the street

Adv McCarthy replied that DSO realised that in the Western Cape it had not yet come to grips with the management of organized crime but it had established and was trying to work in clusters that complemented the work being DSO did acknowledge that it had neglected a certain segment of the market and would address the gap He further said that the point Mr Solomon had raised was taken to heart This was work in progress and the next time DSC appeared before the Committee it should have some progress regarding the lower level offences

Imam Solomon asked if DSO policy towards victims of crimes matched the SIU policy of funding organisations that gave victim support

Mr Mopp replied that DSO did not fund organisations but would instead get an order for compensation under section 300 of the Criminal Procedure Act, and the money went to the victims

The Chairperson remarked that she was aware that there was an appeal pending in the LeisureNet issue and asked for details

Adv McCarthy replied that this matter was not finalised He could confirm that application had been made for leave to appeal which had been granted and the appeal would proceed on both conviction and sentence However th judge in the court a quo was still charged with an enquiry from the original matter The DSO would consider its position and was currently preparing on questions of law which it would request the Supreme Court to resolve Inclu money laundering charges as well as the sentencing issues

Mr Mopp added that the legal and operational grounds indicated that DSO would be perfectly entitled to call for an increase in the sentence

The Chairperson remarked that she was well aware of the comments about the Travelgate incident but expressed her disquiet at the insinuations that those high up in the ANC echelons were immune to prosecution and would n pursued She asked DSO whether the Directorate or any of the prosecutors were facing any pressure She remarked that this was an ideal forum to air any grievances or note anything untoward as the Committee would not prot party if DSO was unable to prosecute it would greatly undermine the integrity of the DSO which it had painstakingly worked to achieve

Adv McCarthy replied it would be useful to have an independent observer to write up how DSO functioned He said that the idea that he could influence all 500 people in the department was entirely ludicrous There had been no pressure applied He had allocated some of the best people on the Travelgate case and he himself had applied extra effort to it because of its great sensitivity as it involved members of the executive He added that he had appl twenty years of legal experience and had himself interviewed some of executive members in terms of the Section 28 of the NPA Act Parliament at first was squeamish but in the end was co-operative to the extent that he had b informed that in most countries in Europe this type of matter would never have been allowed to proceed to this advanced stage The tenacious personalities of the team the time and money invested meant that NPA would not s short of prosecuting a high level person simply because pressure had been exerted on the NPA Anyone making insinuations that there was further evidence or that certain people were being protected must bring this evidence forward The matter would proceed in court and he hoped that no delaying tactics would be used in the trial process

Adv Pikoli added that soon after his own appointment he realised the importance of the integrity of the DSO and how even small media stories could attack this integrity One story implied that Adv Pikoli was discussing the Jaco matter with the President and had been seen in whispered consultation with him On that very day Adv Pikoli was in fact en route to Chile The NPA would not be influenced by anyone and any members irrespective of their stat the ruling party or any party would be dealt with according to the law

The Chairperson remarked that the Committee's function was to hold the NPA accountable and where information was not satisfactory the Committee would levy criticism with a view to building and guiding NPA All Members ha keen interest in the issues being discussed The Committee wished it could interface with the units more

Adv Pikoli asked about the progress of the Criminal Laws (Sexual Offences) Amendment Bill which was of particular importance since the current definition of rape was problematic

The Chairperson replied that the Committee had prioritised this Bill but there had been a problem in relation to tagging which was currently under review The South African Law Reform Commission was working on legalising prostitution and there was evidence that there was a direct link between trafficking and prostitution She was not impressed by the substantial funding to organisations who should propose how to legalise sex workers without ma link already to the trafficking issue The models applied by other countries in legalizing sex workers could prove extremely useful tools and this would allow the funding to be used for other related issues

Adv Pikoli asked on the progress of the Child Justice Bill

The Chairperson replied that the problem with this Bill lay in implementation There was lack of capacity in terms of the social workers needed The Department of Justice did not have a problem but the Departments of Correctio Services and Social Development were facing resource problems She emphasised that it was not desirable to have a piece of legislation passed if it could not be implemented practically

The meeting was adjourned

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:

In the matter between:

THE STATE

and

1. JOHANNES VELDE VAN DER MERWE

an adult male South African citizen

2. ADRIAAN JOHANNES VLOK

an adult male South African citizen

3. CHRISTOFFEL LODEWIKUS SMITH

an adult male South African citizen

4. GERT JACOBUS LOUIS HOSEA OTTO

an adult male South African citizen AND

5. HERMANUS JOHANNES VAN STADEN

an adult male South African citizen

(hereafter referred to as the accused)

PLEA AND SENTENCING AGREEMENT IN TERMS OF SECTION 105A OF ACT 51 OF 1977 (AS AMENDED)

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THE PLEA AGREEMENT:

A. PARTIES TO THE AGREEMENT:

1. The State is the National Prosecuting Authority of South Africa and represents the complainant.

2. There are five accused, namely:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO and

HERMANUS JOHANNES VAN STADEN;

B. AUTHORISATION:

3. The prosecutor who represents the Prosecuting Authority in this matter is **Adv AR Ackermann SC,** a Special Director in the Priority Crimes Litigation Unit in the Office of the National Prosecuting Authority, who is duly authorised to enter into this plea agreement on behalf of the State. The relevant authorisation is attached as **Annexure A.**

C. LEGAL REPRESENTATION:

4. At all times during the plea negotiations and these proceedings, the accused have been represented by **Adv Johann Engelbrecht SC** and **Jan Wagener**, of Attorneys Wagener Muller, 833 Church Street, Pretoria, 0001.

D. THE INVESTIGATING OFFICER:

5. The investigating officer was consulted regarding this plea agreement and has indicated that he has no objection to the pleas of guilty as set out in the agreement, or to the proposed sentences.

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E. THE COMPLAINANT'S ATTITUDE WITH REGARD TO THE PLEA AGREEMENT:

6. The complainant, the **Reverend Frank Chikane**, has been consulted and has indicated that:

6.1 He does not harbour a grudge against the accused.

6.2 It is extremely important for him to have the true facts surrounding the attempt on his life disclosed.

6.3 He is satisfied with the plea agreement and does not wish to make any further representations in connection with the matter.

F. THE RIGHTS OF THE ACCUSED:

7. Prior to entering into the plea agreement, the accused were duly informed about their constitutional rights..

8. They have been fully informed regarding the rebuttable presumption that they are innocent until guilt has been proved beyond reasonable doubt.

9. They were informed of their right to remain silent.

10. They were also fully informed of their right not to offer self-incriminating testimony.

11. The accused are fully aware of the fact that the Honourable Court is not bound by this plea agreement.

G. THE CHARGES:

12. The accused are charged with the following offences:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

ALTERNATIVE CHARGE TO COUNT 1: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

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IN THAT the accused, together with **Wouter Basson**, **André Immelman** and **persons unknown to the State, during April 1989** and at or near **Roodeplaat Research Laboratory and/or Pretoria** in the district of **Pretoria,** unlawfully and intentionally conspired to commit the crime of **murder** against the **Reverend Frank Chikane,** and / or to assist in the commission of this offence and / or to further the commission of the offence.

COUNT 2: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, **Wouter Basson**, **André Immelman** and **persons unknown to the State, during 1989** and at or near **Roodeplaat Research Laboratory, Security Branch Headquarters** in the district of **Pretoria and/or other locations unknown to the State,** unlawfully and intentionally conspired to commit the crime of **murder** of **persons unknown to the State** and / or to assist with the commission of such murders and / or to further the commission of such murders.

H. THE PLEA OF THE ACCUSED:

13. The parties to this plea agreement have concurred on the following:

13.1 That all the accused plead guilty to **Count 1,** as set out in the indictment:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

13.2 That the State will withdraw **Count 2** against all the accused.

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1. FACTUAL SUMMARY OF EVENTS:

(i) BACKGROUND:

(For the sole and exclusive purpose of this agreement, the accused admit the contents of paragraphs 14 to 23 as set out hereunder, although at the time the relevant offence referred to in **Count 1** was committed, they had no knowledge whatsoever thereof.)

14. During the period 1982 – 1992, the South African Defence Force ran a Top Secret project, namely Project Coast. The primary objective of this project was to develop a defensive and limited offensive chemical and biological warfare capacity.

15. Dr Wouter Basson was the project officer.

16. Due to the sensitivity of the project, front companies were used to conduct research as well as to manufacture and procure substances.

17. The front company Delta G Scientific (Pty) Ltd (hereafter referred to as "Delta G") was responsible for research and manufacture of chemical substances for the project.

18. Roodeplaat Research Laboratory (Pry) Ltd (hereafter referred to as "Roodeplaat") conducted research in the biological sphere and to a lesser extent, also carried out chemical research.

19. Dr A Immelman was a scientist employed as the head of toxicological research at Roodeplaat.

20. Around the mid-1980s, Dr Basson instructed Dr Immelman to, *inter alia*, carry out research on the use of toxic substances against individuals, methods of application and the traceability of such substances following administration. These toxic substances (including Paraoxon) were manufactured at Roodeplaat and some of them were handed over to Dr Basson.

21. In approximately 1987, Dr Basson ordered Dr Immelman to meet clandestinely with representatives of other branches of the Security Forces and to supply them with whatever substances they needed.

22. As a result of this instruction, Dr Immelman had various clandestine meetings with members of the various Security Force components. During these meetings, the needs of particular components were discussed and toxic substances were in fact later supplied to them.

23. In order to keep a record of the toxic substances that were handed over to these outsiders, Dr Immelman maintained a list (attached to the indictment

as **Annexure "A"**) indicating the date of delivery, the name of the substance and the volume / quantity supplied.

(ii) THE ACCUSED:

24. During the period January 1986 to September 1988, accused No 1 was the commanding officer of the SA Police Special Branch. In October 1988, he was promoted to Deputy Commissioner of Police.

25. General Sebastiaan Smit succeeded him as commander of the Security Police and thereafter, accused No 1 had no further involvement with the project.

26. During the period December 1986 to August 1991, accused No 2 was the Minister of Law and Order in the Republic of South Africa.

27. During the period relevant to the indictment, accused 3 to 5 served as police officers attached to the Security Branch.

(iii) THE VICTIM:

28. The Reverend Frank Chikane was an outspoken opponent of apartheid and the policies of the then lawfully elected government. He was, *inter alia*, the secretary-general of the South African Council of Churches and the vice president of the United Democratic Front. It was the stated policy of the latter organisation to propagate and support countrywide unrest and violence for the direct purpose of rendering the country ungovernable.

29. During April / May 1989, Reverend Chikane was planning to visit various foreign countries with a view to propagating the imposition of economic sanctions against South Africa.

30. The first leg of his trip was a visit to South West Africa, now Namibia. He travelled by air from the former Jan Smuts Airport to Windhoek.

31. After dressing on 24 April 1989 in some of the clothes that had been packed in his suitcase, the Reverend Chikane took ill. He was admitted to a hospital in Namibia, but later the same day, he was transported back to South Africa as a matter of urgency and re-hospitalised on arrival.

32. His condition improved and he was discharged from hospital. He then flew to the USA, both to recuperate and to keep a number of scheduled appointments. Additional clothing was packed in his suitcase, which had arrived from Namibia in the interim.

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33. In the United States, Reverend Chikane again fell ill after wearing clothing taken from his suitcase. Again, after being hospitalised, his condition improved. This pattern was repeated twice more.

34. During his third hospitalisation in the USA, extensive medical tests were carried out on Reverend Chikane. P-Nitrophenol was found in his urine and this, together with specific symptoms and other test results, indicated organophosphate poisoning. P-Nitrophenol is a rapidly biodegradable metabolite of Parathion, of which Paraoxon is the active ingredient.

(iv) THE CRIME:

35. During the 1980s, various individuals / organisations were actively involved in efforts to abolish apartheid in South Africa and/or overthrow the government of the day by violent means. Methods used included the promotion of economic sanctions against and the international isolation of South Africa, as well as direct propagation of civil disobedience in order to render the country ungovernable.

36. During 1987, at a meeting arranged by the South African Defence Force, accused No 1 took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.

37. A list containing the names of persons identified in terms of this order was handed to senior members of the security establishment, including accused No 1. Reverend Chikane's name was among those on this list.

38. The execution of the above-mentioned order was discussed by accused No 1 and No 2.

39. Accused No 1 and No 2 then decided that a special unit should be set up within the Security Branch for the purpose of carrying out this order.

40. Accused No 4 and No 5 were attached to this special unit at all relevant times and from January 1989, accused No 3 served as the commander of the unit.

41. After General Smit assumed command of the Security Branch, he was informed about the objectives of the special unit.

42. Acting on the orders of General Smit, accused No 3 made contact with Dr Basson and requested him to assist the special unit in acquiring substances that could be applied against the enemy. Dr Basson arranged for contact to be made with Dr Immelman.

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43. A number of clandestine meetings took place thereafter between Dr Immelman and accused No 3, 4 and 5. At these meetings, these three accused discussed the details of substances that could be used against the enemy. In respect of Reverend Chikane, a substance that would specifically lead to his death was required. Dr Immelman identified a certain substance for this purpose and explained that it should be applied to close-fitting clothing items, such as a shirt collar and/or underpants. The toxic substance, which was subsequently identified as Paraoxon, was supplied to them by Dr Immelman.

44. Paraoxon is a lethal toxic substance.

45. On 4 April 1989, Dr Immelman delivered the Paraoxon to the accused, as reflected in **Annexure "A" of the Indictment.**

46. Reverend Chikane was due to depart for Windhoek from Jan Smuts Airport on 23 April 1989.

47. On the evening of 23 April 1989, accused No 3 and No 4 were at the airport and Reverend Chikane's suitcase was intercepted. They then applied the Paraoxon supplied to them by Dr Immelman, to the contents of Reverend Chikane's suitcase.

48. The poisoning of Reverend Chikane's clothing resulted in the series of events set out in paragraphs 31-34.

49. The order to kill Reverend Chikane was issued by General Smit to accused No 3 in terms of an order conveyed to accused No 1 and No 2. The accused acted in pursuance of a common purpose to murder Reverend Chikane. At all relevant times, the accused acted unlawfully and with the necessary intent.

AGREEMENT REGARDING A JUST SENTENCE:

J. AGGRAVATING CIRCUMSTANCES:

50. The administration of poison in order to secretly eliminate opponents is an egregious, reprehensible and universally abhorrent act.

51. Accused No 1 was the Deputy Chief of the Republic of South Africa's Police at the time of commission of this crime.

52. Accused No 2 was a prominent political leader and member of the ruling party of the day.

53. Reverend Chikane was a religious leader.

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54. The motive for the planned murder of Reverend Chikane was to prevent him from lobbying abroad for economic sanctions against South Africa and to deprive him of his role in promoting internal résistance against the government..

55. The **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** made provision for persons who were guilty of committing gross human rights violations for political purposes, to apply for amnesty.

56. On several occasions, accused No 1 and 2 availed themselves of this right and testified before the Truth and Reconciliation Committee, each time under oath

57. The accused did not apply for amnesty in respect of the charge to which they have now pleaded guilty.

58. On 10 July 1997, accused No 1 testified before the TRC that he was not aware of the existence of a so-called "internal hit list" that was circulated within the security community.

59. Acts of reconciliation towards Reverend Chikane by accused No 2 took place only after the National Prosecuting Authority had indicated that it had a *prima facie* case against accused No 3, 4 and 5 in respect of the poisoning of Reverend Chikane.

60. During the trial of Dr Wouter Basson, who was charged, *inter alia,* with the poisoning of Reverend Chikane, the accused, and in particular accused No 2, remained silent about their role in the attempted murder and avoided any suggestion of attempted reconciliation.

61. During the prosecution of Dr Basson, accused No 3, 4 and 5 were approached on several occasions by members of the prosecution team with a view to giving evidence as State witnesses. They were offered indemnity from prosecution in terms of Section 204 of Act 51 of 1977 in this regard. The accused consistently refused to offer their cooperation and persisted in furnishing the State with a false version of events. The accused offered instead to cooperate with Dr Basson's legal defence team.

62. After conclusion of Dr Basson's trial, Reverend Chikane wrote to accused No 3, 4 and 5 several times, pleading with them to reconcile with him. The accused consistently ignored all his requests.

K. MITIGATING CIRCUMSTANCES:

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63. None of the accused has any previous convictions. Their respective ages are 71 (accused No 1), 70 (accused No 2), 69 accused No 3), 60 (accused No 4) and 63 (accused No 5).

64. The accused are all married.

65. The accused have all pleaded guilty.

66. Disposal of this case in terms of Section 105A of Act 51 of 1977 saves both the court and the State the cost and inconvenience of a protracted trial.

67. The accused have assisted the State by pleading guilty, in so far as it would otherwise have been difficult for the State to prove its case, since the State is not in possession of any evidence regarding the involvement of accused No 1 and No 2 and has been able to establish their role only as the result of their cooperation. In addition, accused No 3 and No 4 came forward to disclose their roles.

68. The accused have shown remorse for their deeds and have undertaken to act as State witnesses in the event of a prosecution being instituted against General Sebastiaan Smit.

69. Accused No 2 publicly washed Reverend Chikane's feet as a gesture of reconciliation. This act of contrition must be seen against the background that it was performed voluntarily by accused No 2.

70. The sincere remorse of accused No 2 in regard to past deeds is further illustrated by his act of reconciliation towards the mothers of 9 of the 10 Nietverdiend victims killed by the Security Forces, despite the fact that accused No 2 had no knowledge of this operation at the time and nor was it sanctioned by him.

71. At all relevant times, the accused were acting by virtue of their official positions and posts, in defence of the lawfully elected government of the day, to which they had sworn an oath of allegiance.

72. The offence was committed during a period of intense conflict and division between the various communities and structures in South Africa. On the one hand, the ANC and other anti-apartheid organisations that wished to overthrow the government by violent means, had thrown everything into the struggle to achieve their objectives. All members and spheres of society were drawn into the struggle in order to foment resistance in a variety of forms. On the other hand, the then lawfully elected government, in turn, used all the methods and powers at its disposal. The Security Forces, and in particular the SA Police, played a key role in combating the onslaught. Amid the violence raging countrywide as well as in Namibia, the SA Police were increasingly required to act against trained military operatives, which had a significant influence on normal policing. At times,

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they were forced to sacrifice the principle of minimum force and, amid the violence and bloodletting, the distinction between lawful and unlawful action became blurred.

73. At the time of commission of the offence outlined in Count 1, accused No 1 was no longer head of the Security Police and was also no longer involved in the project.

74. Neither accused No 1 nor No 2 had knowledge of the specific attempt on Reverend Chikane's life. Notwithstanding the fact that accused No 2 had made it clear that he wished to be informed in advance if consideration was being given to killing a specific individual, he was not informed in this particular case.

75. Accused No 3 and No 4 were subordinates who acted in terms of a direct order issued by the Security Branch chief, General Smit.

76. The original project aimed at neutralising the influence of high profile members of the anti-apartheid liberation struggle, was not initiated by the accused, but by the SA Defence Force, which itself was acting on higher authority.

77. As secretary-general of the South African Council of Churches and vice president of the United Democratic Front, Reverend Chikane played a key role in fomenting resistance to the former government. The United Democratic Front succeeded in mobilising the masses countrywide, resulting in widespread unrest and violence.

78. In the run-up to the TRC process, accused No 1 did everything possible to encourage members and former members of the SA Police to participate in the process. When the incident involving Reverend Chikane came to his notice, he held discussions with former chiefs and generals of the SA Defence Force in an attempt to persuade them to take part in the process as well. Because members of the defence force were involved in the incident, any attempt to seek amnesty would necessarily have been unsuccessful without their cooperation. The military generals were of the opinion, however, that the **Promotion of National Unity and Reconciliation Act, No 34 of 1995**, contained one-sided provisions that rendered the process unacceptable to them.

79. After conclusion of the TRC process, accused No 1 and No 2 did everything they could to promote creation of a further process that could address shortcomings exposed by the TRC process. Following the decision to prosecute accused No 3, 4 and 5, accused No 1 and No 2 also held discussions with Reverend Chikane with a view to the institution of such a process. He showed empathy for the problems with which accused No 1 and No 2 were wrestling.

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80. With the formulation of the National Prosecuting Authority's prosecutorial guidelines entitled "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (see **Annexure "B")**, a process was created that offered built-in protection for individuals who wished to make use of it, and the accused lost no time in coming forward and making full disclosure regarding this incident, which they had not been able to do in response to the letters from Reverend Chikane referred to in paragraph 62 above.

L. SENTENCE AGREEMENT:

81. In the light of the circumstances set out above, agreement has been reached on the following as appropriate sentences in respect of count 1:

Accused No 1 and No 2:

Each of the accused is sentenced as follows:

> "**10 (ten)** years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

Accused No 3, 4 and 5:

Each accused is sentenced as follows:

> "**5** (five) years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

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SIGNED AT **PRETORIA** ON THIS DAY OF JUNE 2007.

AR ACKERMANN SC
Director of Public Prosecutions
Priority Crime Litigation Unit.

1. JOHANNES VELDE VAN DER MERWE

2. ADRIAAN JOHANNES VLOK

3. CHRISTOFFEL LODEWIKUS SMITH

4. GERT JACOBUS LOUIS HOSEA OTTO

5. HERMANUS JOHANNES VAN STADEN

JAN WAGENER
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REF: JW0423

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VPP 4-

Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuienis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweier is nie.
Rapport het die afgelope week uit onberispelike bronne verneem die polisiedossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiewe poste wat hulle beklee.
Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie.
Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingspan wat die vermeende Boeremagiede aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.
Die nasionale vervolgingsgesag (NV) het die ondersoeke jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.
Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat weinig aan die ondersoeke gedoen het.
Hierna is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.
Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuienis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontploffing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.
In Junie 2004 het mnr. Sipho Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrektiewe dienste, en min. Essop Pahad kan vervolg word nie omdat "daar eenvoudig nie genoeg getuienis is om 'n klagstaat op te stel nie".
Ngwema het destyds gesê die NV weet nie wie het wát gedoen of wie die opdragte gegee het nie. "Indien die NV dit met die getuienis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.
Mnr. Dirk van Eck het reeds aangedui hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.
Die politieke omstredenheid oor vervolgings vir misdade uit die verlede sal uitbrei as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidstak. Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.
Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuienis in die ondersoeke na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweier om te sê of die opdrag nagekom is en wat die vordering daarmee is.
Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phutl Setati, woordvoerder van nasionale speurdiens, verwys.
"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

212

scarstenss@rapport.co.za
) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear '
Sonja CarstensPretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.
Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services.
The sources' names are withheld at the request because of the sensitive positions that they hold.
According to the sources, no further investigation into the information taken in the case files.
The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.
The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.
Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.
After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state. Ackermann was the prosecutor in the Vlok Van der Merwe trial.
Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.
In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linda Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".
Ngwema said then that the NPA do not know who has what or who did not give the orders.
"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility, "was Ngwema's words.
Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.
The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. Institute. Basie Smit, a former head of the police detective and security branch. One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.
Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.
Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.
"The police want his comments on the case reserved," the RAF said.
scarstenss@rapport.co.za
) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

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http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

* In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
* Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
* Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
Cell: 082 333 3880

TP

Le NGI

28-AUG-2007 16:48 FROM DEPRT OF JUSTICE TO 0128849329 VPP6 P.01/6

MINISTRY
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA
Private Bag X 276, Pretoria, 0001, Tel (012) 315 1111, Fax (012) 315 1740
Private Bag X 115, Cape Town, 8000, Tel (021) 467 1703, Fax (021) 467 1703

Our ref: 2/3/1
Enq: Adv. M Sibiya

Adv V P Pikoli
National Director of Public Prosecutions
Office of the National Director of Public Prosecutions
Private Bag X 752
PRETORIA
0001

Dear Adv Pikoli

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to the discussions in the above meeting of 23 August 2007.

2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.

3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.

4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.

5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find the above in order.

Yours sincerely

MS B S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07

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Ref: NDPP/kp

Minister B. Mabandla
Minister of Justice and Constitutional Development
Momentum Building
cnr Prinsloo and Pretorius Streets
PRETORIA

29 August 2007

Dear Minister

MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to your fax of 28 August 2007.

2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.

3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).

4. I confirm and repeat the following:

4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.

4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police. I give the

Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.

6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing.

7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

V.P.

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REPORT OF THE ENQUIRY INTO THE FITNESS OF ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

NOVEMBER 2008

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POST - TRC CASES

209 The Government complains that Adv Pikoli's handling of the post-Truth and Reconciliation Commission (TRC) cases did not show the sensitivity to the victims and an appreciation of the public interest issues that are mandated by the Prosecution Policy. It is alleged that the NPA concluded plea bargains with Mr Van der Merwe and others (the Vlok matter) without discussing them with the task team or informing the Minister, *"notwithstanding potential impact on national security"*.

210 The evidence tendered in this regard was that of the DG: Presidency who testified about being poisoned by the security operatives of the apartheid regime. In substance the DG: Presidency expressed his outrage about the way in which the plea and sentence agreements were concluded with the former Minister Vlok and the other co-accused. The complaint is that the DG: Presidency expected that that process should have as its purpose the revealing of "the whole truth" about the clandestine poisoning and how the institutions of state were used to stifle resistance against the repressive and racist regime of the past

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order. However the prosecutorial guidelines do not provide for revealing the 'whole truth' as a requirement for prosecuting these cases.

211 The law relating to the plea and sentence agreements and the prosecution policy regarding the post-TRC matters does not have as its object revealing "the whole truth". What the law provides for is that the victims of the offence for which a plea and sentence agreement is to be concluded must be consulted by the prosecuting authority. On the evidence, the DG: Presidency was indeed consulted before the plea and sentence agreements were concluded. There were concerns articulated by the DG: Presidency about the nature of the consultation but for the purposes of this report it is unnecessary to deal with those save to say that he found the demeanour of the prosecutor insensitive to his plight as a victim in that case. This complaint also touches very closely on the constitutional guarantee of independence of the NPA to prosecute or not to prosecute, and to do so without fear, favour or prejudice.

212 Adv Pikoli says that the role of the inter-departmental task team was to provide information and advise the NPA, and that the NPA retained

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responsibility for all prosecutorial decisions. He further states that he kept the Minister fully briefed of progress with the post-TRC matters, and wrote to the Minister requesting her assistance in clarifying the role of the task team. He did not receive any response from the Minister to this request. He states that despite representations from Vlok and Van der Merwe, he refused to grant them immunity from prosecution and proceeded to charge them. The prosecution resulted in a plea and sentence agreement with the accused.

213 Moreover Government has not pursued this complaint. In closing argument before the enquiry it was stated on behalf of Government that: *"The TRC and Khampepe we have not gone into. We have not pursued the TRC complaint and the Khampepe complaint"*. As a result it is my considered opinion that Government has not made out a case that Adv Pikoli is not fit for office by reason of this complaint.

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National Prosecuting Authority

Annual Report 2008/09

NATIONAL PROSECUTING AUTHORITY
South Africa

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Challenges Experienced

The TRC Guidelines were declared unconstitutional and invalid by the North Gauteng Provincial Division of the High Court. A decision to appeal the judgment will be made early in 2009. A further delay in the prosecution of cases emanating from the TRC process is therefore inevitable.

The Cape High Court declared the search and seizure warrants executed by the SAPS in its first official terrorism investigation in terms of Protection of the Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA) unlawful. Leave to appeal has been granted. Should the appeal be dismissed, the evidence obtained as result of the execution of the search and seizure warrants would be inadmissible and would negatively affect a decision to prosecute.

In so far as the MPTT is concerned, DNA testing has been placed on hold pending the finalisation of the donor funding to the DNA lab and the resolution of certain staffing matters. This will delay the finalisation of certain cases.

The issue of the quality of police investigations is on an ongoing basis taken up with senior police management with the aim of improving the turnaround time of such investigations. The investigations are dealt with in terms of Prosecution Guided Investigations (PGI) principles to try and bridge shortcomings.

Forecast

The PCLU will continue to focus on all the investigations which are currently in progress with the aim of being able to make properly informed timely decisions on them. The PCLU will continue to maintain and develop the existing stakeholder relationships and focus on addressing blockages. The MPTT plans to check the missing person's cases against SAPS Criminal Records, as well to as undertake a number of exhumations during the non-rainy winter months.

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T Mbeki: Joint Sitting of Parliament to Report on Processing of Presidential Pardons

Address by President of South Africa, Thabo Mbeki to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons

Cape Town
21 November 2007

Madam Speaker and Deputy Speaker of the National Assembly
Chairperson and Deputy Chairperson of the National Council of Provinces
Leaders of our political parties
Honourable Ministers, Deputy Ministers and Premiers
Honourable members
Distinguished guests
Ladies and gentlemen

I would like to thank the presiding officers of both Houses of Parliament for acceding to my request to make this short address to this joint sitting so as to make a particular announcement that I hope will contribute to our continuing efforts towards national reconciliation and nation building.

It is indeed an indication of the deep scars inflicted by our painful past that thirteen years after the attainment of our freedom we still have to grapple with matters of persons who committed offences that might be categorised as political, creating the possibility that we can be accused of having political prisoners.

This day, the 21st of November, holds some special and tragic memories for a number of families in our country, especially those of Mamelodi in the Tshwane Metropolitan City. On this day in 1985, a protest demonstration of thousands of local residents was brutally ended by police bullets and teargas, leaving 13 people dead and many others maimed for life.

We would like to assure the families who were so tragically affected that as they remember their loved ones, the government and people of South Africa stand together with them. Our abiding prayer is that as we engage in various programmes to heal our nation, our efforts will also assuage the pain of those

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families, throughout our country and region, which lost some of their kith and kin as a result of apartheid repression and aggression.

Yesterday, one of our daily newspapers, the Johannesburg Star, carried a chilling story of how four suspected African National Congress (ANC) guerrillas were abducted in July 1987 by the then Northern Transvaal Security Branch. The Security Police first took two of these suspects, Andrew Makupe and Jackson Maake to a farm in Pienaars River. After beating them for hours, the apartheid police unit made Makupe to phone his friend, Harold Sefolo, pretending he wanted to see him.

They then picked up Sefolo and finding it difficult to extract information from him, they wired Makupe to a portable generator and electrocuted him in front of Sefolo. They did the same to Maake and told Sefolo that he was also going to be electrocuted. He asked to make a final request and his torturers agreed. He then gave a short speech and sang Nkosi Sikelel' iAfrica. When he finished, he too was electrocuted to death.

The fourth victim, Justice Mbizana, was arrested and taken to a farm in Hammanskraal where he was tortured and bludgeoned to death. The police then tried to destroy the bodies of the deceased with explosives, to ensure that the stories, the fate and identity of those who had been murdered would never be known.

However, the critical work that the Truth and Reconciliation Commission (TRC) did ensured that the nation got to know what happened to these and many others who died so that we can enjoy the freedom for which we pride ourselves today. Further, the sterling work of the Missing Persons Task Team of the National Prosecuting Authority found the remains of the patriots featured in the story in the Star in a grave in Winterveldt outside Tshwane and through Deoxyribonucleic Acid Analysis (DNA) tests, was able to identify the deceased.

As far as we know, their families and indeed the families of the many who died in similarly horrible circumstances have not asked for vengeance, but have insisted on a process of healing. They have not asked for retribution. Rather they have requested that all of us should sustain the memory of the heroes and heroines in everything we do.

Accordingly, when we speak of our continuing efforts towards national reconciliation and nation building, and when we take additional steps in this

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direction, as we are doing today, we do so with the memory of all these martyrs fresh in our minds.

Honourable members,

Conscious of the horrors that were done to perpetuate white minority rule, many have hailed South Africa's relatively smooth and peaceful transition as one of the most outstanding achievements among modern political transitions.

While our freedom and democracy represent the most profound and indestructible reparation for all the people of South Africa, we recognised that individuals and communities affected by specific acts of gross human rights violations deserved and deserve specific attention.

We also all agreed that those who perpetrated acts of gross human rights violation needed to come clean, to admit to their actions and apologise to those who had been harmed. We also recognised that some of the acts perpetrated by certain individuals were politically motivated and thus needed to be taken into consideration by the Truth and Reconciliation Commission's amnesty process.

The Post-amble of South Africa's Interim Constitution placed emphasis on reconciliation and the reconstruction of a post-conflict South African society.

It said: "In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date which shall be a date after 8 October 1990 and before 6 December 1993 providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed".

This Post-amble set the stage for the adoption of the Promotion of National Unity and Reconciliation Act, (TRC Act) 1995. Among other things, the TRC Act created the political and moral climate for the consolidation of our democracy and fostering a culture of human rights.

It provided for the establishment of the Truth and Reconciliation Commission (TRC), with the specific purpose of promoting national unity, reconciliation

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and healing, in a spirit of forgiveness, compassion and understanding.

Undoubtedly, the TRC was an important process which, while confronting our ugly past, sought to help us to advance beyond the very conflicts and divisions that had brought pain and suffering among many of our compatriots.

The final act of the Commission as it concluded its important work was to make recommendations to the President in respect of reparations to the victims of gross human rights violations.

Honourable members,

The drafters of the Interim Constitution also saw amnesty as an essential element of the quest to advance reconciliation and national unity. The amnesty process of the TRC was therefore a massive undertaking in terms of building bridges across the great divides caused by racial conflict and repression.

The cut-off date, relating to offences that could be considered by the TRC's Amnesty Committee, was initially set by the Post-amble of our Interim Constitution to be before the 6th of December 1993.

However, following requests from various political formations, especially those organisations whose members were incarcerated for offences committed just before the 1994 elections, and because of our relentless pursuit of the objective of national reconciliation, we all agreed to an extension of the cut-off date to 10 May 1994, the day of the inauguration of the new, democratically-elected President of the Republic.

While this new date served to accommodate the concerns of various individuals, members and supporters of various political organisations and thus further promoted national reconciliation in the run-up to our country's first ever democratic elections in 1994, this date did not take into consideration that political violence in this country, especially in certain areas such as KwaZulu-Natal, persisted well beyond that cut-off date.

Therefore, once the TRC had finished its business, we still had a number of issues, such as the question of amnesty for many South Africans who had not participated in the TRC process for a number of reasons, which had to be finalised. It thus became clear that the so-called "unfinished business" of the TRC would have to be finished in one way or another.

When I was privileged to address a Joint Sitting such as this one, on 15

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April 2003, tabling the Final Report of the Truth and Reconciliation Committee, I referred to one element of this "unfinished business". I said:

"Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be."

This reality cannot be avoided. Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

To facilitate this process, the authorised Ministerial Committee has since this statement was made, developed the required guidelines to assist the National Directorate of Public Prosecutions to do its work.

This means that those who committed offences of the kind that was considered by the TRC Amnesty Committee, who did not apply for amnesty and have not been convicted for any offences they may have committed, are free to approach the National Director of Public Prosecutions and engage in the processes we have described.

Honourable members,

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For some time since the year 2000, government has been seized of the challenge to bring to a close the vexing matter of those prisoners serving sentences for what might be considered to be politically motivated crimes of the kind that fell within the brief of the Amnesty Committee of the TRC. In dealing with the challenges I have outlined, we have had to proceed with care, sensitive to the legacy of the TRC.

With regard to these matters, it is important that our actions do not, in any way, undermine or suggest that any attempt is being made to undermine the TRC process and its outcomes.

From as early as the year 2000, after the mechanisms put in place by the TRC Act had fulfilled their statutory mandates, we have with ever-increasing regularity received requests for pardon from various political parties, organisations and individuals, in respect of individuals who have been sentenced by our courts for serious offences, both before and after the 10 May 1994 TRC cut-off date, allegedly in furtherance of political objectives or aims, arising out of conflicts of the past.

Currently, government is in possession of at least 1062 applications for presidential pardons by people who have been found guilty of offences which were allegedly committed with a political motive, arising from the conflicts of the past.

Honourable members,

In the last few years, both prior to the commencement of the new constitutional dispensation and thereafter, amnesty and indemnity laws were enacted and utilised to extinguish criminal (and in some instances civil) liability, and/or expunge criminal convictions and criminal records of persons who committed offences with a political objective, during the conflicts of the past.

The lifespan of all these pieces of legislation, namely the Indemnity Act (Act 35 of 1990), the Further Indemnity Act (Act 15 of 1992) and the last being the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995)(the TRC Act), have expired and can no longer be utilised.

We have also considered other statutory provisions, such as Section 82 and other measures in the Correctional Services Act, 1998 (Act 111 of 1998), and those in the Criminal Procedure Act, 1977 (Act 51 of 1977). I have not found

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any of the existing measures suitable to deal with the specific matters at hand, to which I have referred, in a flexible, decisive and speedy manner.

As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this "unfinished business."

As the honourable members know, our Constitution says that the President is responsible for "pardoning or reprieving offenders and remitting any fines, penalties or forfeitures." (Article 84(2) (j).)

The Honourable members will also remember the 1997 ruling of the Constitutional Court in the matter of the President of the Republic of South Africa v Hugo. The Court said:

"Pardoning a sentenced person is not a private act of grace in the sense that the pardoning power in a monarchy may be. It is recognition in the Interim Constitution that a power should be granted to the President to determine when, in his view; the public welfare will be better served by granting a remission of sentence or some other form of pardon."

The Constitutional Court also said, "No prisoner has a right to be pardoned, to be reprieved or to have a sentence remitted. The Interim Constitution places such matters within the power of the President."

I believe that the sum total of all this is that the President has an obligation to consider all requests made to him or her to pardon or reprieve offenders and remit any fines, penalties or forfeitures.

At the same time, having thus applied his or her mind, the President is under no obligation to accede to the requests made to him or her, provided that she or he proceeds in a rational manner.

I requested the convening of this Joint Sitting to inform the honourable members of Parliament that, considering what the nation sought to achieve through the TRC process, I have decided to institute a special process to assist me as I discharge my constitutional obligation to consider the requests for pardon from people who have already been convicted for offences they claim belong among the category of offences that were considered by the TRC Amnesty Committee.

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This process will cover the requests for pardon of those people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC.

Further to entrench the practice the nation has sought to cultivate, of acting in unity as it addresses the crimes of the past, I would like the political parties represented in our Parliament to assist me properly to discharge my constitutional responsibility to consider the requests made to the President to pardon those who have been convicted in the context of the circumstances I have mentioned.

I therefore take this opportunity to request the political parties represented in this Parliament each to appoint a representative who would serve on a Reference Group that would consider each of the requests for pardon which the President would refer to the group, and then make its considered recommendations to the President.

Needless to say, this will not in any way subtract from the obligation placed by the Constitution on the President, and described by the Constitutional Court, for the President to grant pardons, etc. In other words, the constitutional task to grant pardons and so on will remain with the President.

However, the President would seriously take into account the recommendations made by the Reference Group, respecting the effort the nation has made to unite behind the objective of responding to the conflicts of the past, in the interest of promoting the critical objectives of national reconciliation and nation-building.

The process we are proposing will be of limited duration. It will have to be strictly managed in terms of the mechanisms and procedures which are to be put in place to ensure that the requests for pardon for the category of persons we have mentioned are dealt with in an open and transparent manner, uniformly and in strict compliance with predetermined procedures and criteria.

In this regard, among other things, we will have to act in a manner that respects the observation made in 1996 by the Constitutional Court in the matter of The Azanian People's Organisation (AZAPO) et al versus The President of the Republic of South Africa et al. I refer here to the following determination made by the Court:

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"The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purpose of effecting a constructive transition towards a democratic order. It is only available where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in Section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued."

Honourable members,

During a three-month "window of opportunity", covering the period 15 January to 15 April 2008, persons who were convicted for offences they believe were of the nature of the offences considered by the TRC during the period up to 16 June 1999, will have the opportunity to apply for a Presidential pardon in the prescribed manner, if they have not already done so.

Applicants who were convicted for involvement in any offence of a sexual nature, or any act of a domestic violence nature, or any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992, which relates to the manufacture and supply of scheduled substances, the use and possession of drugs and dealing in drugs, will not qualify for consideration.

In order to ensure that we do not undermine the work of the TRC, applicants who had applied to the Amnesty Committee established under the TRC Act and whose application for amnesty was refused, will not be considered for this Presidential pardon process.

The President will make his decision whether to refuse or grant pardon on each application placed before him, on an individual basis.

Further, the President will, with regard to each application placed before him:

* seriously consider the recommendations made to him by the Reference Group;
* form an independent opinion on the basis of the facts/information placed before him, to arrive at a decision whether to grant or refuse pardon;

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and,
* in so doing, the President:

* will be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and,
* uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process.

The Presidency and the Department of Justice and Constitutional Development will announce further details about this process.

These will include a description of the support mechanisms we will need to support the Reference Group, specific Terms of Reference for this Group, and the time frames for the completion of its work, which, obviously, will in part be determined by the number of applications for pardon that would be received during the "window of opportunity" we have mentioned.

I trust that all the political parties represented in our Parliament will respond positively to our invitation and request to them to appoint a representative to serve on the Reference Group. Such representatives need not be members of Parliament. And naturally, there is also no obligation on any political party to agree to be represented on the Reference Group.

Perhaps only as a matter of detail, I request that those parties ready and willing to serve in the Reference Group should communicate the names and details of their nominees to the Director General in the Presidency, the Rev Frank Chikane, by 10 December 2007.

This will enable us to constitute the Reference Group without unnecessary delay and give us the possibility to consult it about all relevant matters, prior to the opening of the "window of opportunity" on 15 January 2008.

As I said earlier, all of us have a responsibility to help our country to advance further away from the conflicts of the past, to work together for a shared future that is free of violence, free of bitterness, free of prejudice, free of the albatross of the past â a future of harmony, of respect for the Constitution and the law, of peace and prosperity for all our citizens.

When I had the privilege to address the 15 April 2003 Joint Sitting of our Houses of Parliament to which I have referred, I said:

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"In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity".

To be true to ourselves as human beings, demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

Once more, let me express my sincere thanks to you, the elected representatives of our people, for convening in this Joint Sitting of the Houses of Parliament to enable the President of the Republic communicate to you, honourable members, the decisions I have taken to deal with a matter that is of great concern to all of us as South Africans, who, I trust, are indeed moved by a new and common patriotism.

Once again, as the late Nkosi Albert Luthuli, Africa's first Nobel Peace Prize laureate once said in different circumstances, we continue to knock at the door of all our compatriots, humbly requesting that we act in concert to pursue what must clearly be a shared and noble goal.

Finally, let me wish all the honourable members and our guests a peaceful and Merry Christmas and Happy New Year, as well as a well-deserved rest during the period between the adjournment of Parliament this week, and the opening of its next session early in 2008.

I thank you for your attention.

Issued by: The Presidency
21 November 2007

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https://web.archive.org/web/20080922001900/http://www.info.gov.za:80/speeches/2008/08011615151001.htm

Commencement of Presidential pardons period

16 January 2008

The Presidency wishes to announce the beginning of the period of applications for Presidential pardons for alleged political offences in accordance with President Thabo Mbeki's announcement in Parliament on 21 November 2007.

Prospective applicants have a three-month period from 15 January to 15 April 2008 to apply for pardons.

The Multi-Party Reference Group, which will consider applications for pardons and make recommendations to the President, will meet for the first time at the Union Buildings later this week.

As announced by the President, only those people who were convicted for political offences committed before 16 June 1999, will be considered for amnesty. On the other hand, people who have been convicted for sexual offences, domestic violence and any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992, or those whose applications for amnesty were refused by the Truth and Reconciliation Commission's Amnesty Committee do not qualify for amnesty.

For background information, please read President Mbeki's November 21, 2007 speech in Parliament on the Presidency website. The link for the speech is stated below:
http://www.thepresidency.gov.za/show.asp?type=sp&include=president/sp/2007/sp11211540.htm

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PRIORITY CRIMES LITIGATION UNIT (PCLU)

2007-2008

REPORT TO JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

ADV ANTON ACKERMANN SC
HEAD: PCLU

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Performance Continued …

- TERRORISM

  – **Assistance to foreign country**
  Request for mutual legal assistance executed

  – **DFA Counter Terrorism Group**
  The unit participated in meetings of Multidisciplinary Governmental Task Team which is responsible for ensuring compliance with the UN resolutions relating to terrorism

- TRC PROSECUTIONS

  Only partial success was achieved due to intervening factors beyond the control of the unit.

  – ***S v Vlok & 4 Others***
    - Accused were convicted after a protracted plea bargaining process;
    - 16 Cases have been identified for investigation and possible prosecution

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NATIONAL PROSECUTING AUTHORITY

Annual Report 2009/2010

NATIONAL PROSECUTING AUTHORITY
South Africa

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The MPTT also provided training to members of the Kenya Truth, Justice and Reconciliation Commission, Kenyan NGOs and Kenyan victim organisations in Nairobi. A brief workshop was also held for visiting members of Ugandan judiciary and NGOs engaged in transitional justice studies, and members of Burundi civil society organisations.

Challenges Experienced

The absence of a formalised relationship with the DPCI in respect to matters which fall within the mandate of both the DPCI and the PCLU remains a challenge.

For the MPTT the ongoing destruction of documentation by government departments such as the SAPS and the magistrates' courts and the difficulties in tackling cases of persons who disappeared in exile hampers progress in finalising matters. New requests from families with legitimate cases of political disappearances have also increased the MPTT's responsibilities.

TRC cases: The PCLU is required to advise the NDPP in making decisions whether or not to prosecute in cases arising from the TRC process. Matters need to be fully investigated before any final prosecution decision can be made. Since 2003 the NPA has struggled to secure the necessary cooperation in this regard. With the establishment of the DPCI, the responsibility for such investigations was transferred to this unit. The PCLU had to recommence its negotiations de novo. Currently, the DPCI has indicated that it will conduct the necessary investigations, but only after the conclusion of the 2010 FIFA World Cup, due to the fact that it has a number of special responsibilities in connection with this event.

Forecast

The PCLU will continue to focus on current investigations with the aim of being able to make properly informed and timeous decisions and will maintain and develop the existing stakeholder relationships with the aim of enhancing efficiency. It can be predicted that the workload will increase during the World Cup. The MPTT will strive to finalise existing projects, exhumations and investigations.

Council for the National Prosecuting Authority Annual

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PMG PARLIAMENTARY MONITORING GROUP

National Director of Public Prosecutions on NPA Strategic Plan 2010

This premium content has been made freely available

Justice and Correctional Services

12 April 2010

Chairperson: Mr J Jeffery (ANC)

Meeting Summary

Noting that the National Prosecuting Authority received its mandate from the Constitution, the National Director of Public Prosecutions provided an hour long presentation on the strategic goals and plans of its four programmes and the role of the provincial Directors of Public Prosecutions. The National Director of Public Prosecutions exercised oversight duties over the Directors of Public Prosecutions. He presented an organogram of the NPA and spoke about specialised Directors of Public Prosecutions dealing with public interest litigation, complex commercial crime, organised crime, asset forfeiture, sexual offences and priority crimes litigation. The main challenge facing the National Prosecuting Authority was increasing the current rate of finalised cases as well as convictions. In light of the new Child Justice Act, the National Prosecuting Authority would try to increase the number of diversion programmes which was a challenge. The Thuthuzela Care Centres was donor funded and the challenge was that there was no funding from Treasury and this impacted on their sustainability.

The Committee expressed concern over the recent spate of news articles about the restructuring of the National Prosecuting Authority. Members were of the opinion that the restructuring constituted demotions. The concern about the future of the units headed by Adv Ackerman, Adv Jordaan and Adv Majokweni. The National Director of Public Prosecutions' intrusive role in a number of recent high profile cases was questioned as Members felt that there were elements of unlawfulness in his conduct. The National Director replied to questions about when new offices would be set up in Limpopo and Mpumalanga, post TRC prosecutions, the Hlongwane matter, the Terreblanche and Boeremag cases, the sustainability of the Thuthuzela Care Centres, the conviction rate, the repair of the Innes Chambers, the arms deal investigation and after hour bail applications.

Meeting report

National Prosecuting Authority (NPA) Strategic Plan and Budget presentation

Advocate Menzi Simelane, National Director of Public Prosecutions (NDPP) noted that Section 179(2) of the Constitution empowered the NPA to carry out its functions. Section 5 of the NPA Act established the office of the NDPP. The NDPP was not a Director General. The NPA had special directors responsible for portfolios such as sexual offences, community affairs, priority crimes, special commercial crimes and litigation. The NPA Act provided for a special seat for the NPA in each of the High Courts. The provincial Directors of Public Prosecutions (DPP) could prosecute crimes without the permission or knowledge of the NDPP. The NPA would try to ensure that the legislative framework was fully complied with. The NDPP would exercise oversight duties over the provincial DPPs.

Adv Simelane continued that the NPA was not a separate department but part of the Department of Justice and Constitutional Development. The NDPP had capacity to deal with public interest litigation, complex commercial crime, sexual offences and priority crimes litigation. Specialised DPPs focused on the following areas: general prosecutions, specialised prosecutions, complex commercial crime, organised crime, asset forfeiture and corporate governance. The Justice, Crime Prevention and Security (*JCPS*) priorities for the NPA were addressing overall levels of crime, combating corruption and managing the perception of crime among the population. The key strategic goals were excellent governance and delivery. The key measurable objectives of the NPA were to reduce the number of case backlogs, combat corruption by successfully convicting 100 people and confiscate their assets to the value of at least R5 million, establish additional Thuthuzela Care Centres (TCC) this year from 20 to 45 and increase the value of freezing orders. Donors funded the TCCs and the challenge here was that there was no funding from Treasury and this impacted on their sustainability.

There were four programmes: Public Prosecutions, Witness Relocation, Asset Forfeiture and Support Services and the plans and objectives of each of these were outlined. The aim of the NPA was to prosecute speedily and efficiently. Stakeholder relationships were important to the NPA – this included the police who were their immediate partners. The NPA would try to divert as many cases involving children as possible. This would then mean that there had to be an increase in the number of diversion programmes and this was a challenge.

The main challenge facing the NPA and the Committee as public representatives was increasing the current rate of finalised cases as well as convictions. The conviction rate in sexual offences was lower than other crimes. The reason for this was that sexual offences cases were difficult.

The Chairperson interrupted and informed Adv Simelane that time was limited and the presentation had already gone beyond an hour.

Adv Simelane continued that sexual offences cases were difficult because of the evidentiary burden. The vacancy rate was high within the NPA but the human resource department was being engaged with on this matter. Transformation of the NPA was vital. This was however not only related to gender and racial demographics. It was also about process change.

Discussion

The Chairperson said that the presentation was such that one could not understand what the elements of the programmes were.

Mr G Ndabandaba (ANC) asked how the NPA reconciled the fact that virtually every crime had an element of being organised.

Ms M Smuts (DA) said that she was not happy to vote R2.5 billion to be granted to the NPA on the basis of what had just been presented. The Authority had been radically reorganised. The new organogram looked like a game of snakes and ladders where the senior officials would slither down the to the bottom rungs of the ladders. The disappearance of the entire administrative section was not a matter that one could be happy about. The entire layer of special directors had disappeared and this included Adv Ackerman's Priority Crimes Litigation Unit, the Specialised Commercial Crimes Unit and the Sexual Offences and other units. The NPA Act stipulated that "The Office of the NDPP should include special directors". It seemed as if the special directors had been retained within the Office of the NDPP but with the function of spotting trends and building stakeholder relations. Did this mean that they would be having lunch and reading newspapers. What was the justification for this? Furthermore what of the employment rights of these individuals who seem to have been demoted?

The Chairperson interrupted and asked where Ms Smuts got the concept "demoted" from considering what had been presented.

Ms Smuts responded that she got it from the fact that Adv Ackerman, Adv Jordaan and Adv Majokweni did not really have jobs anymore and had been in the Office of the NDPP. A series of prosecutors had recently discovered that they had been reassigned to Magistrates Courts when they had been running whole courts or regions. Could there be a comment on the matter of Adv Simelane's instruction to the prosecutor in the case of Mr Maarohanye to not oppose bail – as this was unlawful. Further, what was the legal basis for stopping the forfeiture proceedings in the case of Mr Fana Hlongwane? Were politics involved in both instances?

The Chairperson asked for the indulgence of the Committee. The Committee had a strategic plan in front of it, the essential purpose of the meeting was to ask if the NPA was presenting what it would undertake to achieve based on the programmes put before the Committee. Could what the NPA presented be effectively monitored? The Committee was advised to avoid issues of who appointed whom. This could potentially undermine the separation of powers. In front of the Committee was a strategic plan that would be the basis of the Committee's decision on the budget vote. The Committee was strongly advised to stick to this issue. If there were controversial issues they could be dealt with at any time through a summons of the NPA.

Mr S Swart (ACDP) differed with the Chairperson and suggested that the Committee should consider controversial issues, as this was an opportune moment. The questions raised by Ms Smuts were valid and supported. The demotions raised concerns because they affected the operation of the criminal justice sector. It was pleasing to note that the demotions had been reversed. There were impacts that had to be considered when performing the oversight function and the NPA was at the forefront of the fight against crime and these were issues that had to be engaged. What was the explanation on the Hlongwane matter? The number of serious crimes that were recorded by the police were 2 098 000 and yet the target was 324 000. This meant that only 15% of serious crime cases came before courts and there was only a 10% conviction rate. This could not be acceptable and the blame was not just on the NPA to shoulder alone. The conviction rate of the NPA was good but somewhere along the line there were a lot of issues that came into play. If one looked at the budget in terms of the NPA was getting less money. The Committee had to look at this more closely.

Mr J Jeffery (ANC) asked if the NPA was going to wait for the Superior Courts Act to be promulgated or would it commence with setting up a Limpopo public prosecutions unit. It was good to note that there were some for diversion regarding the Child Justice Act. However it was not the intention of the Act that every case should be diverted. The intention of the Act was to try and keep children out of jail. There was a lot of confusion in media about the Child Justice Act and what its implications would be in the Terreblanche murder case. The prosecutor and Mr Baloyi were quoted as saying that the criminal capacity of one of the accused was an outstanding issue that would still be dealt with. This was not in the Act: according to the Act there was no criminal capacity under the age of ten; from ten to fourteen years the state had to prove criminal capacity and 14 upwards capacity was assumed.

Mr Jeffery commented that the NPA wanted to increase the number of Thuthuzela Care Centres yet there was no money for them and according to the Annual Report the numbers had gone down, could there be more clarity on this please. The vacancy rate had gone down from 24% to 16% and this was quite an improvement but if one had to consider this more objectively then 16% was still too high. Could this figure be reduced and what was the new target? Would there still be focus on crimes post the Truth and Reconciliation Commission (TRC) where individuals did not appear for amnesty or applied and did not receive it. What was the NPA going to do about human trafficking during the World Cup and the uncertainty around the understanding of the law in that area? There had been a protocol amongst the different government departments during the last election: there going to be any review on this protocol before the elections next year?

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Mr J Sibanyoni (ANC) asked if after hours bail applications happened only in the cities or throughout the country, and were there prosecutors who attended these bail hearings? What was the security arrangement for prosecutors who attended applications for bail after hours especially when the prosecutor lived far away from where the application would be heard. Special courts would be set up to handle matters after hours durir World Cup, what had been done to anticipate the higher number of cases that would arise during the World Cup? How far was the Boeremag case and was it nearing its conclusion? To what extent was the Child Justice applicable in the Terreblanche case for the accused minor?

Ms N Michael (DA) asked what was going to be done about the witness protection of victims of human trafficking. What was going to be done to improve safe houses for whistle blowers? What plans were in place to re case backlogs, as they were unacceptably high? How was the NPA moving forward with the computerisation of the legal system as a whole? The plans for the FIFA World Cup were a concern as it was unclear what role NPA would play? Where exactly were internships for prosecutors being advertised. Was the NPA going to universities for instance? Was the NPA's mentoring programme internal or external?

The Chairperson said that Parliament was now empowered to be able to amend the budget, for the Committee to exercise this power it all depended on how focused it was going to be on what had been presented be The Committee was free to deal with whatever it wanted to deal with but from a Chairperson's perspective the duty was to ensure that the strategic plan was dealt with.

Adv Simelane responded that some questions were on cases that were sub judice and would therefore not be answered. The DPPs, NDPP and the Deputy Directors of Public Prosecutions (DDPP) were the only officers could institute prosecutions. Anybody else could institute prosecutions if they were delegated. The special directors remained in their positions.

The Chairperson interrupted and asked if this was what the Committee wanted to engage in? The discussion now was on who must work where within the NPA and not the strategic plan

Adv Simelane continued that special directors were appointed in terms of a proclamation by the President. Their mandate was also defined in the proclamation. This was why they were special DPPs. The functions of t DPPs were specifically defined and included advising the NDPP. The special DPPs were different from the provincial DPPs. No official had been demoted and this was a misunderstanding.

The Chairperson interrupted and said that the Committee had to deal with the NPA's programmes and not matters that should normally be dealt with in the Commission for Conciliation Mediation and Arbitration.

Ms Smuts asked for an explanation concerning the instruction for Mr Lamprecht, as it seemed to be unlawful.

The Chairperson asked Ms Smuts what seemed to be unlawful.

Ms Smuts replied that it was the issue of not opposing bail as per the NDPP's instruction to Mr Lamprecht through a senior.

The Chairperson said that this was a policy issue and thus it had to be answered.

Adv Simelane said every prosecutor in the NPA carried out his or her functions under the control and direction of the NDPP. The NDPP had specific legislative authority to intervene where there were grounds for inter it was important to understand that there would be a lot of interventions in many cases. The law would inform all interventions. It was not proper to say that the role of the NDPP would be not get involved in cases. Th NDPP would get involved in the detail of cases, as it was an important thing to do in order to ensure that things went according to plan. All individual prosecutorial decisions would be respected. The Hlongwane matte b judice; it was still an ongoing matter.

Ms Smuts asked if it had been abandoned.

Mr Swart asked what the NDPP meant when he said it was still ongoing.

Adv Simelane responded that the whole matter was in the hands of the police. The arms deal matter had been in the NPA and had been investigated by the Directorate of Special Operations (DSO). The disbandment c DSO meant that all investigations were transferred to the Directorate for Priority Crimes Investigation (DPCI). The matter of the Liechtenstein investigation and the frozen funds was a small part of the broader investig in South Africa. The Sunday Times newspaper was incorrect in saying that the frozen funds amounted to R200 million, the correct figure was about R5 million. It was assumed that the matter was dropped, this was not The preservation order that had been applied for, had been satisfied and it was the view of the NDPP that there was no need to carry on with it.

Mr Silas Ramaite, Deputy National Director of Public Prosecutions, said that the Committee must trust the NPA when it said a matter was sub judice. The NPA would not in any way attempt to mislead the Committee.

Ms Smuts asked for a response on the administrative section.

Adv Simelane replied that the NPA was still working on the ensuring that the accountability framework was still there. The NPA needed administrative support and therefore they would always be there.

Adv Simelane continued responding to the questions and addressed case figures. The figure of 324 000 related to matters where the prosecution had decided to take the matter to court. It was correct to say that ther many other cases that never got as far as being presented in court. Sometimes it was clear that a crime had been committed but on the strength of the evidence gathered it would transpire that a conviction would not secured and the matter would not be prosecuted. The matter would then be referred to the police for them to carry on investigating. The figure for withdrawn cases referred to such instances. The budget decrease w follow through to what was affecting every government department over a three-year cycle.

Mr Swart interrupted and said that if during the middle of the year the NPA would provide information concerning an increase in the budget then the Committee would be able to "batter" on their behalf for that increa

Adv Simelane continued saying that the NPA had sent senior officials to the Limpopo area. The NPA would also send personnel at Deputy level and hopefully they would not argue that they were being demoted. Mr Ba was misquoted and he had not dealt with the issue of capacity it was in fact the defence in the Terreblanche case. The Thuthuzela Care Centres had not been reduced, they would increase and in addition to donor fun funds from the NPA would be used. The final figures for the vacancy rate were still due to be concluded. The figure would change once all currently outstanding appointments had been made. The Priority Crimes Litig Unit (PCLU) was still working on a number of post TRC cases. The figure was eight cases. The NPA was using other relevant legislation to prosecute human trafficking offences. There had been no discussions yet on the protocols but this might be revised closer to the elections. There was a roster for prosecutors to be on duty for after hours bail. The NPA was faced with the normal security challenges. There was however security pe stationed at the courts over a 24-hour period. There was a specific programme that was driven by the NPA that focused on FIFA, it had been budgeted for and there were courts set aside for the tournament. The Boer case was ongoing and the state had closed its case a year ago. Witnesses under the protection programme were in safe houses. The national office dealt with backlogs, there were additional staff on contract that assis this matter. The national office also dealt with Information Technology (IT) integration especially at court level. The programme for this was a priority. The NPA ran a programme to recruit prosecutors. Adverts were pl e newspapers and individuals such as graduates applied. The organised crime components in the presentation referred to organised syndicates such as cash in transit gangs. It was acceptable to say that almost all c re 'organised' in the sense that they were planned.

Ms L Adams (COPE) asked if the NDPP had forbidden prosecutors to speak to the media and what was the ratio of prosecutors per court? Where would the line be drawn between the NDPP's oversight role in cases an interference with the prosecutor's own discretion in a case? On what basis would the NDPP decide to get involved in a particular case? When would the Committee receive the report on the Innes Chambers?

Mr Jeffery felt that the question on regional jurisdiction was not fully answered. Was an office being set up in Polokwane and what was the jurisdiction in the North West province? What was happening with the sexual offences courts?

Ms Smuts asked if the prosecutorial guidelines had been challenged as they had been deemed to be unconstitutional?

The Chairperson said that the process of interrogating the strategic plan was an ongoing one. It was difficult to ascertain what measurable objectives were set out in the document. The structure of the document was consistent as there were targets for certain programmes but not for others.

Adv Simelane said no prosecutor was banned from talking to the media, the NPA only insisted that prosecutors had to get sign off from their DPPs before doing so. The NDPP had the power to review and the NDPP or changed / altered a decision if an individual approached him/her and requested a review. Where there were inter-house discussions, the prosecutor always had the final decision. It had been decided that there would standalone courts for sexual offences cases only as judges did not want to adjudicate the same matter. The issue of jurisdictions was one which was affected by provincial boundaries, which were not consistent with t administrative boundaries.

The Chairperson asked what the NPA would be doing with the funds that it would receive for the next three months?

Adv Simelane said that there were no cases that the NPA was currently prosecuting regarding post TRC matters. The reason being that the dockets were still with the police for investigation. It would be difficult for the Committee to expect the same kind of objectives from the NPA as with other departments due to the nature of its work. The NPA would never be able to give an actual target for number of cases prosecuted as the conclusion of one case depended on multiple factors. The NPA was still awaiting assistance from the Department of Public Works about office space so that there could be an office in Polokwane and Nelspruit. The off were available and ready to move but there was no allocated office space. The ratio of prosecutors per court was 1 and a half.

Dr Khotso DeWee, Acting CEO of the NPA, said that the Innes Chamber report had been submitted to the Committee. The NPA approached the Department of Justice and Constitutional Development to take over the I Chamber on the basis that the NPA did not have the R220 million needed to refurbish the building.

The Committee Secretary added that an incomplete report on the matter had been submitted last year. The matter was followed up later in the year and the Committee was told that there were still some outstanding

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with the Department of Public Works. The department was going to make some follow ups and submit a full report. this was the report being referred to

The Chairperson differed with Adv Simelane on the point of targets and said that where money was paid, there had to be things that were achievable. It cannot be said that since it was the NPA, there would be a hope things would change one day. The point was that there had to be a commitment to some target

Mr Jeffery was not happy with the response on regional jurisdiction. The South Gauteng jurisdiction was easy to set up. 16 years had passed and there was still no office for Limpopo and Mpumalanga. why?

Adv Simelane responded that the first thing that would be a necessity would be office accommodation. The prosecutors and officials were already there and ready to move but they did not have space to move into. Th Minister and the Judges President still had to decide how the jurisdictional boundaries would be framed. The NPA could then come back to the Committee with a timetable

The meeting was adjourned

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AFFIDAVIT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM

do hereby make oath and state that:

1 I am an adult male of full legal capacity, serving as a Special Director of Public Prosecutions in the Priority Crimes Litigation Unit (PCLU) in the office of the National Director of Public Prosecutions (NDPP).

2 I have been requested to make a statement regarding the disappearance of the **CRADOCK 4** police docket, which is a Truth and Reconciliation Commission (TRC) case, from the Offices of the National Prosecuting Authority (NPA).

3 In 2013 I was a Deputy-Director in the PCLU. Advocate Abrahams was then Acting as the Head of the unit. Adv Jiba was Acting as the NDPP. Ms J Lepinka was acting as the ANDPP's Manager.

4 On 26 April 2013 Ms Lepinka wrote to Adv Abrahams, asking for information relating to the case. On 22 May 2013 Adv Abrahams replied to her.

5 There was no reply from the ANDPP in response to Adv Abrahams. At a certain stage, however, I was requested to handover the docket as it had been called for by the Office of the ANDPP. I complied with the request. At this moment in time, I cannot recall who made the request.

6 I reported that a response from the ANDPP was awaited. In October 2013 Mr Nxasana was appointed as the NDPP and Adv Jiba moved from being the ANDPP to, firstly, the Head: NPS (National Prosecution Service), and thereafter, Head: LAD (Legal Administration Department).

7 Mr Nxasana removed me from my normal duties so as to focus on foreign bribery cases with which I continued until December 2015.

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8 On my return to my normal duties, I was allocated a number of terrorism matters and did not deal further with TRC cases. At a certain stage Adv Pretorius SC, who was then acting as the Head of the PCLU, enquired about the docket and I informed him that it had been uplifted from our Office.

9 In April 2019 I became the Acting Head of the PCLU and was advised that the docket had not been located. Adv Mzinyathi, who was then acting as the Head: NPS, informed me that a proper search had been conducted, but that the docket could not be located. At that stage, Adv Jiba had had her employment with the NPA terminated by the President and Ms Lepinka had been suspended, due to being charged with removing an NPA computer from the Office. It served no purpose at that stage to try and locate the docket.

10 The docket comprised of an investigation against General Hankel as well as extracts from the **CRADOCK 4** formal inquest and TRC amnesty hearing. Copies of the Hankel investigation were available as were key documents relating to the inquest and amnesty hearing. Further material relating to the inquest was available at Rhodes' University and at Archives in King Williams Town. The TRC material was available either on the Department of Justice website or at the State Archives.

11 I therefore gave the material in my possession to the investigating officer, Colonel Makua, and advised him to reconstruct the docket. A decision was, however, taken to refer the case to investigators in the Eastern Cape. I was able to locate considerable additional material relevant to the case, which was provided to those investigators.

12 I do not have evidence at my disposal to suggest that the docket was stolen. All the material contained in the docket was easily re-obtainable.

RC MACADAM

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at **PRETORIA** on this the 26th day of May 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

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Capt
Kaekenoer.
COMMISSIONER OF OATHS
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FULL NAMES: Jaco Conraad Kaekenoer.
ADDRESS: 215 Visagie St. Coal Piet Jaubert Building, Pta CBD.
CAPACITY: Capt.
DRC: Crimes Against the State.
SAPS.

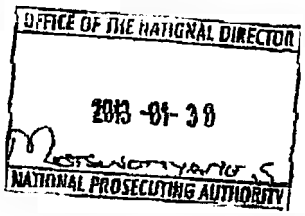
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THEMBISILE PHUMELELE NKADIMENG



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29 January 2013

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

Fax: (012) 845 6337 BY HAND

Dear Dr Silas Ramaite,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I am the sister of Nokuthula Aurelia Simelane ("Nokuthula"). My identity number is 730210 0329 088. On behalf of my family, I seek the holding of a formal inquest in terms of Act 58 of 1959 in respect of the circumstances surrounding the murder and other offences perpetrated by members of the former South African Police Security Branch against Nokuthula.

Background

Nokuthula was the first child of Ernestina and the late Matthews Simelane. She was a member of Umkhonto we Sizwe (MK), the military wing of the African National Congress (ANC). My sister was a student at the University of Swaziland in the early 1980s. During this time, she acted as a go-between for the ANC and exiled leaders in

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Swaziland. In September 1983 shortly after completing her university studies, and whilst on an MK mission to South Africa, she was kidnapped by the Security Branch from the Carlton Centre in Johannesburg. She was then brutally tortured over a period of several weeks and then disappeared.

Most of the policemen who kidnapped and tortured her and then caused her disappearance applied to the TRC for amnesty. They received amnesty for her kidnapping even though they were found to have been untruthful about their treatment of my sister.[1] The senior officers were denied amnesty for her vicious assault. None of the police officers applied for amnesty for the murder of Nokuthula. The senior police officers, in whose presence she was last seen, have refused to disclose the whereabouts of the remains of Nokuthula. To this day her remains have not been found for a burial with dignity.

My family and I have constantly searched for the truth about what happened to my sister. Shortly after her disappearance we spoke with ANC members. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her. We even made inquiries in neighbouring countries such as Botswana. Nokhuthula's disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.

All these efforts proved fruitless until early 1996 when the Sowetan newspaper published a story about Nokuthula's disappearance. The newspaper article appeared to finally spur the police into action. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. During July 1998 one of the senior officers was warned of his rights in terms of section 35 of the Constitution in respect of the "murder" of Nokuthula Simelane. He declined to make a statement.

[1] Decision (AC/2001/185) of the Amnesty Committee of the Truth and Reconciliation Commission.

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We raised her disappearance with the TRC. We have pleaded with prosecutors to take the case forward. I have even appointed private detectives. A documentary was made and screened on TV ("Betrayal", 2006). A statue was erected in her memory in Bethal. However we are still without answers.

We know from the TRC hearings that my sister suffered terribly at the hands of the South African security branch. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price. My father died in 2001, without knowing what happened to his daughter. I refuse to give up the search for the truth and justice.

Attempts to seek justice

I have met police officers as well as prosecutors from the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA) on a few occasions. On each occasion various excuses were provided as to why this case could not go forward.

Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised us that they were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977.

The PCLU also advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. They were not permitted to proceed until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. Together with the wives of the Cradock 4 I applied to court to have this policy set aside as unconstitutional. The Pretoria High Court struck down the policy in the case of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD

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case no 32709/07). In this matter the NPA had argued that the amended policy survived constitutional scrutiny as families could still bring private prosecutions in matters where the NDPP declined to prosecute. The court rejected this contention stating that it was the primary responsibility of the NPA to prosecute. The NPA was denied leave to appeal.

Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations.

During the course of 2006 one of my legal representatives presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokhutlyla constituted the international crime of torture. Torture was, by 1983, a prohibited and unlawful act in terms of customary international law. South Africa was obliged to investigate and prosecute transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

My legal representatives also proposed that those suspects who did not apply for amnesty be prosecuted for kidnapping. I am advised that kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. Notwithstanding that there was no legal impediment to the preferring of such charges this proposal was rejected. My legal representatives also proposed that charges of defeating the ends of justice be brought against two of the senior officers for intimidating a junior officer into making a false statement and for attempting to coach a witness into making a false statement. The PCLU declined to pursue such charges.

Other excuses include an apparent lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is without merit. It is based on an erroneous reading of section 31 of the Promotion of

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National Unity and Reconciliation Act 34 of 1995 which, in any event, was not invoked in these particular proceedings before the TRC.

The need for a formal inquest

This matter is now urgent. Nearly 30 years has passed since Nokuthula's disappearance. Some 17 years has lapsed since the more recent police docket was opened. My mother is now elderly and sickly. Witnesses are also getting old. Some have died in suspicious circumstances.

The PCLU had previously suggested that an inquest be held in this matter. At that time my family and I preferred to see a prosecution taking place. Indeed we have been trying to launch a private prosecution, but we have been unable to raise sufficient funds to pay the security for costs, which we are advised will be a substantial sum of money. In the circumstances we now wish to have formal inquest held as speedily as possible.

If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution.

Last week I met with the investigating officer, Captain Masehela. He advised me that he submitted his report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act. I then spoke with Advocate Macadam who advised me to approach Madeleine Fullard, the Head of the Missing Persons Task Team at the National Prosecuting Authority of South Africa.

I met with Ms Fullard who advised that her Task Team had not been able to locate the remains of Nokuthula. She suggested that I approach the suspects and offer not to

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prosecute them if they disclose the location of Nokuthula's remains. I have discussed this suggestion with my family and we have decided not to do a deal with the suspects. The suspects have had more than ample time to come forward and disclose the whereabouts of the remains. They have chosen rather to cause me and my family untold pain and anguish by maintaining a wall of lies and deceit.

Please advise me per return whether the statements and relevant documents have been submitted to a magistrate or judicial officer in terms of section 5 of the Inquest Act. If not, please advise why not. If the documents have been submitted, please advise which magistrate or judicial officer is dealing with this matter. I am advised that I am entitled to be given reasonable notice of the holding of an inquest in terms of section 7 of the Inquest Act. I further request that steps be taken to ensure that the inquest is a formal public inquest which includes the giving of oral evidence. Given the sensitivities of this matter I request that this inquest be held in the High Court of South Africa.

Should you at any point choose to institute criminal proceedings in this matter I request that you appoint a special prosecutor to lead the prosecution, in consultation with me and my family.

I accordingly ask that you treat this request with great urgency and advise me at your earliest convenience.

Yours sincerely,

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit

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OFFICE OF THE HIGH COMMISSIONER

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MANDATE OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

REFERENCE

G/SO 217/1/South Africa

24 July 2014

Dear Mr. William Kerfoot,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its 103rd session from 7 to 16 May 2014, in Geneva, Switzerland. I would like to refer to the reported disappearance in South Africa which your organisation submitted regarding **Ms. Nokulthula Aurelia Simelane (case No. 10004285)**.

The Working Group considered this case and transmitted it to the Government of South Africa in 13 June 2014. In transmitting this case, the Chair-Rapporteur of the Working Group expressed his hope that appropriate investigations would be carried out in order to clarify the fate and whereabouts of the disappeared person and to protect her rights. Any information received from the Government of South Africa concerning this case will be transmitted to you in due course. I wish to emphasize that, in view of the purely humanitarian character of the Working Group's action, any information given to you on this matter is exclusively destined for the relatives of the disappeared person.

I would like to take this opportunity to inform you that the Working Group shall hold its 104th session in Geneva from 15 to 19 September 2014. The Working Group would be grateful if any written information which your organisation wishes to submit for the Working Group's consideration at its 104th session could be received by 22 August 2014. I would like to bring to your attention that, however, information may be submitted at any time of the year and it will be reviewed by the Working Group during its forthcoming sessions as soon as it can be processed.

In conformity with its usual practice, the Working Group receives representatives of interested organizations and families of the persons reported disappeared during its sessions. Should your organisation wish to request a meeting with the experts of the Working Group at the 104th session, please contact the Secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 0041 (0)22 917 9286; fax: 0041 (0)22 917 9006; e-mail: wgeid@ohchr.org) by 22 August 2014, to

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Mr. William Kerfoot
The Legal Resource Centre
3rd floor Greenmarket Place, 54 Shortmarket Street, Cape Town 8001, South Africa
Tel.: 2721 481 3000. Fax: 272121 423 0935
william@lrc.org.za

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schedule an appointment or for any additional information. Please note that unfortunately the Working Group will not be able to provide any financial assistance.



Ariel Dulitzky
Chair-Rapporteur
Working Group on Enforced
or Involuntary Disappearances

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IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,

PRETORIA

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

MINISTER OF JUSTICE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

IMITIAZ AHMED CAJEE **FOURTH RESPONDENT**

FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below.

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1 INTRODUCTION

1.1 I am an adult and I am employed by the National Prosecuting Authority, herein represented by the first respondent. I have already deposed to the first respondent's answering affidavit and remain duly authorized to place the evidence contained herein before the Court on behalf of the first respondent.

1.2 Unless the context indicates otherwise, the contents of this supplementary answering affidavit fall within my knowledge and they are true and correct. In some respects, my knowledge of the contents hereof is derived from the documents to which I also refer herein. I believe that the contents of such documents are true and correct when regard is had to the source of such documents.

1.3 The purpose of this supplementary answering affidavit is to deal with the contents of the fourth respondent's answering affidavit and supplementary affidavit.

1.4 I have considered the fourth respondent's answering affidavit and I reply thereto below to the extent that it is necessary to show that the first respondent is not responsible for the delays in prosecuting the applicant and that the delays complained of do not justify the relief which the applicant seeks.

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1.5 I have also considered the contents of the fourth respondent's supplementary affidavit in which is attached an uncertified transcript of what purports to be an interview conducted with a radio station. This supplementary affidavit is irrelevant and serves no purpose in these proceedings and was filed with an intention to paint the National Prosecuting Authority and the South African Police in a negative light. I do not admit the authenticity of the transcript attached to this supplementary affidavit and I am not going to respond thereto.

2 THE DELAYS

2.1 The fourth respondent filed an answering affidavit to oppose the relief which the applicant seeks in this application. This affidavit, however, reads like a supporting affidavit intended to boost the applicant's case and I have no doubt that the applicant will rely on it to support his case.

2.2 In such answering affidavit, the fourth respondent also seeks to tell the Court what caused the delays in instituting the criminal proceedings which are sought to be stayed permanently by the applicant. The only issue which the first respondent takes with the fourth respondent's approach is that he seeks to blame the National Prosecuting Authority and the first respondent for such delays.

2.3 I strongly deny that the first respondent is responsible for the delays upon which the fourth respondent seeks to rely. Even on the evidence upon

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which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others.

2.4 Even if it may be found that the first respondent is responsible for the delays, which I deny, the delays and the first respondent's conduct is not of such a nature that it justifies the permanent stay of the criminal proceedings when regard is had to the following:

2.4.1 the nature of the criminal offence with which the applicant is charged;

2.4.2 the circumstances under which Mr. Timol died;

2.4.3 the fact that the fourth respondent himself says that the National Prosecuting Authority was subjected to severe political pressure not to take urgent steps to prosecute people such as the applicant;

2.4.4 the fact that the interests of justice require the Court to refuse the permanent stay sought by the applicant; and

2.4.5 the fact that the National Prosecuting Authority and its Priority Crimes Litigation Unit which was responsible for the prosecution of TRC matters since 2003 always wanted to have these cases investigated and prosecuted.

2.5 It is not entirely clear from the fourth respondent's answering affidavit as to what he seeks to achieve by blaming the first respondent when on the

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other hand, he says that the first respondent was prevented from prosecuting by political office bearers.

2.6 Mr. Timol died in October 1971. An inquest which was conducted thereafter did not result in any criminal prosecution.

2.7 In paragraph 82 of his answering affidavit, the fourth respondent seems to accept that the circumstances around Mr. Timol's murder were covered up by the then government of the Republic of South Africa between 1971 and 1994 and that this cover up "*naturally explains*" the inaction during that period.

2.8 It is surprising that the fourth respondent does not take issue with the people responsible for the cover-up and does not seek any punishment against them. He, however, seeks to lobby for an inquiry to be conducted in relation to certain officials of the first respondent, which officials he accepts were subjected to severe political constraints and interference. It would appear from his answering affidavit that this is indeed his sole motive of seeking to blame the first respondent for the delays in prosecuting the applicant even though at the end he says that the delays in prosecuting the applicant do not justify the granting of the permanent stay relief which the applicant seeks in this application.

2.9 It is common cause that Mr. Timol's murder was politically motivated and it is for this reason a political crime. The fourth respondent also describes it

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as such in paragraph 84 of his answering affidavit. It is also common cause that Mr. Timol's murder is not the only political crime for which the perpetrators have not been prosecuted.

2.10 When regard is had to the nature of the crime, it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government. It is irrelevant as to what one calls such steps. The fourth respondent calls them political interference with the National Prosecuting Authority. He describes the position as follows in paragraph 84 of his answering affidavit:

"*84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "TRC cases"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.*" (Own emphasis).

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2.11 The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol. When regard is had to what advocates Pikoli, Ackermann and Macadam say in their affidavits confirming political interference with the first respondent's prosecutorial decision-making processes, it is clear that it is in fact not the first respondent who stalled the investigations and prosecution of cases such as the present. For this reason, no purpose would be served by throwing stones at the first respondent.

2.12 When regard is had to what the fourth respondent says in paragraph 84, the only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's own doing or its malice – it was as a result of the political interference and the "*severe political constraints*" to which the first respondent was subjected.

2.13 The fourth respondent relies on certain incidents which he says constitute evidence of political interference. None of these incidents were created by the first respondent. On the fourth respondent's own version, "*the NPA and its officials dealing with my uncle's case ... became subjected to severe political constraints ...*" There is no doubt that the National Prosecuting Authority and its officials could not have subjected themselves to the "*severe political constraints*" referred to by the fourth respondent.

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2.14 It is necessary for me to comment on each of the instances upon which the fourth respondent relies to demonstrate that the first respondent is not the author thereof.

The secret *government report*

2.15 This is a report of the Amnesty Task Team. This task team was appointed by the Director-General's forum on 23 February 2004. The Director-General's forum was not created by the first respondent. It was chaired by the Director-General of the Department of Justice and Constitutional Development. This Director-General must have chaired this forum on the instructions of his superiors. The National Prosecuting Authority was represented thereat by Gerhard Nel and Lungisa Dyosi who were not members of the National Prosecuting Authority's Priority Crimes Litigation Unit responsible for the prosecution of cases such as the present.

2.15.1 The task team was required to consider and report on, amongst others, the following:

> "2. *Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.*"

2.15.2 The report clearly indicates that the democratic government, at its highest level, intended to give people such as the applicant, who did

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not participate in the TRC process, another opportunity to apply for amnesty. For this reason, the task team considered that it had to "*perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the tabling of the report of the Truth and Reconciliation Commission on 15 April 2003.*"

2.15.3 The report further states that the President provided, amongst others, the following guidelines:

"*(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.*

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process" (Own emphasis).

2.15.4 Paragraph 3.3 of the report shows that consideration was given to establishing "*a further amnesty process similar to that of the TRC process.*" This, however, was rejected by the task team with the following provision:

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"*3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.*"

2.16 It is clear from the report upon which the fourth respondent relies that:

2.16.1 The functions of the aforesaid task team were not determined by the first respondent.

2.16.2 The government, through the President at the time expressed its willingness to establish a second amnesty process similar to that of the TRC clearly in order to give people such as the applicant an opportunity to fully disclose their participation "*during the conflicts of the past.*"

2.16.3 To the extent that the work of the Amnesty Task Team contributed to a delay in the applicant's prosecution, the blame for that does not find a place to sit in front of the first respondent's door steps. In the premises, the report of the Amnesty Task Team upon which the fourth respondent seeks to rely does not in any way establish any wrongdoing on the part of the first respondent.

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2.16.4 At best, the government of the Republic of South Africa could be criticized for having entertained the thought of establishing another amnesty process similar to that of the TRC process – but that is as far as that criticism can go. There is absolutely no evidence placed before the Court to suggest that the entertainment of such a thought was malicious and not at all in the interests of justice and the interests of the community as a whole. The time taken entertaining that thought and giving effect to it clearly contributed to the delay in prosecuting the applicant – but that was not the first respondent's doing.

The affidavit of Adv. Vusi Pikoli

2.17 The fourth respondent says that the contents of the affidavit of Adv. Pikoli constitutes evidence of some of the "*various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases.*"

2.18 Pikoli was appointed as the National Director of Public Prosecutions on 1 February 2005. This is the highest position within the National Prosecuting Authority. Prior to that, he was the Director-General of the Department of Justice and Constitutional Development. His affidavit, however, does not say much about the role he played on the Amnesty Task Team. It also does not say anything about the origin of the task team and why it was necessary to set it up.

2.19 In paragraph 85.2 of his answering affidavit, the fourth respondent says that Pikoli's affidavit "*sets out how the independence of his office was seriously compromised*" and "*how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. BS Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases*."

2.20 I must say upfront that I do not dispute the contents of Pikoli's affidavit upon which the fourth respondent relies. The contents of such affidavit, however, do not constitute a basis to grant the permanent stay which the applicant seeks in this application and further show that the first respondent did not abandon the intention to prosecute people such as the applicant.

2.21 It is important that I highlight some of the contents of Pikoli's affidavit which clearly indicate that the first respondent and its officials were indeed, as alleged by the fourth respondent, subjected to severe political constraints as a result of which, on the fourth respondent's version, it was "*extremely difficult, if not impossible, for them to carry out their responsibilities under law*."

2.21.1 In paragraph 8 of his affidavit, Pikoli says that:

> "*8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty by the then President, Mr. T Mbeki on 23*

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September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me..." (Own emphasis).

2.21.2 It is clear from the above quoted paragraph 8 of Pikoli's affidavit that he did take a "*decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty*" by the Truth and Reconciliation Commission. Pikoli suspects that this decision also influenced President Mbeki to suspend him. Accordingly, not only was there political interference in the work of the highest office of the National Prosecuting Authority, but there was also action taken against the highest office of the National Prosecuting Authority for taking prosecutorial decisions.

2.21.3 In paragraph 14 of his affidavit, Pikoli says the following:

"*14. ... I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...*" (Own emphasis).

2.21.4 Pikoli also deals with what is referred to therein as the TRC cases. He says that decisions to prosecute certain members of the Security

Branch of the South African Police Service were taken by then Acting National Director of Public Prosecutions. After such decisions were taken, it was decided that the matters would be "*held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy*"

2.21.5 The contents of paragraph 33 of Pikoli's affidavit reveals what could have been the motivation against prosecuting people such as the applicant at the time. Therein, Pikoli suggests that the prosecution of "*cases like the Chikane matter could open the door to prosecutions of ANC members*" and that such prosecution could then "*give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.*"

2.21.6 In paragraph 52 of his affidavit, Pikoli refers to a memorandum which he wrote to the then Minister of Justice complaining about political interference in the work of the first respondent. Therein, Pikoli says that:

"*52. In this memorandum I concluded that there had been improper interference in relation to the TRC caces and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in*

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terms of the normal legal processes and sought guidance on the way forward." (Own emphasis).

2.21.7 The contents of the above quoted paragraph, which the fourth respondent accepts as true and correct and reflective of the correct legal position, clearly indicates that the highest office of the National Prosecuting Authority had reached a point where it "*was unable to deal with these cases in terms of the normal legal processes*" and deemed it necessary to seek "*guidance on the way forward.*" According to Pikoli, such guidance was never received. In paragraph 54 of his affidavit, Pikoli concludes that:

"*The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.*"

2.21.8 In paragraph 60 of his affidavit, Pikoli again gives light to the reluctance from the political level to prosecute cases such as the present. Therein, he says that there was a "*fear of opening the door to prosecutions of ANC members, including government officials.*"

2.22 All that is contained in Pikoli's affidavit, upon which the fourth respondent relies to create an impression that the first respondent is responsible for the delays, clearly indicates that the highest office of the National Prosecuting

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Authority was subjected to political interference and political pressure not to prosecute cases such as the applicant's case.

2.23 There is nothing in Pikoli's affidavit that could be interpreted to suggest that the first respondent was remiss or negligent in handling what is referred to in Pikoli's affidavit as the TRC cases, which include the applicant's case.

2.24 In the premises, on the fourth respondent's version, the delays in prosecuting the applicant were occasioned by political interference and political pressure and not by the first respondent itself. In the premises, there is no room to blame the first respondent for the delays or to use the delays to justify the permanent stay of prosecution.

The affidavit of Adv. Anton Ackermann

2.25 The affidavit of Adv. Anton Ackermann does not take the matter any further.

2.26 In his affidavit, Ackermann confirms that cases such as the prosecution of the applicant were not prosecuted due to political pressure and political interference as stated in Pikoli's affidavit.

2.27 I do not deny what Ackermann says in his affidavit but I do state that the contents of Ackermann's affidavit do not justify the granting of the permanent stay of prosecution which the applicant seeks in this application.

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2.28 The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and send a clear message that political office bearers should stop interfering with prosecutorial decisions unless otherwise authorized to do so by law.

2.29 What one sees in Pikoli and Ackermann's affidavits is that the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority was far from being authorized by law. This being the case, there can be no rational basis to use such unlawful political interference and political pressure to justify the permanent stay of criminal prosecution which the applicant seeks in this application.

2.30 I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application.

2.31 It is important that I again highlight that the fourth respondent does not say that the "*manipulation of the criminal justice system to protect individuals from prosecution*" was perpetrated by the first respondent and its officials.

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Insofar as it is not the fourth respondent's version that the manipulation of the criminal justice system was perpetrated by the first respondent and its officials, there can be no basis to use that against the first respondent to justify the granting of the relief which the applicant seeks in this application.

2.32 The relief which the applicant seeks in this application is so drastic that it cannot be granted simply on the basis of the manipulation of the criminal justice system or by what the fourth respondent says amounts to political interference or severe political constraints.

2.33 In the light of the contents of Pikoli and Ackermann's affidavits and the correspondence attached thereto, there can be no merit in the fourth respondent's suggestion in paragraph 97 of his answering affidavit that "*the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid-era cases.*" It is important to draw the Court's attention to the fact that the fourth respondent does not even tell the Court as to when this alleged collusion with political forces occurred. The fourth respondent is called upon to produce evidence of this alleged collusion or to formally withdraw such allegation.

2.34 In any event, the suggestion that the SAPS colluded with the National Prosecuting Authority is completely inconsistent with the contents of Pikoli and Ackermann's affidavits. The two affidavits clearly tell the Court as to why cases such as the applicant's case were not immediately prosecuted

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and they do not include the alleged collusion between the SAPS and the National Prosecuting Authority.

2.35 It is not correct that the National Prosecuting Authority has decided to shield "*itself from embarrassment as well as violations of its obligations and duties under the Constitution*" as alleged in paragraph 142.3 of the fourth respondent's answering affidavit. The correct position is simply that the applicant did not in his founding affidavit call upon the first respondent to deal with the issues which the fourth respondent somehow suggests the first respondent ought to have dealt with in answering the applicant's founding affidavit. It is the fourth respondent which has now raised the issues which I have now answered in this supplementary answering affidavit.

2.36 In paragraph 142.1 of his answering affidavit, the fourth respondent contends that "*the period leading up to the decision to institute criminal proceedings cannot be ignored.*" There is no legal basis for this. The fourth respondent contends, in paragraph 142.3, that "*what transpired during this time-period must be explained by the NPA.*" I deny this. The applicant, however, does not rely on this point.

2.36.1 In support of the above contention, the fourth respondent seeks to rely on paragraph 3(C) of the Prosecution Policy.

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2.36.2 Paragraph 3 of the Prosecution Policy deals with the role of a prosecutor. Paragraph 3(C) deals with prosecution in the public interest and seeks to provide guidance to prosecutorial decision-making process in relation to prosecution of cases in the public interest.

2.36.3 In relevant parts, paragraph 3(C) of the Prosecution Policy upon which the fourth respondent relies for his contention that the first respondent must provide an explanation for the time period leading up to the institution of criminal charges against the applicant provides that when a prosecutor considers whether or not it will be in the public interest to prosecute, the prosecutor must consider all relevant factors including, amongst others, whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.

2.36.4 It is important that I draw to the Court's attention the fact that the very same paragraph states that:

"*The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.*"

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2.36.5 At all material times relevant to this case, the first respondent has always been aware of the long period of time which has passed between the date when the crime was committed and the date on which criminal proceedings were instituted against the applicant. For this reason, it cannot be suggested that the first respondent did not take into account the delay between the date on which the crime was committed and the date on which criminal proceedings were instituted against the applicant.

2.36.6 When regard is had to the nature and seriousness of the offence; the manner in which Mr. Timol was killed; the pain which Mr. Timol must have suffered; and the fact that the applicant has not admitted guilt and has not shown repentance the delay between the date on which the crime was committed and the date on which the prosecution was instituted justify the dismissal of this application. All of these factors, together with the fact that the delay in prosecuting the applicant was not deliberately caused by the first respondent, it is not in the interests of justice to grant the permanent stay relief which the applicant seeks in this application.

2.37 I deny the fourth respondent's insinuation in paragraph 142.6 that Chris Macadam did not act properly when the investigation of this matter was entrusted to him. In this regard, I attach hereto as **SA1,** Chris Macadam's affidavit in which he sets out in detail, and supported by documentary

evidence, his role during the relevant periods in the investigation of this matter.

2.38 When regard is had to the contents of Chris Macadam's affidavit, it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases such as the present. For this reason, the insinuation against Chris Macadam is wholly misplaced. [Chris Macadam's affidavit attached hereto as SA1 is the very same affidavit referred to in my main answering affidavit but was not attached thereto].

2.39 In the light of the interest which the fourth respondent has shown in Macadam, it is necessary that I draw the court's attention, and indeed the fourth respondent's attention to some of the contents of Macadam's affidavit and the annexures thereto.

2.40 Macadam is a senior advocate of this court and has, since 2003 served as the Senior Deputy Director of Public Prosecutions in the National Prosecuting Authorities Priority Crimes Litigation Unit. This unit has always been located within the office of the National Director of Public Prosecutions.

2.41 In paragraph 12 of his affidavit, Macadam says that the then National Director of Public Prosecutions took a decision, shortly after the

NGJ

establishment of the Priority Crimes Litigation Unit, that such unit "*should take over the TRC cases which had not been finalized either by the DPP or by the defunct TRC unit.*" This is a clear indication that right from the beginning, the National Prosecuting Authority intended to investigate and prosecute cases such as the present.

2.42 In paragraphs 15 and 17, Macadam indicates that Mr Timol's case was identified as one which required further investigation and this is confirmed in annexure RCM2 to his affidavit.

2.43 In an internal memorandum dated 15 July 2003 Advocate Ledwaba of the then Directorate of Special Operations (then known as The Scorpions) which was mandated to investigate cases such as the present advised Macadam and others, amongst others, as follows:

"(i) TRC Cases

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used."

2.44 Pursuant to Ledwaba's aforesaid decision, Macadam and Ackermann did the right thing by commencing engagement with the SAPS after which

Commissioner J F De Beer of the SAPS addressed a letter dated 26 September 2003 to Ackerman in, amongst others, the following terms:

"As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking ...

In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seemed to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues." (Own emphasis).

2.45 The above-quoted letter clearly signaled the beginning of difficulties in investigating and prosecuting cases such as the present. In order to avoid delays and being entangled in bureaucracy, Macadam and Ackermann attempted to persuade Ledwaba to reconsider his decision not to investigate cases such as the present. Their frustrations are well documented in annexure RCM5 attached Macadam's affidavit – being an internal memorandum dated 11 November 2003. Therein, they set out their frustrations and concluded as follows:

"2. *As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions (eg. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability*

of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the bona fides of the National Prosecuting Authority into serious [disrepute] and do irreparable damage.

Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of section 28(1)(b). This chapter in our country's history must be closed without further delay."

2.46 Despite Ackermann and Macadam's pleas, the then Directorate for Special Operations did not appoint investigators as requested and cases such as the present were not further investigated. To make matters worse, in 2004, Macadam was assigned a case which required his full-time attention until late 2007 and was then not involved in the investigation and possible prosecution of TRC cases.

2.47 No serious investigation of cases such as the present took place and the reasons for this are clearly apparent from Macadam's affidavit. In paragraph 40 of his affidavit, Macadam says that he requested the Directorate for Priority Crimes Investigations to re-open the investigation of Mr Timol's case.

2.48 After having done all of the above, Macadam was informed by Advocate Johnson, the then head of the Priority Crimes Litigation Unit *"that we should not continue to work with TRC cases as they were going to be removed from the PCLU."* (Own emphasis).

2.49 Attached to Macadam's affidavit as RCM16 is a letter dated 8 February 2007 from then Minister of Justice Ms Mabandla to then National Director of Public Prosecutions, Pikoli. In this letter, the then Minister expressed her concern that she read media articles suggesting that the National Prosecuting Authority was going ahead with prosecutions of cases such as the present. The then Minister said, amongst others, the following:

"I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions, you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

2.50 The contents of the then Minister's letter clearly indicates that government at the highest level was of the view that the first respondent knew that cases such as the present were not going to be investigated and prosecuted. In addition, the letter also suggests that Pikoli had advised the Minister that *"the NPA will not be going ahead with the prosecutions."*

2.51 In a memorandum dated 15 February 2007 from Pikoli to then Minister of Justice, Pikoli, amongst others, expressed his frustrations arising from political interference with the National Prosecuting Authority's prosecutorial decision-making processes. The upshot of Pikoli's frustrations is set out in paragraph 5.2 of this memorandum, wherein he said:

"5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end. (Own emphasis).

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Own emphasis).

2.52 Insofar as this particular matter is concerned, the political position about the prosecution of cases such as the present did not change until the re-opening of the inquest into the death of Mr Timol. As we now know, the matter was investigated after the 2017 inquest judgment was released and the first respondent then took a decision to prosecute the applicant herein.

2.53 When regard is had to the contents of Macadam's affidavit, there can be no rational basis to suggest that he acted in a cavalier and uncaring manner. The facts set out in his affidavit, confirmed by way of a confirmatory affidavit by Pikoli, clearly indicate that the political interference with the first respondent's prosecutorial decision-making processes did not only start in 2007 when Pikoli was suspended from his position as National Director of Public Prosecutions for what he says, amongst others, deciding to prosecute cases such as the present.

2.54 It is important to draw the court's special attention to paragraph 5.4 of Pikoli's memorandum to the Minister quoted above. Therein, and based on the prevailing political environment at the time, Pikoli took the view that *"these TRC matters"* could not be proceeded with *"in accordance with the 'normal legal processes' and 'prosecuting mandate'"* of the National Prosecuting Authority. Having taken this view, Pikoli then called for the Government to provide direction as far as the investigations and prosecutions of the TRC matters was concerned. Pikoli correctly called for this direction from the State *"in view of the fact that the NPA prosecutes on behalf of the State."* When regard is had to Pikoli's, Ackermann's, and

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Macadam's affidavits, it is clear why Pikoli called for this direction from the State – simply because the State had clearly expressed its reluctance to prosecute cases such as the present and its desire to establish a second amnesty process for people such as the applicant.

2.55 The above being the case, this court cannot perpetuate the injustice to which Mr Timol was subjected by granting an order in terms of which the applicant's prosecution is stayed permanently. Mr Timol was subjected to injustice by the apartheid government and its security agents and cannot again be subjected to injustice by this government, for which he died.

I now turn to respond to some of the paragraphs of the fourth respondent's answering affidavit in which negative and incorrect statements are made about the first respondent.

3 AD PARAGRAPHS 64 AND 65

Ad paragraph 64

3.1 I deny that the National Prosecuting Authority acted in a cavalier and uncaring manner.

3.2 The fourth respondent's suggestion that the approach of the National Prosecuting Authority was cavalier and uncaring is not supported by any admissible evidence placed before the Court. Such a suggestion can easily

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be disposed of by reference to the contents of Macadam's affidavit to which I have referred above.

Ad paragraph 65

3.3 The contents of paragraph 65.1 do not justify the criticism levelled against the first respondent. This is so due to the fact that the Amnesty Task Team referred to therein was not created by the first respondent. As I have demonstrated above, the Amnesty Task Team was created by the government, in particular, by the highest level of government. Rightly or wrongly, the Amnesty Task Team was clearly created to find ways to give people such as the applicant herein an opportunity to apply for amnesty in respect of their participation in what is referred to in the Amnesty Task Team's report as "*conflicts of the past.*"

3.4 The contents of paragraph 65.2 are not entirely correct. It is not correct that the amendment to the prosecution policy was intended "*to facilitate impunity for apartheid-era criminals.*" A simple reading of the report of the Amnesty Task Team clearly shows that it was not the intention of government to grant people such as the applicant blanket amnesty. There were stringent requirements with which they had to comply.

3.5 Pikoli's affidavit shows that it is not correct that government intended "*to facilitate impunity for apartheid-era criminals*" where he refers to instances where he refused to accept representations not to prosecute people such as

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the applicant. The people referred to in Pikoli's affidavit, whose representations not to be prosecuted he refused, would have been granted amnesty easily if government's intention was indeed "*to facilitate impunity for apartheid-era criminals*" as suggested in paragraph 65.2.

3.6 The contents of paragraph 65.3 are not in dispute and do not justify the relief which the applicant seeks in this application and clearly show that it was former President Mbeki who "*introduced a political pardons program to further accommodate perpetrators*" and not the first respondent.

3.7 The contents of paragraph 65.4 are not in dispute.

3.8 The contents of paragraph 65.5 must necessarily bring an end to any criticism levelled against the first respondent by the fourth respondent. In paragraph 65.5, the fourth respondent says that the "*NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases*" which cases included the case of Mr. Timol. On this version, there could not have been collusion between the police and the National Prosecuting Authority.

4 AD PARAGRAPHS 82 TO 94

Ad paragraph 82

4.1 The cover-up of political crimes referred to in paragraph 82 which the fourth respondent says it "*naturally explains the inaction between 1971 and*

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1994" is not different from the political interference which resulted in cases such as the present not being prosecuted immediately. For this reason, there is no basis to blame the first respondent and the National Prosecuting Authority for the delays in prosecuting this case.

Ad paragraph 83

4.2 There is no basis to suspect that the first respondent did not explain the delay as a result of an ulterior or improper motive. The position is simply that the applicant did not in his founding affidavit make out a case which required an explanation for the delay in the manner in which the fourth respondent has done in his answering affidavit.

4.3 It is clear from the applicant's founding affidavit that the applicant did not have much information on the basis of which he could criticize and blame the first respondent for the delays in the manner done by the fourth respondent in his answering affidavit. In fact, the fourth respondent's answering affidavit reads like a supporting affidavit on behalf of the applicant.

Ad paragraph 84

4.4 I have already dealt with the contents of paragraph 84 elsewhere above in this supplementary answering affidavit.

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Ad paragraph 85

4.5 I have already dealt with the contents of paragraph 85 elsewhere above in this supplementary answering affidavit.

Ad paragraph 86

4.6 The statements and conclusions attributed to Pikoli and Ackermann in paragraph 86 are not in dispute.

Ad paragraph 87

4.7 I fail to understand the purpose of the contents of paragraph 87 because the fourth respondent is fully aware that the first respondent herein did not oppose the application referred to therein. Insofar as the first respondent did not oppose the application referred to in paragraph 87, it was not necessary for it to file an answering affidavit. The applicant's legal representatives are clearly aware of this.

4.8 The contents of paragraph 87 are clearly intended to create unnecessary sensation and negative atmosphere against the first respondent and the SAPS because a false impression is created that they were supposed to file answering affidavits but neglected to do so (even though they did not oppose the application).

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4.9 The alleged "*considerable publicity that the case attracted*" did not on its own justify the filing of answering affidavits in circumstances where the first respondent and the SAPS decided not to oppose the application in issue.

Ad paragraph 88

4.10 I have already dealt with the contents of paragraph 88 elsewhere above in this supplementary answering affidavit.

Ad paragraph 89

4.11 I draw the Court's attention to the fourth respondent's conclusion that "*the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic-era*" is the "*manipulation of the criminal justice system to protect individuals from prosecution*" referred to in paragraph 88 and the political interference with the independence of the National Prosecuting Authority – none of which was done by the first respondent. On the fourth respondent's own version, it is the first respondent who was politically interfered with.

Ad paragraph 90

4.12 I admit that the unlawful interference with the first respondent's duties and the manipulation of the criminal justice system referred to in the fourth respondent's answering affidavit is not sufficient to justify the granting of a

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permanent stay of the prosecution instituted against the applicant. There is no reason why the fourth respondent relies on the unlawful interference with the first respondent only to say it does not justify the relief sought.

Ad paragraph 91

4.13 The contents of paragraph 91 are admitted.

Ad paragraphs 92 and 93

4.14 The contents of paragraphs 92 and 93 are not in dispute.

4.15 It is not in the interests of justice to grant the relief which the applicant seeks on the basis of what the fourth respondent says was an unlawful manipulation of the criminal justice system and unlawful political interference with the first respondent's prosecutorial decision-making processes.

Ad paragraph 94

4.16 In paragraph 94 of his answering affidavit, the fourth respondent seeks to suggest that the National Prosecuting Authority and the South African Police Service are not doing anything about the possible prosecution of cases such as the present. I deny this.

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4.17 The cases to which the fourth respondent refers are 9 deaths cases and 11 cases relating to the murder, kidnapping and torture of political activists. These cases include the so-called Cradock 4 and Pebco 3 murders and were placed before the Directorate for Priority Crimes Investigations and the National Prosecuting Authority in January 2018. I deny that "*absolutely no progress has been made in any of these 20 cases.*"

4.17.1 One of the above cases relates to the death of Hoosen Haffejee. In this case, the second respondent has approved the re-opening of the inquest into this death and the fourth respondent is fully aware that this matter is under investigation as it is apparent from the letter attached hereto as **SA2**.

4.17.2 Since the aforesaid cases where allocated to the Directorate for Priority Crimes Investigations and the National Prosecuting Authority, all the required support and resources have been provided to investigate and to then prosecute these matters.

4.17.3 A task team of 15 police officers has been constituted and each case has been allocated at least two investigators. This task team consists of members of the Crimes Against the State unit of the South African Police Service.

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4.17.4 Progress meetings have been held on these cases and the fourth respondent and the fourth respondent's investigator, Frank Dutton have attended some of these meetings.

4.17.5 I am also aware that the fourth respondent's investigator, Frank Dutton, has interacted with Captain Chantelle Simpson of the South African Police Service on these matters and the fourth respondent must be fully aware of such interactions but creates a wrong impression that nothing has been done. This wrong impression is deliberately created in order to portray the National Prosecuting Authority and the South African Police Service in a negative light – which does not serve any purpose in proceedings such as the present.

4.17.6 I deny that two former members of the old South African Police's Security Branch were appointed "*to lead these investigations*." It serves no purpose for the fourth respondent to accuse the South African Police Service and the National Prosecuting Authority and their officials without producing any evidence to support such accusation.

4.18 For the reasons stated above, the contents of paragraph 94 do not advance the fourth respondent's case, they are in any event irrelevant and ought to be rejected.

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5 AD PARAGRAPHS 97 TO 99

Ad paragraph 97

5.1 I deny that the SAPS and the National Prosecuting Authority colluded with political forces to ensure the deliberate suppression of apartheid-era cases.

5.2 The fourth respondent's suggestion that the SAPS and the National Prosecuting Authority *colluded with political forces* is not supported by any admissible evidence placed before the Court. Of importance, this suggestion is inconsistent with some of the evidence upon which the fourth respondent relies which the fourth respondent himself has placed before the Court.

5.3 Elsewhere in his answering affidavit, the fourth respondent makes it clear that there was political interference and political pressure brought to bear upon the National Prosecuting Authority. This being the case, one fails to understand as to on what factual basis the fourth respondent can begin to speculate, let alone suggest, that the National Prosecuting Authority "*colluded with political forces.*" Such a suggestion, if accepted, would mean that Pikoli and Ackerman on whose affidavits the applicant heavily relies, are guilty of the collusion referred to in paragraph 97.

Ad paragraph 98

5.4 I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions.

Ad paragraphs 99 and 100

5.5 The contents of paragraph 99 are not in dispute.

5.6 The contents of paragraph 100 are not in dispute.

6 AD PARAGRAPHS 140 TO 148

Ad paragraph 141

6.1 The contents of paragraph 141 do not take the matter any further.

6.2 In paragraph 141 of his answering affidavit, the fourth respondent is responding to paragraphs 1.1 to 2.2.4 of the first respondent's answering affidavit to the applicant's founding affidavit. There is no basis to criticize the first respondent because the applicant's founding affidavit did not call the first respondent to provide an explanation for what the fourth respondent refers to as "*the near total inaction of the NPA.*"

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Ad paragraph 142

6.3 I have already dealt with the contents of paragraph 142 elsewhere above in this supplementary answering affidavit.

Ad paragraph 143

6.4 The contents of paragraph 143 clearly reveal the fourth respondent's motive in painting the first respondent in a negative light. The motive is to obtain answers to the criticism levelled against the first respondent which the fourth respondent would then use to call "*for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.*" This is clearly wrong.

6.5 The contents of the affidavits filed in this application for purposes of opposing the relief which the applicant seeks in this application were clearly not intended to defend the first respondent and "*those prosecutors and police*" who allegedly failed in their duties to uphold the rule of law. For this reason, it would be wrong to create an impression that such affidavits also constitute a defence against an allegation that "*those prosecutors and police*" failed in their duties to uphold the rule of law.

6.6 For the avoidance of any doubt, I expressly state that the purpose of this affidavit and the other affidavits filed on behalf of the first respondent in this application are not intended to be an answer and shall not be used as an

answer to the unfounded allegation that "*those prosecutors and police*" have failed in their duties to uphold the rule of law.

Ad paragraph 144

6.7 The contents of paragraph 144 do not require a further response from the first respondent.

Ad paragraph 145

6.8 The contents of paragraph 145 do not justify the relief which the applicant seeks in this application and it is not clear to me as to why the fourth respondent chose to include them in his answering affidavit, the purpose of which is, so I thought, to oppose the relief which the applicant seeks.

Ad paragraph 146

6.9 The affidavit of the investigating officer, Captain FN Mathipa is attached herewith as **SA3 (i)** and the unopposed bail application as **SA 3 (ii)**.

Ad paragraph 147

6.10 The contents of paragraph 147 do not require a further response from the first respondent other than to state that the fourth respondent himself has already told the Court of the reasons why this case was not investigated and prosecuted earlier than now. It accordingly does not serve a purpose to repeat the same contentions differently.

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Ad paragraph 148

6.11 The affidavit of Macadam referred to in my main answering affidavit is the one now attached hereto as SA1.

6.12 I stand by what is stated in my main answering affidavit.

6.13 In conclusion, I state that the contents of the fourth respondent's answering affidavit do not justify any of the criticism levelled against the third respondent and the National Prosecuting Authority and also do not justify the granting of the permanent stay of prosecution relief which is sought by the applicant in this application.

6.14 In the premises, I persist that the application for a permanent stay of the criminal prosecution instituted against the applicant ought to be dismissed with costs including the costs consequent upon the employment of two counsel.

WHEREFORE, I pray that it may please the Court to dismiss the application with costs including the costs consequent upon the employment of two counsel.

JACOBUS PETRUS PRETORIUS

43

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I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 4th day of February 2019, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

Ally S. Murray Captain

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

OFFICE:

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FW de Klerk FOUNDATION

THE NPA'S DECISION TO PROSECUTE 'APARTHEID ERA' CRIMES

FW de Klerk Foundation Editorial

On 27 June the NPA welcomed the judgement of the Supreme Court of Appeal to dismiss the stay of prosecution application of 82-year-old Joao Rodrigues. Rodrigues had been charged with the murder of Ahmed Timol, an SACP activist, in October 1971. It added that the judgement aligned with its commitment - and the commitment of the Hawks - to prosecute perpetrators of apartheid era crimes - where there was sufficient evidence.

The NPA announced that it was expanding its capacity to deal with the 53 cases that it had already identified. It was setting up a specialist unit to deal exclusively with apartheid era prosecutions and would be appointing former prosecutors and 34 detectives for this purpose.

All of this ignores entirely the fact that amnesty was, from the outset, a *sine qua non* for the negotiations between the ANC and the National Party government. The NP government originally proposed that the Norgaard principles should be used to determine who should reasonably be granted indemnity or amnesty. The principles had been successfully applied in Namibia and allowed amnesty for all those who had committed offences in the pursuit of political objectives - unless they had made use of egregious or disproportionate violence. However, the NP government was forced to abandon the Norgaard principles as the ANC's price for returning to negotiations after 26 September 1992. The ANC demanded the release of all its cadres who were still in prison and insisted that political motive should be the only requirement.

The NP government adopted the Further Indemnity Act in November 1992 in terms of which the only substantive requirement for indemnity was political motive. 1 477 people were subsequently released from prison - the vast majority of whom were members of the ANC and allied organisations - and many of whom had been convicted for "necklace murders" and other egregious crimes.

One of the greatest failures of the NP's negotiators was their inability to conclude a comprehensive amnesty agreement before the 1994 elections. However, the final paragraphs of the 1993 Constitution stated peremptorily that "amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past' (emphasis added).

Nevertheless, the 1995 Promotion of National Unity and Reconciliation Act circumvented the clear intention of the interim Constitution and set conditions for amnesty that were far more onerous than those that the ANC had insisted on with regard to the release of its own supporters in terms of the Further Indemnity Act of 1992. The Act set a much higher standard for amnesty than political motive by requiring applicants to "make full disclosure of all the relevant facts relating to acts associated with a political objective" and to "comply with additional requirements set out in the Act." It was then up to the TRC's Amnesty Committee to decide whether or not the applicants had made a full disclosure. It was on this basis that the Committee refused amnesty to Janus Walusz and Clive Derby-Lewis for the assassination of Chris Hani - which, although reprehensible, had indisputably been a political act.

Because of an informal agreement between the ANC leadership and former operatives of the pre-1994 government, the NPA suspended its prosecutions of apartheid era crimes. However, in June 2019, in another matter affecting Rodrigues, the Gauteng High Court instructed the National Director of Public Prosecutions, Adv Shamila Batoyhi, to enquire whether improper influence had been brought to bear on the NPA in suspending apartheid era prosecutions.

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The result would appear to be the NPA's recently announced decision to proceed with the prosecutions. However, when it embarks on this course the NPA should give very careful consideration to the constitutional requirement that "everyone is equal before the law and has the right to equal protection and benefit of the law."

It would accordingly be unacceptable to apply one standard to "apartheid era crimes' and another to crimes perpetrated by anti-government organisations. And yet there is not the slightest indication in the NPA's statement that it has any intention whatsoever to prosecute the latter. This is despite the fact is that the vast majority of the approximately 22 000 people who were killed in political violence between 1984 and 1994 died in the conflict between the ANC and the IFP or as a result of the actions of other anti-government organisations.

The struggle has been meticulously documented in Anthea Jeffery's "People's War" - in which she exposes the ANC's campaign to eliminate its revolutionary competitors. Crimes committed by the ANC and other anti-government organisations included the assassinations of more than 400 IFP leaders and the necklace killings of more than 560 people. They also included the killing of 53 IFP protesters outside the ANC's headquarters at Shell House on 28 March 1994. Little or nothing has been done to investigate these killings or to bring those responsible to account. Yet each of these deaths also left grieving families searching for closure.

The NPA should also recall that amnesty was not granted to 27 senior ANC leaders - many who are still alive - who had applied unsuccessfully to the TRC for collective amnesty and who were in overall command of the ANC's revolutionary activities.

If the NPA chooses to prosecute only those from the anti-revolutionary side it will be in clear breach of its constitutional obligation to exercise its functions 'without fear, favour or prejudice.' If it does not act in a scrupulously even-handed manner, it will be difficult to avoid the perception that the trials that would ensue would be political trials.

The question arises why the NPA is so intent on pursuing a course of action that is likely to polarize even further our deeply divide society? Why is it committing so many of its limited resources to raking over crimes that occurred more than 27 years ago - instead of the prosecuting the rampant corruption that is tearing the country apart - or trying to bring to justice the killers of the 21 325 people who were murdered last year (i.e., almost the same number as those who were killed in the political struggle between 1984 - 1994)?

One-sided prosecutions would be irreconcilable with the 1993 Constitution's call for 'understanding but not for vengeance'; reparation but not for retaliation;' and 'ubuntu but not victimisation'.

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NATIONAL 28 JULY 2021

A renewed commitment to TRC cases

By Tyman Smith



Justice delayed: A poster outside the Central Methodist Church in Johannesburg calls on people to share their stories at the Truth and Reconciliation Commission. (Photograph by Gallo Images/ Rodger Bosch)

When the Supreme Court of Appeal dismissed former security police administrative clerk João Rodrigues' attempt to obtain a stay of prosecution for his involvement in the 1971 murder of Ahmed Timol on 21 June, it led to a flurry of activity in the usually stagnant waters of apartheid-era justice.

It also led to various groups representing the interests of families of apartheid victims making heated accusations against former president FW de Klerk.

Rodrigues predictably made submissions to the Constitutional Court in a final bid to never stand trial for his involvement in Timol's death and its subsequent cover-up by the security police.

But the National Prosecuting Authority (NPA) and the Directorate for Priority Crime Investigation (Hawks) released a rare statement on 25 June, the anniversary of the 1985 murders of the Cradock Four, addressing several issues related to Truth and Reconciliation Commission (TRC) cases.

In it, national director of public prosecutions (NDPP) Shamila Batohi and Hawks head Lieutenant General Godfrey Lebeya welcomed the appeal court's decision and pledged to "move ahead to prosecute Rodrigues and other perpetrators of apartheid-era crimes, where there is sufficient evidence, and where prosecutions have not taken place for various reasons".

Batohi has been transferring TRC cases to the directors of public prosecutions "in the regions where the crimes were committed, with support from a national office capacity". This approach has "increased the number of prosecutors available to handle these complex cases" and TRC cases under investigation have jumped from four to 53 in the past year, she said.

To bolster investigative capacity, the NPA "is in the process of setting up a specialist unit to deal exclusively with these matters, and will be appointing former experienced prosecutors in offices which require additional capacity", it said. The Hawks have also "embarked on the process to establish a dedicated team by a recruitment drive to re-enlist a number of competent and highly skilled former police officials with a wealth of knowledge in the detective environment".

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investigation in the past three months. The Hawks envisage concluding these investigations by the end of 2021.

The NPA and the Hawks cautioned that "the apartheid atrocities under consideration date back to the early 1960s. The health condition and circumstances of the witnesses and suspects, and nature of available evidence, further complicate the investigation and prosecution of these cases. The challenge in investigating these cases cannot be underestimated."

"Time is not on our side," said Batohi. "We have a small window to address this. Loved ones need to see justice being done, and justice will not be served until we act decisively against those that the NPA was once powerless to hold to account."

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Wary and sceptical

The allegations of political interference by high-ranking officials in the Thabo Mbeki regime in the prosecution of TRC cases are much reported. But the NPA's statement reveals little about how it plans to deal with those alleged to have helped deny justice to victims' families for almost two decades. "This is a complex and complicated matter and the NDPP has been engaging with the minister of justice to determine the most effective course of action," is all the statement says.

The Foundation for Human Rights (FHR) and the Apartheid Era Victims' Family Group (AVFG) welcomed the statement but are wary of some aspects of Batohi's approach.

The first is her strategy of sending cases for investigation to regional directors of public prosecutions to investigate. The FHR warned on 28 June that the NPA's "decentralisation policy ... has proven disastrous by causing delays in investigations and prosecutions ... because inter aliathe responsibility to make decisions ... has been shifted around to different offices without clarity as to who has the ultimate authority to make decisions". The FHR has suggested that the NPA's new capacity should fall "under a special director appointed by the president, with the sole responsibility to oversee and manage the TRC cases".

The second relates to the former police officers "as the families of apartheid-era victims are rather sceptical of the appointment of 34 supposedly experienced detectives", said the AVFG. "Based on our past experience with the Hawks, we demand a transparent process for the appointment of these investigators. The public is entitled to know the identities and history of candidates, in particular, whether any of them are or were previously involved in apartheid-related structures."

Contentious phrase

The FW de Klerk Foundation published an editorial on 5 July in response to the NPA and Hawks announcement. It rehashes what led to the amnesty process adopted by the TRC and says the ANC used the Further Indemnity Act of 1992 to ensure the release of 1 477 of its cadres, many of whom "had been convicted for 'necklace murders' and other egregious crimes" under the sole condition that their actions had been politically motivated.

The editorial further bemoans that "one of the greatest failures of the NP [National Party] negotiators was their inability to conclude a comprehensive amnesty agreement before the 1994 elections". It also says that the 1995 Promotion of National Unity and Reconciliation Act, which laid the foundations for setting up the TRC, "set conditions that were far more onerous than those the ANC had insisted on with regard to the release of its own supporters [in 1992]".



Members of the ANC give testimony in Cape Town about human rights abuses committed during apartheid. (Photograph by Gallo Images / Oryx Media Archive)

It then proffers that "because of an informal agreement between the ANC and former operatives of the pre-1994 government, the NPA suspended its prosecutions of apartheid era crimes".

Some view this sentence to reveal that De Klerk has knowledge of this "informal agreement", long rumoured but never backed up by evidence, between the new guard and the old.

Good Party secretary general Brett Herron said De Klerk's reference to the agreement "confirms one of South Africa's most disgraceful secrets" and that it "further confirms that the NPA was captured long before the term 'state capture' rose to the prominence it has, and that the ANC had accomplices in the genesis of our current capture pandemic, the party of apartheid led by De Klerk". Herron described the editorial as "a thinly veiled threat to the NPA to stay in its lane or the ANC will face consequences". He added that "what the De Klerk Foundation really wants is for the terms of its informal amnesty deal with the ANC to be upheld by the NPA".

Disingenuous ending

FW de Klerk Foundation chairperson David Steward was at pains to point out that "FW de Klerk is the emeritus chair ... [and] is not involved in the day-to-day management of the foundation, or in the production of its articles and editorials".

Steward also claimed that the reference to an "informal agreement" was not based on any information that De Klerk had offered to the writers. Rather, it was a perhaps poorly worded interpretation of a paragraph from the judgment the high court handed down in the Rodrigues matter in 2019. The paragraph reads: "All investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the NPA's prosecutorial decision-making."

Steward emphasised that the "foundation was simply referring to the reference from the

The editorial ends disingenuously and with little regard for the long struggle for justice and answers by victims' families. It asks why the NPA is "so intent on pursuing a course of action that is likely to polarise even further our deeply divided society" and questions the NPA committing its "limited resources" to "crimes that occurred more than 27 years ago" rather than recent corruption and murders.

There have been repeated calls since the end of the TRC process in 2003 for De Klerk to be called to account for his alleged involvement in apartheid-era crimes. He has come under fire for statements made last year in which he refused to recognise apartheid as a crime against humanity.

But Steward said the foundation is "not at all" concerned that the NPA announcement will have implications for a prosecution of De Klerk. Rather, he said, the reasoning behind the publication of the editorial is to remind the NPA that if it "does indeed decide to prosecute 'apartheid-era crimes', it must investigate and prosecute crimes committed by all sides for which amnesty was not requested or obtained".

Potential precedent

While the storm around the editorial raged, Rodrigues' lawyer, Ben Minnaar, petitioned the Constitutional Court to overrule the appeal court's decision. He claimed it infringes on Rodrigues' constitutional right to a fair trial.

Minnaar wants the court to deal with the factors that caused the 47-year delay between Timol's death and the NPA charging his client in 2018. He said the appeal court only considered the political interference between 2003 and 2017.

Minnaar also wants more detail about that political interference to be made available to his client, and reiterated Rodrigues' deteriorating health.

The families view Rodrigues' Constitutional Court appeal as the last, desperate attempt of a man who has questions to answer. They have also pointed out that his appeal will mean further expense for taxpayers.

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other perpetrators waiting to follow in his footsteps. A ruling by the court could go some way to revealing necessary further details of political interference, while calling those alleged to have facilitated it to account once and for all.

It would also demonstrate a commitment to finally fulfilling the promises made in the Constitution that those who did not apply for or were not granted amnesty by the TRC will ultimately have to face the consequences of their actions, whether they're a lowly former security police administrative clerk or the former occupant of the highest office in the country.

This article was first published by *New Frame*.

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Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing

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Justice and Constitutional Development

08 December 2021

Chairperson: Mr G Magwanishe (ANC)

Meeting Summary

Video

In a virtual meeting, the Committee met with the Ministry of Justice and Correctional Services and the National Prosecuting Authority (NPA) to be briefed on the resignation of Adv Hermione Cronje, Head: Investigating Directorate (ID), and the reasons for the NPA missing the deadline for issuing a prosecutorial decision on the Cradock Four matter.

The Minister said the challenges faced by the NPA and the ID were immense, but not insurmountable. The Ministry had supported the ID in its engagements with National Treasury and the Department of Public Service and Administration in terms of office accommodation and personnel. The Directorate for Priority Crime Investigation had appointed 34 investigators to deal exclusively with the Truth and Reconciliation Commission cases.

Members asked for details on the challenges faced by the ID and what was being done to address them. Why had there been delays in acquiring a new building for the ID? Was the ID functioning optimally, as almost three years had passed without any progress having been made? Was there any truth to claims of a secret agreement during the end of apartheid negotiations, and if there was, whether it hampered the prosecution of Truth and Reconciliation Commission cases.

The NPA said that Adv Cronje's reasons for resigning, which derived from a variety of factors which would not be disclosed, were understood, and that her resignation did not leave the NPA and the ID in a crisis, but rather that the ID was well-poised for the future. The ID had over 120 staff and the number would hopefully be increased to 200 by the end of 2022.The annual budget of the ID was approximately R107 m, which was expected to grow to R180m in 2022. The ID had begun onboarding resources from the State Capture Commission to manage the process of submitting the report to the President. The Deputy National Director of Public Prosecutions: Asset Forfeiture Unit would support Adv Cronje and her senior managers during the transition process. The NPA would simultaneously begin the process of searching for a new Head of the ID in close consultation with Minister Lamola. The appointment process would be rigorous, and there would be no leadership gap during the transition phase.

The NPA said its commitment to make a prosecutorial decision in the Cradock Four case by 2 December 2021 had been dependent on investigations being completed. When it became clear that the deadline would not be met, a letter was sent on 1 December to indicate this. Unfortunately the letter did not reach the lawyers.

Members asked about institutional issues which had put the NPA in a precarious position. The salary discrepancies between senior prosecutors and other members were raised, as well as why so many positions had yet to be permanently filled. Members requested timelines to be provided on the resolution of the Cradock Four matter, and for tangible progress to be presented on other Truth and Reconcillation Commission cases. Members asked for reasons for Adv Cronje's resignation and an explanation of the claims of interpersonal tension and other conflicts mentioned by Adv Cronje in her previous Committee briefing. Did the NPA have a long-term plan for the ID? Members asked for an update on the progress in migrating resources and equipment for the digital forensic laboratory from the Zondo Commission.

Meeting report

The Chairperson welcomed everyone to the meeting. He said that Mr Ronald Lamola, Minister of Justice and Correctional Services, had asked to be released after making his presentation in order to attend a Cabinet meeting. He explained that the Committee had requested a briefing on two issues, the first of which was the resignation of Adv Hermione Cronje, Head: Investigating Directorate (ID), National Prosecuting Authority (NPA), and the second of which was the NPA's failure to meet the deadline in relation to the Cradock Four matter. In light of this, he requested the Minister to present before Adv Shamila Batohi, National Director of Public Prosecutions (NDPP), NPA, so that he could be released.

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Minister's briefing

Minister Lamola thanked the Chairperson for inviting the Ministry to the briefing. He said that he would be present in the meeting until 10 am, at which point he would have to leave to present an item at a Cabinet meeting. He said that Mr John Jeffery, Deputy Minister of Justice and Constitutional Development, would remain in the meeting.

The Department of Justice and Constitutional Development (DoJ&CD) had tried its best to give the necessary support for the establishment of the ID as per the President's directive in 2019. The ID was set up to investigate common law offences, including fraud, forgery, theft, and any offence involving dishonesty. The ID was required to attend to statutory offences, such as organised crime, money laundering, and offences related to corruption in the public service. The ID investigated any unlawful activities relating to serious high-profile corruption matters arising from various commissions of inquiry or from those cases referred to by the NDPP.

He had been briefed on the institutional requirements of the NPA and the ID, which had left him believing that the challenges faced would be difficult, but not insurmountable. This task would be to help rebuild the NPA and ensure the institution was able to restore public confidence in the justice system. The NPA had been able to fill the vacant positions at senior management level. The ID had been assisted to acquire additional personnel and a new building. The terms of reference of the commission of inquiry had been amended to help the ID. The Ministry had also provided support to the ID in its engagements with National Treasury and the Department of Public Service and Administration (DPSA).

He said he would leave the matter of Adv Cronje's resignation to Adv Batohi. With regard to the Truth and Reconciliation Commission (TRC) matters, the Directorate for Priority Crime Investigation (DPCI) had appointed 34 investigators to deal exclusively with those cases, and the NPA had obtained approval from the DPSA to designate 23 prosecutors exclusively to TRC cases which had to be prosecuted within a period of three years.

A request had been made to appoint an investigative judge on the matter relating to alleged interference by the executive in terms of investigations into the TRC. Former Justice Kate O'Regan had been approached, but she was unavailable to assist, and hence this search was still ongoing. Hopefully the judge would be appointed before the end of 2021. There was a process of issuing the memorandum regarding the resignation of Adv Cronje to the Ministry, whereafter it would be sent to the President.

The Chairperson asked the Members if they had any questions to ask Minister Lamola before he left the meeting.

Discussion

Adv G Breytenbach (DA) asked Minister Lamola to be more specific regarding what the challenges were in respect of the ID and what he had done to address those challenges. She noted that it had taken the ID nearly three years to finally acquire and move into the new building. She asked if Minister Lamola was suggesting that two or three Cabinet Members could not engage and sort out this issue in less than three years for an institution that was launched to much fanfare and was heralded by Minister Lamola as being the answer to corruption in South Africa. She asked what made the accommodation that the ID had received suitable and why it was so difficult to finally give them accommodation.

She noted that the ID had eroded public confidence. She was sure that a lot of groundwork had been done, but the public did not want to hear that, they wanted to see results and consequences for actions. The ID had not taken a single case to court in its existence. How would that restore public confidence? How was the ID assisted with obtaining personnel? What access did the ID have to digital forensic skills, and how had the DoJ&CD assisted with this? As far as the TRC prosecutions were concerned, the ratio of investigators to prosecutors was unacceptable. The TRC investigations and prosecutions were thus poorly capacitated.

She asked when Minister Lamola was approached to appoint an investigative judge. There were so many retired judges, so she could not imagine why this appointment was taking so long. She asked for more clarity regarding this.

The Chairperson noted that due to time, some of the responses to the questions would have to be answered by the Deputy Minister.

Mr W Horn (DA) said that Minister Lamola had previously, and constantly, referred to the role the Ministry had played in relation to the ID and the NPA as "the giving of support". This was concerning, because looking at his constitutional responsibilities, Minister Lamola had final responsibility for the NPA, which meant that he had to play a more active role. Minister Lamola had to explain why he thought in providing merely reactionary support he was discharging these responsibilities and duties in respect of the NPA. Further, considering that Minister Lamola was the poster model of this government's fight against corruption, he had to explain how he had discharged his duties and functions in terms of the National Prosecuting Authority Act 32 of 1998.

He asked if Minister Lamola had, at some stage since the ID had been established, engaged with the ID and taken the entity to task about the slow pace at which matters had progressed. In light of Adv Cronje's resignation, had Minister Lamola scrutinised the dysfunctionality of the ID? What had he done to ensure that the ID became functional? He had to do more than merely support the entity so as to adequately discharge his duties.

Mr G Hendricks (Al Jamah-Ah) asked if Minster Lamola had been hampered by decisions taken at the Convention for a Democratic South Africa (CODESA) not to prosecute the TRC cases. He said Minister Lamola had to be honest with South Africa. It seemed as though National Treasury was complicit in that they failed to support Minister Lamola by not giving sufficient funds to ensure the functioning of the ID and the NPA.

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He asked if Minister Lamola could provide a list of persons of interest in the TRC cases and whether those persons could be brought to appear in court and provide evidence, as many interested parties were passing away before being able to receive justice. The lack of prosecutions, and the slow pace with which the TRC matters were being dealt with was a betrayal of the TRC. The TRC cases took priority over modern corruption cases.

Ms N Maseko-Jele (ANC) appreciated the work that had been done, even though much more work still had to be done. She asked if Minister Lamola understood the feelings of families affected by the TRC cases, because there had been so many delays. The public had lost confidence in justice as a result of the slow process, with many interested persons dying without receiving justice. She asked what criteria the DoJ&CD was using in selecting the so-called serious cases.

She noted that with the resignation of Adv Cronje, more time would be lost in dealing with the TRC matters. She asked when the Committee could expect tangible progress, especially with regard to the TRC cases.

Mr S Swart (ACDP) said that it was known that the Zondo Commission would give its report at the end of December. It was also expected that the NPA would then be on the receiving end of an immense amount of work. Hence, he asked whether Minister Lamola, in light of prior capacity complaints, ensure that the ID and the NPA were properly capacitated to do the required work. How long would it take for the investigative judge to be appointed and complete his or her work? Was there a timeframe on this?

Mr R Dyantyi (ANC) suggested that the NDPP provide their presentation before the Members receive a response from either Minister Lamola or the Deputy Minister so that there could be an expansive discussion, because the exercise of rapidly throwing questions at Minister Lamola and expecting prompt responses was not appropriate. He said it was better to get into a discussion after receiving both briefings.

Response

Minister Lamola said that it unfortunately seemed as though some of the Members had called him to the meeting for politicking rather than a civilised discussion. This sort of questioning was not helpful. The ID was in the process of being established when he had arrived. As such, support had been given, including ensuring that the ID operated in accordance with the DPSA regulations, in terms of personnel. The digital forensic laboratory [assembled for the Zondo Commission] was in the process of being migrated [to the ID]. Engagements had been conducted. He said the DPCI had been struggling to acquire and provide sufficiently experienced investigators to the ID, hence work had to be done with the limited resources. But, there were constant engagements with the DPCI to get more investigators

He admitted that the ID had not been able to operate optimally, but this was not unusual for entities which had to work on such complex matters. The necessary engagements had been done, and reports were requested when appropriate. Hence, progress reports had been received, and the Department had done the necessary political oversight.

On the issue of the new building, if Ministers had procured the building for the ID then the Committee would have called those Ministers to appear and face scrutiny for procuring that building. The Director-General of the DoJ&CD was instructed to engage with National Treasury, the NPA, and all the relevant stakeholders to ensure that the building was procured. He said that it had taken less than two years for the ID to acquire the building, because within the first year there was not a lot of staff which required a separate building. Further, the Covid-19 pandemic resulted in the need for a building also diminishing, but the building was nonetheless procured through the proper channels. He was sure that Adv Breytenbach and Mr Horn knew that Ministers could not procure buildings for government entities.

On the TRC cases, there was new designated capacity for the cases. There were many reasons why these matters were not prioritised in the past, but there was now a focus on resolving those matters. The NDPP would be able to clarify the matters directly relating to those cases. He said that the question regarding what he had done to give effect to his duties in relation to the NPA was merely an attempt at immature political grandstanding, which he did not expect of Mr Horn. That question was not helpful nor necessary. There was no need to copy the EFF and say that he was a poster boy for the fight against corruption.

On CODESA, he was not aware of any agreements which provided that there would be no prosecutions of TRC matters. The NPA Act was clear with regard to what matters were to be prosecuted, and Adv Batohi could provide more detail on that. He understood the victims of the TRC matters frustrations. He had attended the Cradock Four memorial lecture, and had engaged with some of the victims. He had provided some insight into the progress of proceedings. It was hoped that the process going forward would be helpful to the victims, the community, and South Africa as a whole.

He said that the NPA had the necessary capacity to deal with the relevant matters, and Adv Batohi had been engaged with regard to starting to prepare for what would arise from the Zondo Commission. Hopefully, with the evidence given, the NPA could start to prepare itself for the issuing of the Zondo Commission report. In certain cases the Ministry approved specific cases brought by the NPA relating to investigations of high profile matters in order to speed up the processes.

The Chairperson thanked Minister Lamola for briefing the Committee and for responding to questions. He allowed Minister Lamola to leave the meeting and asked Adv Batohi to present.

National Prosecuting Authority briefing

Adv Cronje's resignation

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SAPA

PRETORIA July 14 - SAPA

FORMER SADF CHIEFS CALL FOR GENERAL AMNESTY

Three former SA Defence Force chiefs on Wednesday called for general amnesty to be granted to soldiers and officials from all camps who were involved in the apartheid struggle.

This was the only way to deal even-handedly with human rights violations committed by former SADF members and liberation fighters, they said in Pretoria through a spokesman, retired General Dirk Marais.

Citing what they labelled the shortcomings of the Truth and Reconciliation Commission, Generals Magnus Malan, Constand Viljoen and Jannie Geldenhuys called for legislation to allow for general amnesty.

They said they had urged the TRC earlier in the month to lend its support to this proposal in the interest of reconciliation.

"The TRC should at least recommend to the government that general amnesty be allowed in order to realise the original aims of the TRC."

A memorandum along similar lines was submitted to Justice Minister Dullah Omar last month.

Marais said it was by now commonly accepted that the TRC would not be able to deal with all human rights abuses committed between 1960 and 1994.

The generals said it would be impossible for either apartheid forces or liberation fighters to reveal each and every act committed by them over the 34-year period. This meant they could not possibly comply with the TRC's prerequisite of full disclosure in order to receive amnesty. Therefore, blanket amnesty would be a more viable option.

The generals also contended that the TRC had painted itself in a corner with regard to human rights violations committed outside South Africa during the apartheid years.

The TRC refused to probe abuses in former African National Congress camps in neighbouring states, saying legal limitations precluded it from guaranteeing indemnity from prosecution abroad for such violations.

"Yet, the TRC is critical of former SADF members using the same argument for not seeking amnesty for human rights transgressions committed in past cross-border raids," the generals said.

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They said this reinforced perceptions that the TRC was biased in favour of the African National Congress.

"The TRC's only escape will be to either investigate the ANC punishment camps or to promote the idea of general amnesty," the generals said.

Marais said deputy TRC chairman Alex Boraine last week reacted to the generals' call by saying the TRC would not make recommendations on policy issues.

"We are still awaiting a response from Mr Omar," Marais said.

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SAPA

CAPE TOWN 4 March 1999 - SAPA

REJECTION OF ANC AMNESTY HIGHLIGHTS FLAWS IN TRC LAW: FF

The Truth and Reconciliation Commission's decision to reject the amnesty applications of 37 senior African National Congress leaders opened up the possibility that they could now be prosecuted for their actions, Freedom Front leader Constand Viljoen said on Thursday.

If this was the case, and prosecutions did flow from the TRC's report, everyone had to be treated equally before the law, he said in a statement.

The FF reitterated its standpoint that the existing TRC law had many flaws and was causing polarisation in South Africa, Viljoen said.

The party repeated its call for the courts to be given the right to grant amnesty once the TRC's amnesty committee has ceased to exist.

People would then have to plead for amnesty in the courts, rather than pleading guilty or not guilty to committing acts under apartheid, Viljoen said.

The ANC leaders' amnesty applications were rejected by the TRC's amnesty committee on the grounds that they had been based on the notion of collective responsibility, and on their statement that they had not committed any offence in terms of the TRC legislation.

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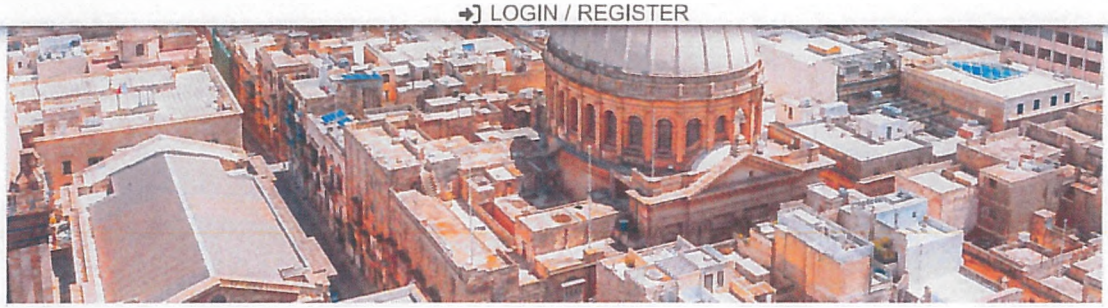
Generals, ANC members talk about amnesty

By Hannes De Wet

Retired military generals and top African National Congress figures recently reached agreement on a form of extended amnesty, former SA Defence Force chief General Jannie Geldenhuys said on Sunday.

They submitted proposals in this regard to the government a few months ago, he told Sapa in Pretoria.

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The recommendations resulted from talks that started about four years ago. A forum comprising senior ANC members and five former SADF chiefs conducted the deliberations.

These revolved around individuals who, for whatever reason, did not have amnesty for acts committed during the armed struggle against apartheid.

Geldenhuys, who took part in the talks, said: "We reached consensus. Our proposals provide for some form of indemnity which would be available to all parties that were involved in the armed struggle."

Geldenhuys declined to name the ANC members who served on the forum.

President Thabo Mbeki mentioned to parliament in March 1999 — while he was still deputy president — that amnesty ideas put forward by military generals needed to be discussed.

The amnesty issue came to the fore again earlier this month after Mbeki pardoned 33 Eastern Cape prisoners, including a number of individuals who have been denied amnesty by the Truth and Reconciliation Commission.

Government representative Joel Netshitenzhe at the time explained that the move to pardon the group was not a policy decision. It was in response to representations made by the prisoners.

He added a discussion by the government was on the cards on a general amnesty for prisoners convicted of crimes that might be politically motivated.

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The Justice Ministry has since said there would be no blanket amnesty.

The amnesty recommended by the forum of generals and ANC members provided for some exclusions, Geldenhuys said on Sunday.

"It would not apply to any individual who has committed deeds for his own financial or other gain or to satisfy his own objectives or needs," he said.

"All members of parties that were involved in the armed struggle should be equal before the law."

Geldenhuys would not elaborate on the nature of the recommendations, which he said were submitted to the Justice Ministry.

"I am not sure what path they have followed after that, and I cannot say what the precise status of the proposals are at present."

Justice Ministry representative Paul Setsetse said he was not aware of the matter. Presidential representative Bheki Khumalo also had no knowledge of recommendations by such a forum.

Several former SADF members, including those who were involved in cross-border operations, have opted not to seek amnesty from the TRC.

On the side of the ANC, the amnesty bid of a number of leading figures was refused by the TRC in 1999, partly because their applications did not relate to any specific act.

The group included Mbeki and his deputy Jacob Zuma.

Opposition parties at the time pointed out that the TRC ruling rendered these ANC leaders vulnerable to criminal prosecution and civil claims. – Sapa

Tags: Eastern Cape, Kwazulu Natal, Pretoria

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SAPA

JOHANNESBURG May 22 1999 - SAPA

MBEKI WANTS CHANGES TO TRC RULES ON AMNESTY

Deputy president Thabo Mbeki has asked for a review of the Truth and Reconciliation Commission legislation to allow people to be granted amnesty without having to apply as individuals, as is presently required, the Sunday Times reported.

Soldiers of the old SADF, those involved in violence in KwaZulu-Natal and members of political parties should qualify for such amnesty, Mbeki said in an interview with the Sunday newspaper.

He said that although the deadline for amnesty applications had passed, he had asked justice minister Dullah Omar to look into allowing "organisations and bodies" to be granted amnesty in cases where no perpetrators had come forward to seek indemnity.

Smuts Ngonyama, Mbeki's ANC communications chief, said a group of former SADF generals had told Mbeki that they would "come clean" and hand over the full details of all abuses sanctioned by the military, but only if they were assured they would qualify for amnesty.

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the appropriate course of action.'[83] Such statements will later be put into context with regard to the governmental perspective concerning its actual approach towards prosecutions.

In 2007, there were announcements made regarding yet another pardon process concerning liberation movement members convicted of political crimes related to the apartheid conflict.[84]

2. *Bargaining Over the TRC's Legacy*

In 2002, rumours on secret consultations between former generals of the SADF and the government were highlighted in the media.[85] The South African government and the ANC did indeed engage in secret talks and consultations with representatives of the SADF and the security police over a long period from the end of the TRC in 1998 until about early 2004. Two separate processes of consultations concerning the two factions of the former security establishment took place.[86] Details of the secret meetings were never disclosed to the public.[87] As will later be outlined, the common denominator of the talks was that a legislative solution should be reached on how to avoid prosecutions in the wake of the TRC. The consultations are indicative of the real motivations and political considerations of the government during the years after the end of the TRC in 1998 and also provide valuable background information for the evaluation of later developments.

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[83] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[84] *Presidential pardons in the spotlight* SAPA, Nov 15, 2007.

[85] M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 93; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

[86] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[87] P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

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2.1 *Consultations with the security police*

During and after the operation of the TRC, the Foundation for Equality before the Law occasionally conducted talks with the government concerning the amnesty proceedings and general questions of accountability.[88] Especially after the main work of the TRC was completed in 1998, consultations concerning post-TRC accountability were conducted, which mostly involved high-ranking members of the government. On behalf of the former apartheid state employees and the Foundation for Equality before the Law, former President F.W. de Klerk assumed a central role in the consultations. De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government. Apart from that the organisation was in contact with various other government officials and submitted proposals.

The Foundation for Equality before the Law's aim in the consultations was to find a solution to avoid the prosecution of former members of the security police who had not received amnesty. Allegedly, legislation for a general amnesty was never requested. A general amnesty would certainly have served the organisation's purposes in avoiding trials. However, it was clear that a general amnesty was not an option since it would have seriously damaged the TRC process and its scheme of conditional amnesties and would thus not have been feasible politically. Accordingly other legislative options had to be explored. After 1998, the Foundation for Equality before the Law initially advocated a procedure, which envisaged that indemnity from prosecution could be granted, if all details regarding the crime in question were disclosed. This would therefore have reproduced the TRC's precondition of amnesty subject to a full disclosure. The proposal was later altered so that the granting of indemnity would be dependent only on the crime in question falling within the legal ambit of section 20(1) of the TRC Act. This would mean that the act was associated with a political objec-

[88] Unless otherwise stated, the information laid out in this subchapter comes from an interview with Johan van der Merwe in Pretoria on 5 May 2006. The consultations were conducted in strict confidentiality. Apart from the broad framework, details concerning negotiations with security police members could thus not be provided.

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tive and was committed in the course of the conflicts of the past.[89] The proposal was quite similar to the indemnity laws of the early 1990s.[90] It was proposed that a full disclosure in terms of the TRC Act should not be required since the amnesty proceedings had shown that there were still many uncertainties as to when a full disclosure was in fact made.[91] According to the proposal, such indemnity proceedings should be conducted before a judge.[92]

Although among members of the Foundation for Equality before the Law the government had raised expectations that a solution according to the proposals was desirable, no agreement was reached. The talks continued until about 2004. The consultations had allegedly highlighted the government's lack of political will to adequately react to the TRC's recommendations on prosecutions, which also explains the huge delay in initiating trials.[93]

2.2 *Consultations with the generals*

More or less concurrently with the consultations with the police representatives, starting in 1998, the government conducted talks with a group of high-ranking former generals of the SADF.[94] Initially, the former chief of the SADF, General Constand Viljoen[95] was approached by one of the leading members of the ANC and government at that time, Jacob Zuma,[96] with the aim of consulting over questions of criminal

[89] E-mail from Johan van der Merwe (May 31, 2006).

[90] See *supra* Chapter 2 note 297.

[91] E-mail from Johan van der Merwe (May 31, 2006).

[92] Ibid.

[93] Interview with Jan Wagener in Pretoria (May 16, 2006).

[94] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[95] After his career in the SADF, Viljoen went into politics as the co-founder and leader of the right-wing Afrikaner party *Vryheitsfront* (the predecessor of the Freedom Front Plus) and was a member of parliament (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 83–84 and 302–3).

[96] The later deputy President of South Africa was at the time mainly involved in regional politics of his home province KwaZulu-Natal (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317–18).

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accountability in the wake of the TRC.[97] Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the *Kontak Buro*,[98] who were, thus, already working intensely on amnesty issues and prosecutions. He immediately referred Zuma to the network group of generals around Geldenhuys.[99]

2.2.1 *The process of meetings*

General Geldenhuys agreed to meet with Zuma. A series of frequent meetings, negotiations and consultations ensued from 1998. The main process of consultations was conducted over four years until early 2003.[100] A small number of meetings, however, infrequently continued until 2004.[101] The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms.[102] The talks were mediated and facilitated by Johannesburg businessman Jurgen Kögl, who is closely connected to leading ANC members, especially to Jacob Zuma. All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.[103]

Zuma was asked to conduct the talks on behalf of the government or ANC.[104] Apart from him, various other high-ranking members of the ANC, such as the then Minister of Justice Penuell Maduna or Mathew Sposa, Sidney Mufamadi and Charles Nqakula also participated occasionally. On various occasions Thabo Mbeki was also present, as Vice

[97] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[98] See *supra* Chapter 3(1.1.2).

[99] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[100] Interview with Jurgen Kogl in Johannesburg (May 12, 2006).

[101] Ibid.

[102] Interview with Jurgen Kogl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[103] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[104] Interview with Jurgen Kogl in Johannesburg (May 12, 2006). Since in practice the distinction between ANC and government concerning the negotiations was often blurred, the two expressions will be used synonymously.

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President and later in his capacity as the President.[105] On the side of the generals, Jan Geldenhuys assumed a leading role. He participated along with two to four other generals belonging to their support group. Both sides were accompanied by legal advisors. The main process of consultations came to an end in or about early 2003. Only as a matter of courtesy did a few meetings continue to take place until 2004.[106]

2.2.2 *Motivation of the government*

The main catalyst for Zuma's approach to the generals was the still very volatile political situation in KwaZulu-Natal, which was due to prolonged political tensions between supporters of the ANC and IFP during the late 1990s.[107] Zuma was at that time successfully conducting mediation and appeasement efforts between the two political factions of the ANC and IFP in order to contain possible fresh occurrences of violence.[108] The question of accountability for political crimes in the wake of the TRC was considered to be a critical issue in this regard.[109] As a great amount of politically motivated human rights violations had occurred in the conflict between IFP and ANC, especially during the negotiation period between 1990 and 1994, and considering that many IFP members accused of such crimes had not applied for amnesty, it was feared that the release of the TRC Report and prosecutions in its wake could stir up conflict again and be a constant source of unrest in the region.[110] On top of that, the second democratic elections were imminent and it was crucial to avoid new conflicts flaring up.[111] The initial intention was, thus, to create an amnesty scheme which would specifically cover the political crimes that happened between ANC and

[105] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[106] Interview with Jürgen Kogl in Johannesburg (May 12, 2006).

[107] Ibid.

[108] P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317. See also *supra* Chapter 1(2.).

[109] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jurgen Kogl in Johannesburg (May 12, 2006).

[110] Interview with Jürgen Kogl in Johannesburg (May 12, 2006).

[111] Telephone interview with Jurgen Kogl (June 14, 2006).

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IFP supporters in KwaZulu-Natal.[112] Yet it was clear that, regarding the constitutional framework and the political implications for the TRC amnesty scheme, a purely local solution would be almost impossible to implement. The generals also categorically refused to support a regionally confined amnesty process.[113]

They were contacted on this specific issue for various reasons. According to Kögl, the government intended to ensure support of other influential groups and important role-players of the apartheid regime, such as the generals, in order to put any possible solution, even if initially mainly focussing on KwaZulu-Natal, on a wider national basis.[114] The generals were already dealing with amnesty issues, had legal expertise, and as such, were relevant candidates to be canvassed for such support.

There was also a range of other specific reasons why the generals were contacted. According to Kögl, one reason for the government's initiative was the SADF's, and therefore the general's alleged involvement in the KwaZulu-Natal conflicts between the IFP and ANC.[115] During the TRC process the former top command of the SADF was accused of having fuelled the conflict between the ANC and IFP during and before the negotiations towards a transition to democracy, in order to weaken the position of the ANC. Allegations were made that weapons and expertise had been supplied to Zulu fighters. There were strong signs that a so-called "third force", established and steered by the security forces, had fuelled the atrocities committed by IFP supporters against ANC supporters, not only in Natal but also to a great extent in the Transvaal areas.[116] There were strong indications of SADF involvement in such activities, such as had been thxe case when weapons were supplied to

[112] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jurgen Kögl in Johannesburg (May 12, 2006).

[113] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[114] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[115] Telephone interview with Jürgen Kögl (June 14, 2006).

[116] See *TRC Report*, vol. 6, s. 4, appendix, paras. 1–43; *TRC Report*, vol. 2, chap. 7, paras. 497–551; *TRC Report*, vol. 5, chap. 6, paras. 126–29.

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the Inkatha Caprivi trainees.[117] Geldenhuys and other generals had been charged in 1995 for their alleged involvement in these Caprivi activities and the KwaMakutha massacre.[118] The government, when approaching the generals, was mindful of the fact that the SADF had supplied the Zulu fighters with weapons on a large scale and that the locations of a number of the hidden weapons caches, which had been established in the region during the last apartheid years, remain as yet unknown.[119] Government officials were wary that the generals could still possess knowledge of such still hidden and unknown weapons caches, established during the late 1980s and early 1990s, that they could, thus, still exercise negative influence on the peace process between IFP and ANC and that they could generally, through the possible third force networks, in some way thwart appeasement attempts or contribute to a re-ignition of the conflict.[120] These factors were allegedly a major reason for integrating the generals in any future approach to post-TRC accountability, to contain their potentially negative influence.[121] Such considerations are also clearly indicated in the aforementioned speech by President Mbeki.[122]

It was also considered that the TRC process suffered from a lack of sufficient findings on SADF activities, especially concerning those that took place in South Africa.[123] Very few SADF members had applied for amnesty, despite the fact that the SADF was involved in many gross human rights violations.[124] The SADF leadership practically refused

[117] *TRC Report*, vol. 6, s. 4, appendix, para. 18.

[118] See *supra* Chapter 1(4.).

[119] Telephone interview with Jürgen Kögl (June 14, 2006).

[120] Ibid.; Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[121] Ibid. Whether the generals really had any potential to thwart the appeasement attempts in KZN remains unclear. Geldenhuys insists that the generals neither would engage in any kind of violent activity nor would they have any special knowledge of weapons caches or have the resources to exercise negative influence on mediation efforts in KwaZulu-Natal.

[122] See text accompanying *supra* Chapter 3 note 81.

[123] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Telephone interview with Jürgen Kögl (June 14, 2006).

[124] *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

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completely to cooperate with the TRC. There were no disclosures made on the involvement in violence during the negotiation period.[125] In this regard the TRC also referred to certain networks with access to weapons and resources.[126] As it was unable to establish the extent of such networks, the TRC stated that it would be essential to investigate the involvement of the police and military in third force activities more closely.[127] The government had this in mind when it approached the generals. The aim was also to work out proposals to satisfy the generals' desire to avoid prosecutions of SADF members and to create mechanisms for cooperation and disclosures on still uncovered secret SADF activities, in order to compensate for the lack of TRC findings in this regard.[128]

Another factor was the government's fear that South Africa could be exposed to claims for reparation and damages by countries, which had been attacked by the apartheid state.[129] The territorial integrity of various neighbouring countries had frequently been violated by illegal invasions of the SADF.[130] Angola, for instance, suffered enormous damages due to the war that was waged by South Africa and due to the massive support the apartheid government provided to the rebel movement UNITA.[131] Apparently, during the late 1990s neighbouring governments had discussed the issue of reparation claims against South Africa concerning the activities of the SADF. The government, thus, tried not to fuel such discussions by prosecuting SADF members for

[125] Ibid., s. 4, appendix, para. 7.

[126] Ibid., para. 33.

[127] Ibid., paras. 42–43.

[128] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[129] The TRC found that the military strategy of South Africa during the times of Apartheid was guided by the principles of pre-emptive interventionism and counter-revolutionary warfare (*TRC Report*, vol. 2, chap. 2, para. 6). It further for instance found that the SADF committed a great amount of gross human rights violations e.g. in its war against Angola (*TRC Report*, vol. 2, chap. 2, para. 72).

[130] *TRC Report*, vol. 2, chap. 2, para. 48.

[131] Ibid., paras. 70–72.

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the atrocities caused in other countries.[132] In this regard, the aim was to make sure that full-scale criminal trials did not go ahead.

Yet another aspect was that the government tried to avoid a drain of military competence and intelligence from South Africa to other African countries.[133] In the process of establishing an effective army for the new democratic South Africa, it was absolutely vital to ensure the support and expertise of former officers and generals of the apartheid state's SADF. Moreover, a number of other African countries were apparently very keen to engage officials of the SADF as advisors on improving their respective armies.[134] The South African government thus wished to avoid former SADF generals and military experts being driven away from South Africa, should SADF activities be investigated and tried on a large scale.[135]

Furthermore, the intention was to avoid setting precedents concerning criminal liability for military operations.[136] The army of the new democratic South Africa, the SANDF, at that time had increasingly become involved in peace keeping and military operations throughout Africa. The government was concerned that trials concerning military operations of the former apartheid-state's defence force, the SADF, could negatively impact on SANDF operations, in that they might lead to legal uncertainty concerning the legality of certain measures.[137] Precedents in terms of what actions by soldiers engaged in conflict situations can lead to criminal liability were to be avoided.[138] The government wanted to ensure that the effectiveness of the South African army and its capacity to act was not tainted by any kind of legal uncertainty.[139] Thus, military operations were to be generally kept out of criminal trials. However, the notion that the SADF generals would in any way be

[132] Interview with Jurgen Kogl in Johannesburg (May 12, 2006)
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Telephone interview with Jurgen Kogl (June 14, 2006)
[138] Ibid.
[139] Ibid.

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willing and capable of instigating any kind of violent uprising against the new South African state is, allegedly, completely unfounded.[140]

The consultations generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.[141] According to Geldenhuys, Zuma underlined this quite clearly when during one of the meetings he emphasised that prosecutions were not in the interest of the government as this could destroy some of the good effects the TRC had on nation-building and reconciliation. The issue needed to be dealt with in a political manner, rather than by the NPA.[142]

In summary, the government tried to work out some kind of legal mechanism, by which to generally avoid convictions, specifically concerning crimes committed in the conflict between IFP and ANC and concerning the SADF and simultaneously to create a mechanism by which to uncover more information that was not uncovered by the TRC.

2.2.3 *Interest of the generals*

Regarding the interest of the generals in the negotiations, it has often been claimed that, considering the many atrocities and criminal offences of the SADF which have not yet been dealt with properly, a general amnesty or convenient deal had been requested.[143] Yet a general amnesty was allegedly neither proposed nor discussed, especially not one that

[140] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 15, 2006)

[141] Interview with Jurgen Kögl in Johannesburg (May 12, 2006); E-mail from Jürgen Kögl (June 26, 2006).

[142] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[143] Interview with Yasmin Sooka in Pretoria (May 3, 2006); *Victims to fight amnesty* Mail & Guardian, June 7, 2002; P Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; C. Carter *No truth for the thousands of apartheid dead* Cape Argus, April 8, 2006.

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would only cover the generals.[144] From the outset it was rather clear that a general amnesty would not square with the TRC scheme on amnesty. A less overt and again, somehow conditional indemnity scheme was also in the generals' interest.[145] However, the generals were obviously interested in securing a convenient agreement in the interest of their former subordinates and in their own interest, which would diminish the chances that former SADF members would be charged for their involvement in SADF operations.[146] As most SADF members had been very suspicious of the TRC process, which was perceived to be biased, the generals sensed they could now take part in working out a, in their eyes, fairer procedure.[147] Furthermore, after the TRC, the general attitude towards the activities of the SADF was perceived to be unreasonably negative and hostile. The TRC's findings in its report were perceived to be an unjustified attack on the SADF's integrity.[148] When entering into consultations with the government the generals were motivated by the opportunity to correct the perceived wrong image of their activities in another forum.[149]

2.2.4 *Results*

The aim of the government was to take the amnesty legislation of the TRC as a reference point and try to establish a new mechanism adapted to the previous amnesty legislation.[150] The mechanism had to apply to the whole of the country and could not be limited to the province of

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[144] Interview with Jurgen Kogl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[145] Telephone interview with Jurgen Kogl (June 14, 2006).

[146] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[147] Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[148] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). The top commanders never made an effort to acknowledge the brutal atrocities which had been caused by the SADF. It also never properly participated in TRC hearings which would have given the SADF command an occasion to defend against perceived unjustified allegations.

[149] Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Jurgen Kogl in Johannesburg (May 12, 2006).

[150] Interview with Jurgen Kogl in Johannesburg (May 12, 2006).

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KwaZulu-Natal. By the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism practically amounting to a new amnesty law.[151] It envisaged a legal concept according to which a special plea on amnesty would be introduced as an amendment to the Criminal Procedures Act.[152] The solution on how to deal with criminal accountability in the wake of the TRC should, thus, be embedded in the normal court procedures. After the agreement was reached, the consultations were practically concluded and only continued with the participation of Zuma and Minister of Justice, Maduna, on an infrequent basis as a matter of courtesy and to conduct a rather general exchange of thoughts on the topic until 2004.[153]

The solution provided that perpetrators of politically motivated offences falling within the ambit of the TRC Act should not principally be exempted from criminal liability.[154] In case they are criminally charged, an alleged perpetrator who had not received amnesty by the TRC could then in the criminal trial launch a special plea on amnesty. Once such a plea was launched, a special inquiry by the judge embedded in the normal public criminal trial should ensue. Should the plea for amnesty succeed, the trial needed to result in an acquittal of the accused.[155] The envisaged preconditions for a successful plea on amnesty were that the criminal offence in question needed to satisfy exactly the same test which was outlined as a precondition to the granting of amnesty according to the TRC Act. It, thus, had to be committed within the fixed time frame applicable for the TRC Act and had to be connected with a political objective and committed in the course of the conflicts of the past etc.[156] Furthermore, the alleged perpetrator would then have to make a full disclosure before the court in order to succeed with the plea.[157] Whether the criteria are satisfied should be

[151] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[152] Ibid.
[153] Interview with Jurgen Kogl in Johannesburg (May 12, 2006).
[154] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[155] Ibid.
[156] Ibid.
[157] Telephone Interview with Jurgen Kogl (June 14, 2006).

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Bubenzer, Ole. Post-TRC Prosecutions in South Africa : Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process. BRILL, 2009. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=634909.
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subject to the scrutiny of the judge and other participants as is normal procedure in a criminal trial.[158] If the plea would not succeed, the trial would resume.[159]

The solution that was agreed upon at the consultations of the generals and the government, thus, embodied an exact replication of the TRC amnesty scheme. The only difference was that the competence to decide on the granting of indemnity would rest with an ordinary criminal court and not with a special committee such as the Amnesty Committee of the TRC. The idea to introduce a special plea on amnesty to criminal procedure law was not at all new. Before the TRC process began, the NP launched a similar proposal aimed at extending the amnesty regime by the same means.[160]

By late 2002 the proposal had been worked out in great detail by the Justice Department and was practically ready to be presented to Parliament for enactment.[161] The public was neither informed of the existence of the proposal nor of details thereof. By the end of 2002, it was first put forward for the consideration of President Thabo Mbeki. The implementation of the proposal depended on the decision of President Mbeki.[162] In early 2003 it was eventually rejected by President Mbeki.[163] The President apparently did not expressly communicate to the consultation group of generals and ANC government representatives that he rejected the draft law. However, his announcements in the speech at the tabling of the TRC Report in Parliament in April 2003 effectively and unmistakably signalled to the consulting parties a rejection of their proposal on another round of indemnity legislation.[164] As mentioned above,[165] Mbeki had announced that it would be up to

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[158] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[159] Ibid.

[160] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 143.

[161] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] See *supra* Chapter 3(1.3).

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Bubenzer, Ole. Post-TRC Prosecutions in South Africa : Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process, BRILL, 2009. ProQuest Ebook Central. http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=634909.
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the NPA to pursue post-TRC prosecutions according to its normal procedures and that any approach such as general amnesty will not be considered, which of course means that the specific indemnity procedure proposed would, at least at the beginning, not be implemented. What exactly motivated Mbeki to turn away from the proposal at that stage cannot be established. However, it is implicit from his speech that he apparently did not consider such an obvious legislative introduction of another amnesty mechanism similar to that of the TRC as appropriate, since he expressly stated that any new amnesty approach, whether applied regionally or nationally, would harm the TRC process. However, elements of the consultations did, as will be shown below, reappear in later policy decisions.

3. *A Prosecution Policy for TRC-Related Cases*

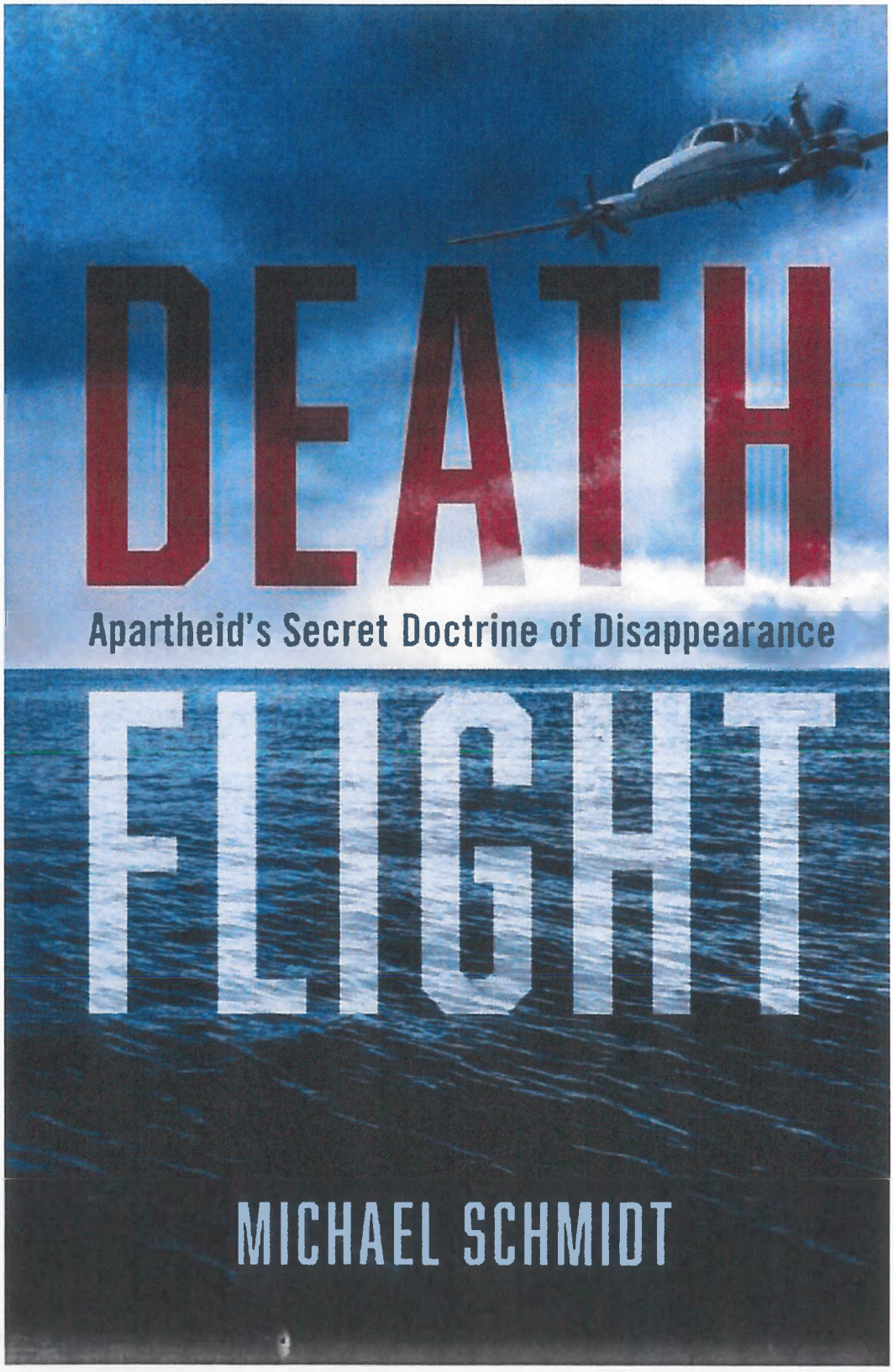
It becomes clear from the consultations with the security forces that the government attempted to introduce new legal mechanisms aimed at avoiding trials directly after 1998. As has been outlined in the preceding paragraphs, the solution, which had been reached by late 2002, was in early 2003 not found fit by the President to provide a sufficient new indemnity mechanism. However, the urge to introduce a satisfactory mechanism persisted. It took until late 2004 for the government to start a new process of developing a solution. Eventually in early 2006, a new legal approach to post-TRC prosecutions was introduced. On 24 January 2006 the NPA presented a set of new guidelines to the public, which were supposed to apply specifically to prosecutions of political crimes connected with the conflicts of the apartheid past.[166] The so-called 'prosecution policy and directives relating to the prosecution of offences emanating from the conflicts of the past and which were

[166] See NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

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Apartheid's Secret Doctrine of Disappearance
FLIGHT
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countries had indeed discussed the possibility of such reparations, so the "government... tried not to fuel such discussions by prosecuting SADF members for the atrocities caused in other countries. In this regard, the aim was to make sure that full-scale criminal trials did not go ahead." Fifthly, the government was wary that a purge of the new SANDF would undermine its military effectiveness – and possibly create "legal uncertainty" over some SANDF actions in peacekeeping operations in Africa. Lastly, Bubenzer states: "The consultations generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past."

But there was another crucial impetus for the ANC initiating what became a seven-year secret negotiations process: from the outset, President Mandela's objective as expressed via his team leaders, Thabo Mbeki in his capacities both as Deputy President and as President of the ANC's National Executive Committee (NEC), its top administrative structure, and Jurgen Kögl, the ANC's/Government's Convenor, was explicitly a quid pro quo, in Marais' words: "They don't want us to be charged – and they don't want them to be charged"[466] – or, as Marais later claimed were Mbeki's words: "I don't want my President to be charged in court," explaining, however, that Mbeki had not meant this in the specific, as in President Nelson Mandela, but rather in the generic, in that he did not want to see *any* ANC State President facing charges. It is a curious aspect of the negotiations that Marais' opposite, Kögl, hailed from the country in which or for the defence of which, as a colony, South Africa's armed forces had spilled the most blood, and in which Operation Dual had performed the bulk of its grisly disposal work. Jurgen Kögl is a South West African-born businessman in whose apartment Mbeki had stayed when he returned from exile.[467]

A letter written by Marais to then Deputy President Jacob Zuma in early 2004, for the signature of the former Chiefs of the SADF,[468] recalled the initiation of the lengthy series of secret, high-level talks: "A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T. Mbeki when he approached General C.L. Viljoen in [late 1996?]. General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC. A convenor, Mr J. Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg [in early 1997?]. That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M. [Matthews] Phosa," leader of an ANC lobby arguing that its members be protected from prosecution, "and by us the former Chiefs of the SADF. There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki expressed, however, the opinion that the process of communication that was mutually agreed to was so important to him that he preferred to remain the prime representative of the ANC in further deliberations."

Bubenzer claims the talks were initiated later, in 1998, at the same time as a separate series of negotiations with representatives of the Police hierarchy began[469] – and he claims that Viljoen was

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[466] Author interview with Dirk Marais (2019).

[467] Jurgen Kogl did not respond to a telephonic message request by this author for an interview.

[468] Draft letter, Dirk Marais to Jacob Zuma, undated, early 2004, copy in the author's possession.

[469] Ole Bubenzer (2009) bases his assertion of separate strictly confidential talks between the ANC/government with the Security Branch in particular on his interview with former SB chief Gen Johan van der Merwe.

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initially approached not by Mandela but by Jacob Zuma, then KwaZulu-Natal's Economic Affairs chief, though Zuma could only have been authorised at the very highest level, "with the aim of consulting over questions of criminal accountability in the wake of the TRC. Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the *Kontak Buro* [the SADF Contact Bureau convened by Marais] who were, thus, already working intensely on amnesty issues and prosecutions. He immediately referred Zuma to the network of generals around [Jannie] Geldenhuys."[470] Bubenzer writes that Geldenhuys and Zuma proceeded to meet, both sides flanked by legal advisors: "The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms... All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals."[471] This compartmentalisation by the ANC of talks between the SADF and SAP may have been a divide-and-rule strategy for the ANC – but as the apex predators of the apartheid state, it likewise suited the military to separate its cause from that of their less powerful and more loose-lipped police colleagues.

Marais said[472] that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals such as former Surgeon-General Niel Knobel, or one of the former Chiefs of the Air Force, as required. Although Marais said that no specific offences were ever discussed, Kat Liebenberg's continuous presence suggests he was monitoring any potential references to Special Forces' black ops such as Op Dual – though it was totally unknown by their ANC opposites at the time – while Knobel's intermittent presence suggests they were monitoring the ANC's limited knowledge of the Project Coast CBW programme. On the ANC/Government side, Marais said Mbeki's team at the talks usually consisted of the "security cluster": that would make it, initially under Mandela's Cabinet, Minister of Defence Joe Modise, Minister of Safety and Security (Police) Sydney Mufamadi, and Minister of Justice Dullah Omar. "Many deliberations followed and mutual agreements were reached," the letter read. Marais said that the discussions towards formulating a "Pact of Forgetting" (this author's term, not Marais') took place once every few months "a few times at Kögl's house, a few times at the Presidency, and once in Mbeki's house, and once in Durban with Zuma" – and were "very social... taking refreshments."

Telling Half-truths at the Truth Commission

Despite the intensity and probity of its investigators' tireless work in describing crimes against humanity committed by *all sides* over the over 1 March 1960 and 26 April 1994 – in other words, over the period from just before the Sharpeville Massacre which had provoked the formation of uMkhonto we Sizwe, until the eve of the first democratic elections – public knowledge of Delta 40 would remain a mere will-'o-the-wisp, an ephemeral flicker in the peripheral vision of TRC investigators. It is not necessary to detail the extent to which the TRC assessed the SADF's sweeping guilt in conducting a dirty war against the civilian populations of South Africa and neighbouring countries, other than to note its controversial finding that "while some acts of regional destabilisation may have been a defence against Communism, the purpose of the war was also to preserve white minority rule in South Africa and was, therefore, a race war," but we will focus here on what the TRC revealed about the military's death-squad functions

[470] Ole Bubenzer (2009).

[471] Ole Bubenzer (2009) claims that the SB and other state employees were championed in negotiations by former President F.W. de Klerk – who "often consulted directly with President Mbeki or with other high-ranking members of the government" – and a lobby group, the Foundation for Equality Before the Law

[472] Author interview with Dirk Marais (2019).

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specifically – or rather, how the military managed to obscure the very existence and operations of such entities, while allowing the police death-squads to bear the brunt of scrutiny.

Along the lines of their secret "Pact of Forgetting" negotiations with the ANC, the warchiefs attempted in fact to more stridently demand a blanket amnesty – similar to that applied in South West Africa in 1989 and 1990 – be applied to cover all apartheid-era crimes committed by whatever force: on 14 July 1998, 19 years almost to the day after the first Operation Dual death-flight, former Defence Minister General Magnus Malan and former SADF Chiefs General Constand Viljoen and General Jannie Geldenhuys made their suggestion public. They had submitted a similar demand the previous month to Minister of Justice Dullah Omar – who had ironically been targeted by the CCB for assassination. Yet the TRC's Deputy Chairperson Dr Alex Boraine responded that it could not make legislative recommendations on a general amnesty. Although they were unable to succeed with the TRC, which completed its work within a few months of their appeal, behind the scenes, the secret "Pact of Forgetting" talks with the ANC Cabinet/NEC leaders continued. According to Marais' letter to Zuma: "When Mr Mbeki could not attend [the talks], he authorised someone, usually a minister, and later on when he became president in 1999, you [Deputy President Jacob Zuma] represented him. In execution of mutual decisions, much effort was put in by the Contact Bureau and some of your ministers to prepare papers and submissions for acceptance by the Deputy President and later on the President."[473] When Mbeki became President, Zuma's "security cluster" team at the talks would most likely have included Minister of Defence Mosiuoa Lekota, Minister of Justice and Constitutional Development Penuell Maduna (replaced by Brigitte Mabandla in Mbeki's second Cabinet), Minister of Intelligence Joe Nhlanhla (replaced by Ronnie Kasrils), and Minister of Safety and Security Steve Tshwete (replaced by Charles Nqakula) – but Ole Bubenzer names only Penuell Maduna, Matthews Phosa, Charles Nqakula, and Sydney Mufamadi, adding: "On various occasions Thabo Mbeki was also present, as Vice [sic.] President and later in his capacity as the President."[474]

Meanwhile, the TRC investigators prepared to consolidate their immense work. At the heart of the TRC's seven volumes, handed to President Nelson Mandela on 29 October 1998 as the *TRC Interim Report* and updated with the *TRC Final Report* of over 4,500 pages handed to President Thabo Mbeki on 21 March 2003, is the list of 21,748 victims identified by the Commission in its hearings – and yet, in the entire list there are only two SWAPO victims named: SWAPO lawyer Anton Lubowski, assassinated by the CCB in 1989; and 22-year-old Tshikani Nkuna, who was "assaulted by members of the SAP at John Vorster Square, Johannesburg, in 1983. Mr Nkuna was interrogated and forced to admit to being a SWAPO member."[475] It is obviously untrue that in its bloody 23-year war against SWAPO, the apartheid authorities only accounted for two SWAPO victims. In echo of this blind spot in the record, Marjorie Jobson, co-ordinator of the Khulumani Support Group, a lobby group acting for victims of apartheid, confirmed that while "we have 169 cases on our disappearances database," none of them were SWAPO members.[476] The *Final Report* stressed that while the police had proven a valuable source of information, the Commission "received notably fewer amnesty applications from members of the former South African Defence Force (SADF), notwithstanding the fact that the SADF was involved in a series of regional conflicts over a period of more than fifteen years. Many of these conflicts transgressed the 'laws of war' as laid down in international protocols."[477] And in fact, the TRC's *Final Report* admits to what can only be described as a fatal limitation of its scope: "While few statements were received from deponents and victims outside South Africa, it has been argued that the *majority* of victims of gross

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[473] Draft letter, Dirk Marais to Jacob Zuma (2004).
[474] Ole Bubenzer (2009).
[475] TRC Victims' List, *TRC Final Report* (2003).
[476] Author sms communication with Marjorie Jobson, 17 January 2020.
[477] *TRC Final Report*, Volume 2, Chapter 1 (2003).

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violations of human rights were in fact residing outside the country's borders at the time the violations were committed." Nevertheless, in its chapter on *The State Outside South Africa between 1960 and 1990*, the TRC noted that evidence had been gathered of "violations committed by South African security forces or their agents and/or surrogates in nine regional states – Botswana, Lesotho, Swaziland, Angola, Mozambique, Zimbabwe, Zambia, Tanzania, and the Seychelles – and in Western Europe – in the United Kingdom, France, Belgium, the Netherlands and Scandinavia."[478]

Although no South West Africans were *judicially* executed during the occupation, out of fear of an international backlash, the TRC found that detentions for indefinite periods under emergency proclamations were widespread – as was the torture of detainees: "In 1983, the SADF revealed that it had detained a total of 2,883 people during the 1977–83 period, while the security police disclosed that they had detained 2,624 people during the same period. Mass detentions in the 'operational areas' were common. Many detainees were held secretly and without access to lawyers or relatives for long periods, sometimes years. Such conditions provided opportunities for prolonged abuse and torture." This period covers the formative phase of Delta 40/Barnacle – and gives an indication of the size of the detainee population that so worried Colonel Johan Theron that he came up with his own "final solution." As the report stated: "There is considerable evidence that the process of 'turning' was accompanied by torture and that the price of non-compliance was summary execution. Once 'turned,' these *askaris* and other *Koevoet* members are said to have carried out atrocities while disguised as SWAPO fighters in order to discredit the liberation movement, as the Selous Scouts had done during the Rhodesian war..."

Finally, D40/Barnacle did make a named, albeit brief, appearance in the Truth Commission's *Final Report*, but its true nature, composition, and mandate was confused by the investigators and commissioners who wrapped it up in their *Final Report* within a general description of the Recce Regiments: "The four Recce regiments were numbered 1, 2, 4 and 5. For a brief period there was also a Recce 3 but that name seems to have given way to Delta 40 or D40. This unit was formed in response to the independence of Zimbabwe and the large numbers of experienced Rhodesian counter-insurgency personnel who were recruited into the South African security network through *Operation Winter*." As will be readily appreciated, here the ex-Selous Scouts unit 3 Recce, a formal if covert military Special Forces commando, was conflated with Delta 40, a secret "civilian" pseudo-ops unit, even if they both reported to Speskop. The Truth Commission's confusion, and slender knowledge of the staffing, functions and operations of Delta 40 and its immediate successor, Barnacle, is excusable as its investigators and commissioners appear to have been deliberately misled or at the very least grossly underinformed by the generals, in a TRC special hearing in Cape Town on 8 October 1997 at which former SADF chief General Constand Viljoen testified, as did the former GOC Special Forces, Major-General Joep Joubert, but at which D40 initiator Major-General Fritz Loots was strangely absent. General Viljoen stated: "There was an increasing requirement for clandestine and covert operations of a new kind in 1986. A small group known as D40 was originally organised for this purpose. D40 developed into Barnacle which later was transformed in the CCB. The CCB was a covert military organisation managed by a managing director under supervision of a senior officer Special Forces."[479] So Viljoen compressed the entire unit history of D40/Barnacle over 1979 to 1986 into two sentences – and naturally completely omitted to mention the Operation Dual death-flights as these were totally unknown to TRC investigators. Also, the way he stated it makes it seem as if D40 was founded in 1986, though by that time, the unit's transformation into the CCB, it had already been an operational unit for almost seven years.

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[478] *TRC Final Report*, Volume 2, Chapter 2 (2003).

[479] Constand Viljoen, TRC testimony, Cape Town, 8 October 1997.

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In his amnesty application,[480] former GOC Special Forces Major-General Joep Joubert was a little more frank, yet still concealed more than he displayed: the functions of the CCB were "a) that ANC leaders and people who substantially contributed to the struggle would be eliminated; b) that ANC facilities and support services would be destroyed; c) activists, sympathisers, fighters and people who supported them would also be eliminated..."[481] In his testimony in illumination of his application, he explained: "before I took over command, the Special Forces started executing clandestine operations outside the borders against ANC bases but its operations were for a long time restricted to intelligence gathering operations overseas. Special Forces consisted of reconnaissance units and a small group known as D40 which eventually became Barnacle and then the CCB. Under my command their task was generally expanded... to support the SA Police in its internal covert operations. The members of Barnacle were all in civilian garb..." Again, no D40/Barnacle personnel or specific operations, missions, or actions were identified, and there was not a whisper of Operation Dual's many dolorous death-flights – which had continued for at least a year under his command as GOC SF between 1 November 1985 and the last presumed death-flight on 12 December 1987. In fact, Joubert's testimony grossly undercounts the death-toll of the CCB: asked by TRC Commissioner Ilan Lax to estimate how many persons he was aware of that Special Forces (as a whole, including the CCB) had killed in operations in support of the SAP – that is, in its *internal* application to the South African domestic situation – Joubert replied that "it must be around 12 persons."[482]

Op Dual Exposed: the Wouter Basson Trial

But Operation Dual finally became public knowledge with the indictment against former Project Coast Director Brigadier Wouter Basson on 23 March 1999. The full-bearded Basson, who had glided apparently untouchably through his TRC testimony only the previous year, cheekily sporting a colourful African-style embroidered, open-necked shirt, now appeared to have been run to ground, facing a litany of 24 fraud and theft charges relating to a web of intrigue and secret slush-fund money that spanned the globe, six drugs charges, 11 murder, 16 conspiracy-to-murder, and two attempted murder charges, plus a handful of lesser counts.

What was most startling to observers was that, at the heart of the murder-related charges, accounting for about 229 deaths, was Charge 31, conspiracy to murder, which claimed that during "the period from 1979 to Dec 1987 and at or near Special Forces... Headquarters, in the district of Pretoria in the jurisdiction of the Transvaal Provincial Division, the accused intentionally conspired with" former GOC Special Forces Major-General Fritz Loots, Speskop SSO Counter-intelligence Colonel Johan Theron, Theron's SO2 Counter-intelligence Major Eric Kennelly, Speskop SO3 Counter-intelligence Captain Danie Phaal, former 5 Recce detention barracks chief Sergeant-Major Chris Pretorius, former Military Intelligence interrogator at Fort Rev Major Henk Coetzee, Speskop SSO Air Ops Colonel Matie van der Linde and his successor Colonel Hap Potgieter, D40/Barnacle adjutant Sergeant-Major Trevor Floyd, Basson's former staff officer at Speskop Dr Kobus Bothma, D40 founding OC Major Neil Kriel, D40 Urban Intel chief Major Gray Branfield, "and other persons unknown to the State to murder a) members of South West African People's Organisation... who were in custody and posed a security risk; and b) own powers that had created a security risk, either committing and/or assisting in the commission of the crime and/or effecting it."

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[480] A key – and very controversial – formulation of the TRC was the offer of amnesty to perpetrators in exchange for a full and truthful confession; these confessions were heard by a separate TRC arm, the Amnesty Committee.
[481] Joep Joubert TRC amnesty application AM3799/96.
[482] Joep Joubert TRC testimony, Cape Town, 8 October 1997.

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But on 12 October 1999, just over a week into the trial, presiding Judge Willem Hartzenberg upheld South West African Administrator-General Louis Pienaar's blanket amnesty for crimes committed by security forces in the territory, and further ruled that other crimes alleged to have been committed by Basson and his associates outside of the border of South Africa were beyond his jurisdictional reach. This effectively saw the hundreds of murders related to Operation Dual dropped. Given prosecutor Advocate J.P. "Torie" Pretorius' very explicit location of the origination of these war crimes and criminal conspiracies at Speskop south of Pretoria, Hartzenberg was playing fast and loose with the legal truth. Fortunately, for the purposes of this study, the men responsible for the Operation Dual death-flights and those drawn into its web were still required to testify over 2 May to 24 November 2000 regarding Basson's alleged provision of drugs and poisons to them – or knowledge of the death-flights, like their unnumbered victims, would have languished in benighted obscurity. It will be readily appreciated that their self-incriminating testimony – and the key confirmatory interviews with this author – forms the backbone of this study.

When it all went down to the wire, however, Hartzenberg discounted the results of prosecution investigator Henry Bruwer's seven-year forensic audit of Basson's WPW/Wisdom Group of companies, finding that Bruwer "failed" to prove that Basson was the beneficial owner of the Group; instead, the judge accepted Basson's bald statements that he had merely been following orders in moving tranches of up to tens of millions of rands around the globe. Frustrated prosecutor Anton Ackermann had attempted in February 2000 to have what he perceived as an obviously biased Hartzenberg recuse himself but failed, and in June 2001, Hartzenberg dismissed another 15 out of the remaining 61 charges to which Basson plead not guilty; by the time Basson himself took to the stand in June 2002 for nine weeks of showboating testimony, he was bursting with confidence and charm, and had the court eating out of his hands.

On 11 April 2002, Hartzenberg read out his judgement, and, as recorded by observers Marlene Burger and Chandré Gould: "The court accepted without reservation that the 'gruesome' murders described had been committed [under Operation Dual], but found that Basson was not involved in them, and that the meeting with General Fritz Loots at which he allegedly agreed to supply Theron with drugs, never took place. Theron was 'a decidedly strange man,' said the judge, who had taken a scientific approach to Operation Dual, he said that the idea of placing poisoned beer at taxi ranks in the Eastern Cape at random [evidence of which had been lead] was a plan so bizarre that it could 'only have been thought up by the same man who devised Operation Dual and single-handedly executed that plan.' According to the judgement, Basson was an 'excellent' witness while Trevor Floyd and Danie Phaal were poor witnesses."[483]

Despite Hartzenberg's careful severance of Basson's ties to Operation Dual, the importance of his official acceptance of the fundamental truth of the Operation Dual crimes against humanity and war crimes is that they can without a shred of doubt be said to have indeed occurred as Neil Kriel, Johan Theron, Trevor Floyd, Matie van der Linde and their cohorts testified. The two observers opined: "There could be no doubt that a conspiracy existed within the SA Defence Force's Special Forces unit to eliminate selected targets, or that poison was one of the assassination weapons available to ensure that the murders could not be traced back to the SADF... considerable care is taken to carry out covert operations in such manner that they can be plausibly denied, and so it was within the Civil Cooperation Bureau and its forerunner, [D40/]Barnacle... all operations were carried out on a strictly enforced need-to-know basis. Because of these safeguards, none of the witnesses called by the State had been able to provide the court with a full or complete picture, but the cumulative effect of all the evidence provided all the proof needed. There could be no doubt that the lethal injections administered to victims killed by

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[483] Marlene Burger and Chandré Gould, *Daily Reports About the Trial of Dr Wouter Basson: 4 October 1999 – 11 April 2002*, Institute for Security Studies, Pretoria, South Africa, 2002.

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the mastermind of Operation Dual, Johan Theron, had been supplied by Basson, or that Theron was telling the truth when he said Basson taught him how to use the substances."

Yet in the biggest reversal since the failure of the Trial of the Generals, Brigadier Wouter Basson was acquitted on all remaining 46 charges – the news sending shockwaves through the country with much angst wrung out in newspaper opinion pieces. The evidence of 153 state witnesses, buttressed by up to 50 supporting affidavits that had been teased out over some 300 trial days, producing 33,000 pages of court transcript had astoundingly been found wanting by Hartzenberg.

Marlene Burger and Chandré Gould reported: "As the judge pronounced Basson not guilty on all charges, there was applause from a group of about 30 supporters, including five former SADF generals – retired Defence Minister Magnus Malan, erstwhile SADF chief Constand Viljoen, former surgeon-general Niël Knobel, who was the Project Coast manager and Basson's immediate superior, Joep Joubert, former commander of the SADF's Special Forces to whom the head of the CCB reported, and Dirk Marais, co-ordinator of the SADF's largely successful campaign to dissuade soldiers involved in the Angolan and Namibian conflict during the 1980s from applying for amnesty from the Truth and Reconciliation Commission."[484] The adulatory response of these men is a powerful indicator that Basson's role was to stand in the breach in lieu of the higher chain-of-command generalship responsible for the war crimes of Operation Dual and other SADF criminality; with the apparent connivance of Hartzenberg, he would not, however, be sacrificed as a judas goat as the SAP had done with Gene de Kock; the leading apartheid military echelons could at last sleep soundly at night. On 3 May, as Burger and Gould recounted, "Hartzenberg granted indemnity from prosecution to 24 of the 30 state witnesses who testified":[485] they included Colonel Matie van der Linde and Major Eric Kennelly, but indemnity was *not* granted to Colonel Johan Theron, Major Neil Kriel, Captain Danie Phaal, Sergeant-Major Trevor Floyd, and Dr Kobus Bothma. Thus the founding OC of Delta 40, his intimate death-flight sidekicks, and at least one of their providers of drugs and poisons were left entirely vunerable to war crimes prosecutions – an exposure underlined by Hartzenberg's ruling that Op Dual had indeed been real.

The month before Basson's acquittal, the TRC Amnesty Committee had appeared to offer hope of a better outcome when it finalised its own report – separate to that of the Truth and Reconciliation Commission's report – in which it had recommended about 300 prosecutions of apartheid-era perpetrators of gross human rights violations. Then on 21 March 2003, a year after Basson waltzed free, the *TRC Final Report* was publicly released, recommending a "bold prosecution policy" in those cases where amnesty has not been applied for so as "to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law." As we have seen, remarkably only two SWAPO dead made it onto the list of victims identified by the Commission, but the *Final Report*'s recommendations on a stern prosecutions approach grounded in international law appeared to strengthen the hand of the National Prosecuting Authority (NPA).

Yet on 3 June, the Supreme Court of Appeal (SCA) in Bloemfontein to whom the NPA had applied to overturn Judge Hartzenberg's 12 October 1999 quashing of the six extraterritorial charges against

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[484] Marlene Burger and Chandré Gould, *Daily Reports About the Trial of Dr Wouter Basson: 4 October 1999 – 11 April 2002*, Institute for Security Studies, Pretoria, South Africa, 2002. On one occasion, Marais reported that "a working session of former SADF chiefs" had adjourned to allow Brig Steve Prinsloo, chairman of the SA Infantry Association, to convey its high esteem for generals Magnus Malan, Constand Viljoen, Jannie Geldenhuys and Kat Liebenberg, and express dismay at the bias of the TRC. Association chaplain Maj-Gen Chris Naudé prayed at the meeting "that the Almighty would give them strength to persevere until success is obtained and the real truth about the righteousness of the cause of the SA Defence Force is known." (SA Press Association report, 24 October 1997).

[485] Marlene Burger and Chandré Gould (2002).

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Basson – including the conspiracy to murder the hundreds of victims of Operation Dual[486] – ruled in favour of Basson, thus upholding the dismissal of the Op Dual conspiracy. So the State advocates of the NPA appealed to the court of last resort, the democratic state's new highest judicial body, the Constitutional Court in Johannesburg.

(Re)disappearing the Disappeared: our "Pact of Forgetting"

But meanwhile, progress had been made by the old warchiefs and Cabinet's security cluster in the seven-year negotiations on agreeing on a legal framework for a post-TRC amnesty process. Major-General Dirk Marais, the Convenor of the SADF Contact Bureau, recalled: "Eventually there was an agreement that they would prepare legislation to grant a sort of amnesty-in-general... and they had a writer, a law writer in Cape Town and when it was time they invited us to Cape Town at state expense..."[487] The date was 17 February 2003, and a delegation of generals lead by former Chief of the SADF General Jannie Geldenhuys met with Minister of Justice and Constitutional Development Penuell Maduna and Minister of Safety and Security Charles Nqakula. "They were very nice," Marais recalled. "We gathered at seven in the morning because it was Zuma's speech at the Parliament that day... they called their writer [a state official in the Department of Justice] and he read to us the proposed legislation... and when he finished we said 'But that's got nothing to do with us'... because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed]... so General Geldenhuys said 'No, we don't need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people... don't have to do that, so this means nothing to us'[488]... The whole thing collapsed there... This whole conversation collapsed..." The differences between the sides were now irreconcileable: the warchiefs wanted a new law granting a blanket amnesty with no disclosure required – but the ministers wanted a new law granting amnesty on a case-by-case basis only after full disclosure.[489] Geldenhuys' delegation then met with Zuma in his office as he had expressed a desire to meet with them, but they merely shared, in Marais' words, "a few niceties and then he greeted us and then we asked [Jürgen] Kögl to book us [a flight] directly back... That was the last getting together."[490] The attempt at estabilishing a mutually-agreed "Pact of Forgetting" had collapsed – though Bubenzer claims "only as a matter of courtesy did a few meetings take place until 2004"[491] – but would be secretly, dramatically revived by the ANC government unilaterally, on its own, very different, terms.

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[486] The State had also applied to the SCA for a ruling against Judge on Hartzenberg's refusal on 15 November 1999 to allow the record of Basson's bail hearing into the record before the accused had even been asked to plead, and against Hartzenberg having refused on 16 February 2000 to recuse himself on the grounds of bias; the SCA ruled against the State in these instances too.

[487] Author interview with Dirk Marais (2019).

[488] Marais implausibly claimed that "Those who did something wrong went to the TRC – and the others did their job.": author interview with Dirk Marais (2019).

[489] Marais claimed that it was the ANC and not the SADF that stood to gain the most from a general amnesty – and the most to fear from any legal requirement that amnesty was dependent upon full disclosure, because they were in power and the stability of their rule would be threatened by prosecutions: author interview with Dirk Marais (2019).

[490] Ole Bubenzer (2009) claims a 1998-2004 timeline for the talks instead of the 1997-2003 timeline that can be deduced from from Marais' letters: "A series of frequent meetings, negotiations and consultations ensued from 1998. The main process of consultations was conducted over four years until early 2003. A small number of meetings, however, infrequently continued until 2004."

[491] Ole Bubenzer (2009).

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Advocate Howard Varney, who had consulted to the TRC,[492] wrote regarding the TRC's amnesty process: "In March 2003 the National Prosecuting Authority established the Priority Crimes Litigation Unit (PCLU) [under Advocate Anton Ackermann] to pursue, amongst other cases, matters emanating from the TRC process. Following an audit of the 300 cases [recommended for prosecution by the TRC Amnesty Committee], the PCLU indicated that just over half of these cases could not be prosecuted but that twenty-one cases, with some further investigation, were ripe for immediate prosecution. However, the unit was rendered impotent by the failure of the State to assign it investigators or to compel the police to provide investigation officers. Less than a handful of prosecutions were taken forward between 2002 and 2004. The only significant prosecution, that of three security police officers who were denied amnesty for the murder of three activists, has stalled." The three – heavyset, moustachioed former Security Branch Colonel (later Major-General) Christoffel Lodewikus "Chris" Smith, Captain Gert J.L.H. Otto and Captain Hermanus Johannes "Manie" van Staden – had not applied for amnesty at the TRC, but almost the entirety of their involvement in the CCB plot to kill the ANC's Reverend Frank Chikane had emerged during the Wouter Basson trial as Basson had allegedly supplied the Paraoxon nerve toxin used to impregnate Chikane's underwear. It turns out that this stalling of prosecutions and the under-resourcing of the PCLU was the result of a deliberate – yet not uncontested – and ultimately *illegal* process that most probably has its origins in the 1996-2003 secret talks towards formulating a legal "Pact of Forgetting" initiated by Nelson Mandela and pursued by Thabo Mbeki and then Jacob Zuma in consultation with the four apartheid warchiefs who had previously demanded a blanket amnesty: Magnus Malan, Constand Viljoen, Jannie Geldenhuys, and Kat Liebenberg. Although the ANC's attempt to get the generals to agree to a general amnesty law that would require a case-by-case granting of amnesty in exchange for full disclosure had fallen apart in February 2003, it appears that the ANC's continued interest in pursuing some kind of post-TRC additional amnesty process *must* have been driven by their fear of the consequences for certain leading ANC figures of the PCLU's recommendations that 21 cases against perpetrators across the political spectrum be initiated in the courts.

On 23 February 2004, Cheryl Gillwald, the Director-General of the Department of Justice & Constitutional Development (DOJ&CD), under Justice Minister Penuell Maduna in the Mbeki Cabinet, convened a forum of her peers which appointed an "Amnesty Task Team" chaired by the department's Deon Rudman and consisting of Yvonne Mabule and Vincent Mogotloane of the National Intelligence Agency (NIA),[493] Advocates Gerrie Nel and Lungisa Dyosi of the NPA, Joy Rathebe of the Department of Defence, and Commissioner Ray Lalla of the South African Police Service (SAPS).[494] The Task Team's mandate – as detailed in a report marked "SECRET"[495] – was given as "1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past. 2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past. 3. Bearing the above-mentioned in mind, whether legislative enactments are required."

The secret report notes that the Amnesty Task Team met for the first time on 26 February, then again on 1 March 2004. By its own rather restrained account, these meetings were very stormy as the Task

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[492] He went on to become chief investigator for the Sierra Leone Truth and Reconciliation Commission, and an advisor to the Commission for Reception, Truth and Reconciliation in East Timor, and now works as a senior project advisor for the New York City-based International Centre for Transitional Justice.

[493] The NIA was the democratic-era successor to the NIS as South Africa's internal intelligence service, the NIS' external functions being taken over by the new South African Secret Service (SASS).

[494] The SAPS was the direct descendant of the apartheid-era SAP.

[495] The "SECRET"-classified *Report: Amnesty Task Team* was disclosed during the proceedings in the matter of Nkadimeng & Others v The National Director of Public Prosecutions & Others (TPD Case Number 32709/07).

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Team's considerations proved to be a lightning-rod for contestations that lay at the heart of the TRC's reconciliation process. Its secret report highlighted a series of concerns, including that the story behind "persons who have disappeared" might not be revealed; here, Operation Dual's victims have a ghostly presence – and in fact, the report later explicitly mentions that although the Criminal Procedure Act allows both for the granting of indemnity from prosecution to perpetrators who testify honestly for the state in court, and for crimes older than 20 years not to be prosecuted, the Task Team specifically *excluded* war crimes[496] from the latter provision. The report nevertheless concludes that "The Task Team is of the view that the only way to address [its] concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team." This fiery argument was between those who rejected a supplementary amnesty process out of hand, feeling this amounted to gross disrespect for the victims on all sides, and between those who believed a further process could resolve the problem that so few perpetrators had applied for amnesty via the TRC[497] – as well as reveal what had happened to the disappeared; the caveat raised by some of those in favour, however, was that (in echo of the generals' position) such a supplementary process *had* to be legislated by Parliament as a statutory follow-on process to the TRC Amnesty Committee's concluded work. Unfortunately, the minutes do not reveal who among the participants adopted what stance in this debate. At around this time, Major-General Dirk Marais wrote a letter to Jacob Zuma to be signed by the former Chiefs of the SADF, claiming that at the Cape Town meeting of the previous year, "Agreement on outstanding matters [had been] again confirmed," yet complaining that more than a year after that meeting, "no sign of implementation has become apparent, neither was there any effort on your behalf to inform us of any progress which could lead to eventual implementation. In view of the above, you are requested to inform us of the desirability from your point of view to keep the door open for further co-operation."[498] But the old warchiefs were now apparently considered irrelevant to the process and Zuma did not respond, slamming that door. Almost a year later there was an attempt to formally conclude the secret negotiations: in response to a 31 January 2004 letter from Kögl suggesting that the defunct talks be properly wound up, Dirk Marais drafted a letter on behalf of "all the members of the Panel of the SADF Contact Bureau,"[499] thanking Kögl for "the diligent efforts displayed by you through the years," and stating further that his "role as a devoted convenor and facilitator during the seven year process of communication between the ANC initially, and the government lately, is admired. It is however considered inappropriate that the process, initiated by Mr T. Mbeki in his former capacity as Deputy President, should stagnate or be concluded without any communication in this regard by the person who initiated it." The letter said the generals were separately appealing to President Mbeki in this regard, but asked Kögl "as the ideally positioned player during the years of deliberations, to compile a review of the entire process which would serve as a trustworthy neutral record of the initiation and development of the process of communiation within the Forum..." The appeals went unanswered: the generals were out in the cold.[500]

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[496] In referring to war crimes, however, the Amnesty Task Team erred in referring to the Rome Statute establishing the International Criminal Court (ICC) which is empowered to prosecute, among other things, war crimes and crimes against humanity – because the ICC has no retroactive jurisdiction for acts committed before 1 July 2002, the date it came into effect. Op Dual's war crimes and those of the apartheid era thus properly fall under the Geneva Conventions.

[497] A total of 7,111 amnesty applications were received, of which 5,392 were refused and 849 granted (this leaves out other categories, such as where applications were withdrawn, etc). The TRC noted with regret that there was little overlap between amnesty applications and victims seeking restitution.

[498] Draft letter, Dirk Marais to Jacob Zuma, undated, early 2004, copy in the author's possession.

[499] Draft letter, Dirk Marais to Jürgen Kögl, undated, early 2004, copy in the author's possession.

[500] At about the same time, ANC/government negotiations with the former Security Branch chiefs also came to an end, according to Ole Bubenzer (2009).

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Dear Mr Zuma

A process of communicating between the ANC, initially, and the Government lately, ~~on~~ with the former Chief of the ~~Defence F~~ SA Defence Force was initiated by the then Deputy President of South Africa, Mr T. Mbeki when he approached Gen C. L. Viljoen in 19?

~~Mr~~

Gen Viljoen, after consultation with other former Chiefs of the Defence Force within the structure of the SADF Contact Bureau, conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC.

A convenor, Mr J. Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was ~~held~~ in the form of discussions ~~and~~ followed by a

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dinner, hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga, Mr M. Phosa, and by us, the former Chiefs of the SADF.

There was enthusiastic agreement that the commenced process of communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki, however expressed the opinion the process of communication, which was mutually agreed to, was so important to him that he preferred to remain the prime representative of the ANC in future deliberations.

Many deliberations followed and mutual agreements were reached. When Mr Mbeki could not attend, he authorised somebody, usually a minister, and later on, the Deputy when he became President in 1999, you represented him.

In execution of mutual decisions much ~~was~~ effort was put in by the Contact Bureau and some of you

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Ministers to prepare papers and submissions for ~~the President~~ acceptance by the Deputy President and later on the President.

In spite of such ~~~~ submissions and apparent acceptances, little, notable implementation was effected by the ANC or Government.

In similar fashion we, the former Chiefs of the SADF, as members of the Forum, were flown to Cape Town ~~at~~ for discussions with Ministers Modluna and Chakula and thereafter with you on 17 Feb 2003. Agreement on outstanding matters was again confirmed. Yet, more than a year later, no sign of implementation has become apparent. Neither was there any effort on your behalf to inform us of any progress which could lead to eventual implementation.

In view of the above you are requested to inform us of the desirability, from your point of view, to keep the door open for further cooperation.

LC NGI

ANC to seek broad national amnesty

Published Dec 11, 2002

SHARE

The African National Congress is to hammer out the guidelines for a "broad national amnesty", which could take the form of presidential pardons, for apartheid-era human rights violators at the ruling party's 51st national conference in Stellenbosch next week.

ANC presidency head Smuts Ngonyama said the dramatic proposal was motivated by ANC branches in politically divided KwaZulu-Natal. It comes hard on the heels of a bitter legal battle by the Inkatha Freedom Party that has delayed the release of the last draft of the Truth and Reconciliation Commission's final report until next year.

"We need to find a way to balance the situation," said Ngonyama.

"There has been a strong call for some sort of solution in KwaZulu-Natal. The ANC branches there moved to have a special amnesty policy discussed at the conference and they have been asked to bring along a concrete proposal."

The ANC supported a "broad national amnesty", said Ngonyama, and a "unique solution" was required.

Most IFP amnesty applications, for example, were rejected by the TRC and the IFP's Musa Zondi said Justice Minister Penuell Maduna had asked the party earlier this year to compile a list of members to be considered for presidential pardons.

The ANC had first approached the IFP with a "special amnesty" offer in 1996, he said.

The extraordinary new move could pave the way for patching relations between the ANC and the IFP in KwaZulu-Natal.

Fragile coalition rule collapsed there in the wake of the floor-crossing controversy.

The amnesty proposals come a week after the government announced plans to initiate an "intense national dialogue" aimed at ensuring "a common national approach" on apartheid reparations and to pronounce its own position on longer-term reparations.

The move also comes amid fears by multinational companies operating in South Africa and potential investors, at the prospect of massive class action suits for compensation launched in the US and Switzerland by three sets of apartheid victims.

Government spokesperson Joel Netshitenzhe said last Wednesday after the cabinet's final meeting for the year that arrangements to hand over the TRC report to President Thabo Mbeki had been abandoned when the IFP, declared the "primary non-state perpetrator" and fingered for 33 percent of apartheid-era atrocities investigated by the commission, turned to the courts to have its leader Mangosuthu Buthelezi exonerated.

The matter is due to be heard in the Cape High Court on January 29 next year.

Netshitenzhe said the government would initiate the dialogue immediately after the court ruling.

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Adding that the government favoured reparations which emphasised "a collective approach", Netshitenzhe pointed out that it had already spent R50-million on urgent financial reparations to 18 000 apartheid victims identified by the TRC for urgent intervention.

Peter Dickson

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DOCUMENTS



Apply the law equally for past political crimes - Foundation for Equality for Law

Johan Botha |
23 February 2020
Johan Botha says no member of ANC NEC has been prosecuted for crimes committed under that organ's command

OPEN LETTER TO THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES, MR. RONALD LAMOLA, BY THE FOUNDATION FOR EQUALITY FOR LAW

21 February 2020

Your recent statement that, as a result of state capture looting of the Treasury, the National Prosecuting Authority lacks the capacity to prosecute the persons responsible, is disingenuous to say the least. Millions of Rands are currently being wasted by the National Prosecuting Authority due to ineffective planning and politically motivated and selective prosecution of only certain persons for offenses related to conflict of the past.

The 2019 re-opened inquest into the death of Ahmed Timol is a case in point and now we have the re-opened inquest into the death of Dr. Neil Aggett. In both cases, all the persons directly involved in the incidents have already died. There is no primary evidence available and consequently secondary and even anecdotal hearsay evidence is presented which cannot be admitted in any criminal case. Moreover, it is a one-sided process where the interests of persons who have died are not protected in any manner and therefore a pervasive system of justice.

The provisions of Article 9 of the Constitution which provide for equality before the law are, in essence, being disregarded by the National Prosecuting Authority.

The following political leaders and members of the former government and security forces have already been prosecuted for crimes related to the conflict of the past.

> General Magnus Malan, former Minister of Defense, General Jannie Geldenhuys, former head of the South African Defense Force and several other generals and members of the security forces in the Kwamakhutha case. They were all acquitted. More than R40 million was wasted on this case.
>
> Dr. Wouter Basson was also charged and acquitted. More than R40 million was also wasted in this case.
>
> Mr. Adriaan Vlok, former Minister of Law and Order, General Johan van der Merwe, former Commissioner of Police and three other former members of the security branch were prosecuted.
>
> Col. Gideon Nieuwoudt and three other members of the security branch were prosecuted for the PEBCO-3 case.
>
> Colonels Willem Coetzee and Anton Pretorius with Capt. Frik Mong are currently being prosecuted for allegedly murdering a member of Umkhonto weSizwe.
>
> Joao Rodriques is currently being prosecuted for the murder of Ahmed Timol.

In stark contrast with these prosecutions, not a single member of the National Executive Committee of the ANC, to whom amnesty has been denied, has ever been prosecuted despite the fact that abundant evidence is available to prove that according to the principle of common purpose in our law, they can be prosecuted in the following cases.

> On 20 May 1983, a powerful car bomb exploded in front of the Nedbank Square Building in Church Street, Pretoria, at approximately 4 p.m. (The building was known as the Nedbank Square Maritime House). A total of 19 people was killed, including 12 civilians and 7 members of the Defence Force. A total of 219 people was seriously injured or mutilated, including 217 civilians and 2 members of the Defence Force.

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On 23 December 1985, targeting civilian Christmas shoppers, members of Umkhonto weSizwe (MK) placed an explosive device in a refuse bin at the Amanzimtoti shopping centre. 5 civilians were killed and 40 seriously injured and mutilated. Former President Jacob Zuma publicly admitted that these MK members acted under his authority.

On 14 June 1986, a car bomb exploded in front of the Magoos pub in the Parade Hotel in Durban. 3 Civilians were killed and 89 seriously injured and mutilated.

On20 May 1987, a limpet mine and car bomb exploded in front of the Johannesburg Magistrate's Court. 3 Policemen were killed and 15 civilians seriously injured and mutilated.

On 2 July 1988, a car bomb exploded in front of the Ellis Park Rugby Stadium in Johannesburg. Two civilians were killed and 37 were seriously injured and mutilated.

On 25 July 1993, defenceless churchgoers who included women and children, were attacked in the St. James church, Kenilworth, Cape Town with AK47 rifles and hand grenades and 11 killed in cold blood. Many were wounded. Mr. Letlapa Mphahlele, the former president of the PAC, who ordered the attack, was prosecuted and initially appeared in court on multiple charges of murder but the case was postponed and has since disappeared.

More than 90% of the victims of the terrorist acts mentioned above were defenceless civilians, including women and children. These acts were all, from a moral point of view, flagrant violations of the provisions of the Protocol to the Geneva Convention and as such a crime against humanity. Decisions by Amnesty Committees and statements made by members of Umkhonto WeSizwe during amnesty hearings are hereby attached to indicate the extent of the evidence available against members of the National Executive of the ANC who have been denied amnesty.

The Foundation for Equality for Law believes that selective, political populist prosecutions and the reopening of inquests fly in the face of the concluding paragraph of the Interim Constitution which is also the basis of the current Constitution and ignore the spirit of the negotiations which led to the Constitution.

Maintaining equality before the law as provided for in terms of Section 9 of the Constitution, is at the heart of any sound legal system and if disregarded, the whole system will rot.

With due regard

Johan Botha

CHAIRMAN : FOUNDATION FOR EQUALITY BEFORE THE LAW

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AfriForum



MEDIAVERKLARINGS

AfriForum waarsku oor eensydige vervolgings van apartheidseramisdade

Deur AfriForum 12/09/2021

D e burgerregteorganisasie AfriForum het 'n dokumenter uitgere'k wat ook die soeklig werp op ANC-lede en hul alliansievennote se misdade tydens apartheid. D t volg na die staat planne aangekondig het om polities gedrewe misdade te vervolg wat tydens apartheid gepleeg is.

Adv. Shamila Batohi, hoof van die Nasionale Vervolgingsgesag (NVG), is in d e proses om 'n eenheid op die been te bring om hierdie tipe misdade te vervolg. Die Valke het ook reeds 'n eenheid gest g om die misdade te ondersoek.

Volgens AfriForum gaan die stappe opnuut polarisasie n die land skep. Die praktyk het naamlik reeds bewys dat die staat wat vervolgings betref, nalaat om hooggeplaaste ANC-lede te vervolg wat nie amnestie van die Waarheid-en-versoen ngskomm ssie ontvang het vir die opdragte wat hulle destyds vir die uitvoer van terreurdade gegee het nie.

> "AfriForum is van mening dat die boek van die verlede gesluit moet word. As die staat wel met die vervolgings voortgaan, behoort dit ook lede van die ANC en sy vennote – wat verantwoordelik was vir die dood en besering van duisende mense – te vervolg. Sou dit blyk dat hierdie vervolgings eensydig is, sal AfriForum se privaatvervolgingseenheid druk op die NVG plaas om ook ANC leiers te vervolg. As dit onsuksesvol is, sal privaat vervolgings sterk oorweeg word," se Kallie Kriel, uitvoerende hoof van AfriForum.

"Daar blyk gronde te wees vir vervolg ng in talle van die sake waar n ANC-lede en bondgenote die verdagtes is. Indien wel, en indien die staat selektief sou vervolg, sal die pr vaatvervolgingseenheid in lyn met ons fokus op gelykheid voor die reg die sake vir privaat ervolging oorweeg," meen adv. Gerrie Nel, hoof van AfriForum se privaatvervolgingseenheid.

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Equality before the law Apartheid crimes of the ANC | Mini-documentary

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Deur afriforum 30/10/2019



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Deur AfriForum 18/04/2024

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Tit-for-tat threat by apartheid generals

| Published Jul 20, 2008

Apartheid generals have threatened to lay charges against ANC leader Jacob Zuma, President Thabo Mbeki and some of his ministers if the state insists on charging former security chiefs.

The situation has been precipitated by the Umkhonto weSizwe Military Veterans' Association demanding the prosecution of former apartheid chiefs, including the former police commissioner, General Johan van der Merwe.

But Van der Merwe said that lawyers representing the generals would be given the go-ahead to lay charges against "a number of senior ANC officials" if the government went ahead with its plans to prosecute them for apartheid crimes.

Afriforum - a pressure group representing the interests of minorities, such as Afrikaners - is also likely to institute litigation against Mbeki, Zuma, intelligence minister Ronnie Kasrils and the senior party leaders who were members of the 1985 national executive committee of the ANC that gave the go-ahead for the use of land mines in the northern Transvaal, now Limpopo.

Threat

Among those likely to be implicated are former transport minister Mac Maharaj and former defence force chief General Siphiwe Nyanda.

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Pikoli was suspended in September - purportedly for a breakdown in his relationship with his boss, justice minister Bridgette Mabandla - while considering about the feasibility of prosecuting people who did not apply for amnesty before the Truth and Reconciliation Commission (TRC).

Menzi Simelane, director-general of the justice department, confirmed that there had been no progress in pursuing such prosecutions since Pikoli's suspension.

He said an interdepartmental team made up of representatives of the justice and intelligence departments and the police was meant to meet Pikoli to discuss which former apartheid chiefs would be prosecuted. The meeting never took place.

"I think everybody just got caught up in the Pikoli matter," said Simelane.

He said one of the main causes of the delay in taking a decision on whom to prosecute was the need to determine which cases warranted further investigation.

Van der Merwe's lawyer, Jan Wagener, said that progress in deciding which of the former apartheid security chiefs to prosecute was awaiting Pikoli's participation.

Pikoli said he was not sure what had become of the discussions since his suspension.

Challenge

Wagener said all eyes were on the Legal Resource Centre's legal challenge to the justice department's directives on post-TRC prosecutions.

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"We see it as another way of opening the door for those who failed to get amnesty from the TRC, to apply for amnesty again," said Achmed Mayet, a director at the Legal Resource Centre.

Van der Merwe said the men who had been under his command did not resent the prosecution of members of the apartheid government's security apparatus, but leaders and members of the ANC and the Pan Africanist Congress, and of their military wings, should also be liable for prosecution.

"We have had our turn," he said, referring to his prosecution, with others, for the attempted murder of Frank Chikane in the 1980s.

Chikane is now director-general of the office of the president.

"We have, over many years, been in discussions with the authorities, including President Mbeki, in an attempt to see if there is a way in which we can deal with the past other than through prosecution," Van der Merwe said.

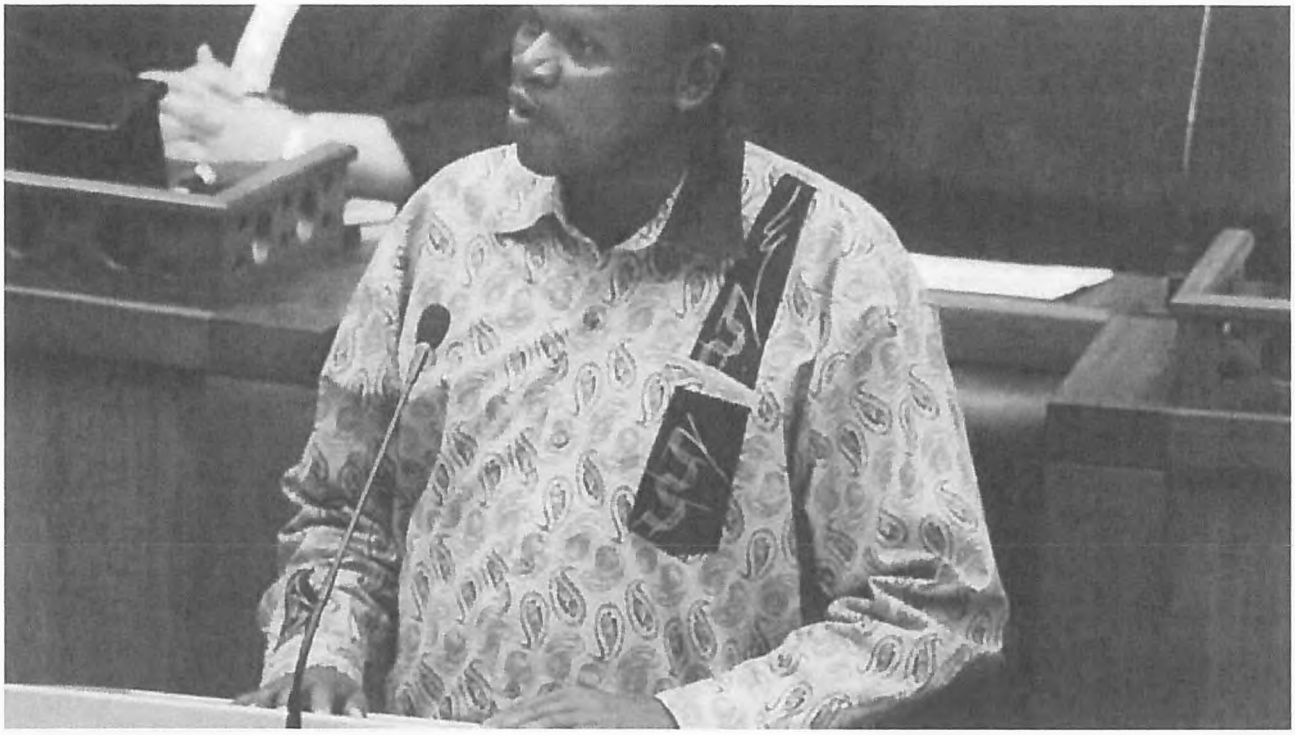
The Umkhonto weSizwe veterans said they supported the prosecution of all apartheid operatives who failed fully to disclose their actions to the TRC.

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Call to prosecute former ANC, PAC leaders for 'conflict of the past'



Letlapa Mphahlele File picture: ANA

| Published Mar 1, 2020

Calls have been made for the prosecution of leaders of the former liberation movement for offences related to "the conflict of the past".

The call has been made by the Foundation for Equality for Law, which wants former president Jacob Zuma and former PAC president and Azanian People's Liberation Army (Apla) commander Letlapa Mphahlele to be among those who should be prosecuted.

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The foundation made the call in an open letter to Justice and Constitutional Development Minister Ronald Lamola.

In his letter, the foundation's chairperson Johan Botha said Lamola's recent statements that the National Prosecuting Authority (NPA) lacked capacity to prosecute those responsible for state capture was disingenuous.

"Millions of rand are being wasted by the NPA due to ineffective planning and politically motivated and selective prosecution of only certain persons for offences related to conflict of the past," he wrote.

He also decried the re-opening of inquests into the death of political activists Ahmed Timol and Dr Neil Agget, saying people who were directly involved in the incidents had long ago died.

Botha charged that there was no primary evidence and "anecdotal hearsay" presented was inadmissible in court.

Botha said the NPA disregarded the provision of the constitution which provided for equality before the law.

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prosecuted.

"In stark contrast with these prosecutions, not a single member of the national executive committee of the ANC, to whom amnesty has been denied, has ever been prosecuted despite the fact that abundant evidence is available to prove that according to the principle of common purpose in our law.

Neither Zuma's spokesperson Vukile Mathabela nor ANC spokesperson Pule Mabe responded to

questions sent to them.

Political Bureau

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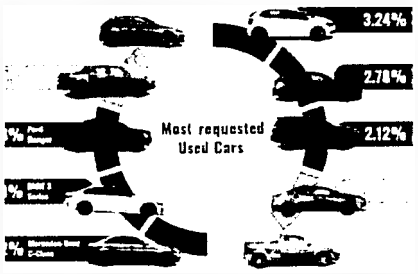
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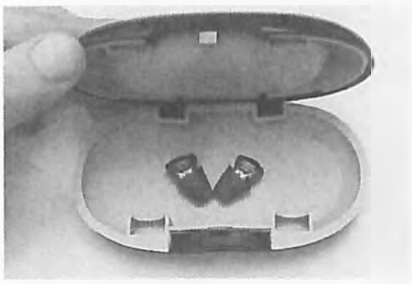
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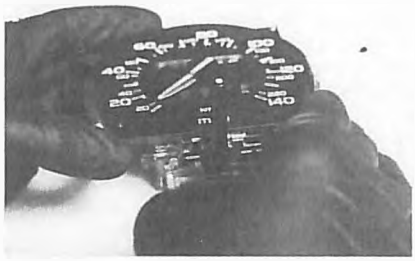
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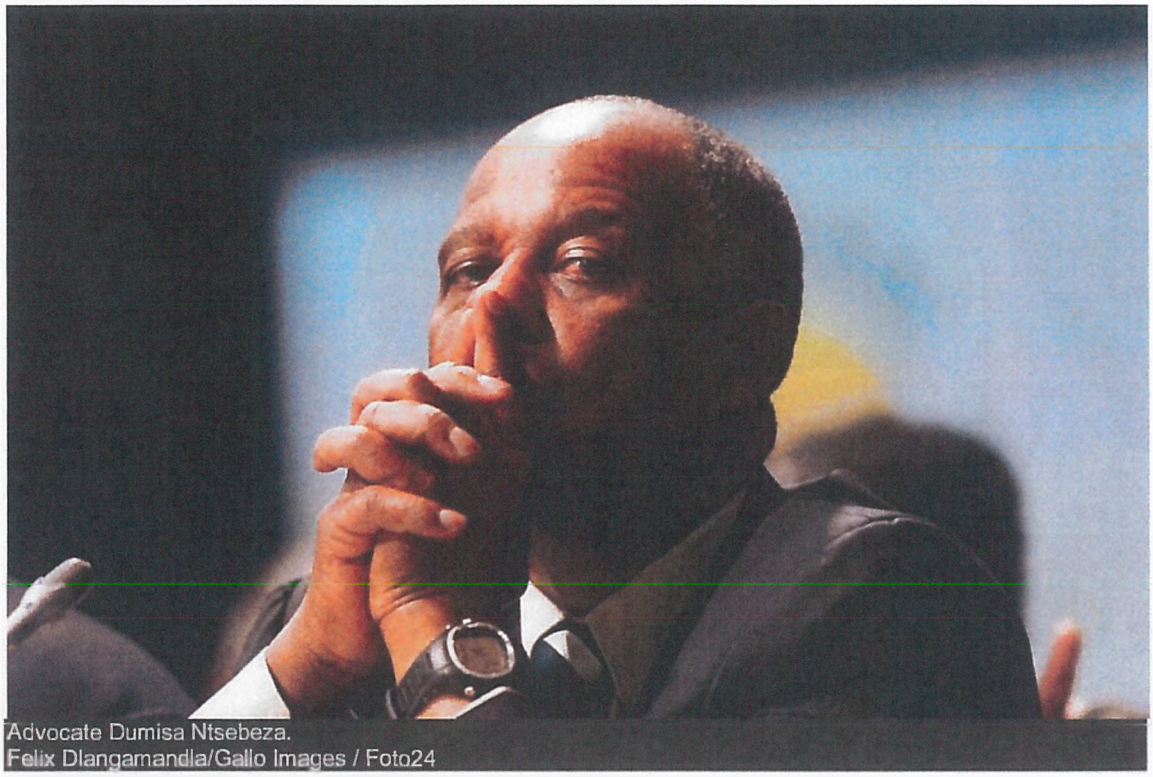
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Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials

Karyn Maughan

Comments Gift article

13:50



Advocate Dumisa Ntsebeza.
Felix Dlangamandla/Gallo Images / Foto24

- **The Truth and Reconciliation Commission's final report referred more than 300 apartheid-era crimes to the National Prosecuting Authority (NPA) for possible prosecution.**
- **Former National Director of Public Prosecutions Vusi Pikoli and other NPA officials said their efforts to pursue the cases were actively stymied.**
- **Last year, the NPA announced that it had appointed advocate Dumisa Ntsebeza to determine whether anyone should face charges for trying to block apartheid prosecutions.**

Three years after the Supreme Court of Appeal (SCA) ordered the state to investigate uncontested evidence that powerful Mbeki administration officials blocked the prosecution

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of apartheid cases, the latter has provided an "opinion" that recommends a public inquiry into those claims.

"The NPA [National Prosecuting Authority] must pursue the establishment of an independent commission of inquiry under either Section 84(2)(f) of the Constitution or the Commissions Act 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017," former Truth and Reconciliation Commission (TRC) member Dumisa Ntsebeza and his team stated in an opinion the NPA released on Monday.

"It is important that any inquiry is public and is empowered with sufficient authority to carry out the investigation, and is clothed with powers of search and seizure, and is able to subpoena people of interest."

Ntsebeza and his team stressed, in the preamble to their investigation into the NPA's ongoing efforts to prosecute crimes linked to the anti-apartheid movement, that they had only been given three months to conduct their potentially politically explosive investigation – and "not been given any investigatory powers or powers to subpoena or interrogate" potential witnesses.

This meant they were unable to obtain possible "valuable information on the rationale behind certain NPA policy decisions adopted during 2003-2017 or the reasons why prosecutions were not pursued and charges under international law were not instituted against accused persons for the crime of apartheid".

Ntsebeza and his team admitted they had not conducted any further investigation into undisputed evidence given by former National Director of Public Prosecutions (NDPP) Vusi Pikoli and other senior NPA officials who detailed how their efforts to pursue the prosecution of alleged apartheid atrocity crimes had been actively stymied by high-ranking officials during the administration of former president Thabo Mbeki.

READ | NPA appoints investigators and prosecutors to tackle TRC matters

That evidence had resulted in the SCA supporting a Gauteng High Court ruling that NDPP Shamila Batohi should conduct a "proper investigation into these issues" to determine whether "any action ... was necessary".

In a ruling that dismissed the bid by accused apartheid killer Joao Rodrigues for a permanent stay of his prosecution for the 1971 murder of activist teacher Ahmed Timol,

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the SCA also confirmed that, between 2003 and 2017, "the executive adopted a policy position" that TRC cases would not be pursued.

The SCA said it was "perplexing and inexplicable why such a stance was taken".

While confirming that the allegations made by Pikoli and other NPA officials were "serious", Ntsebeza and his team now say that determining whether any officials should be charged for unlawfully interfering in these prosecutions would require "a proper investigation, affording the principal players an opportunity to present their version of events".

The NPA says it has not decided whether or not to act on this recommendation, which is not binding on it.

Pikoli has told News24 that he has serious doubts that the ANC government will support a public inquiry into the political interference he detailed.

"Well, essentially it [the government] would be supporting the prosecution of its own officials," he said.

"That's what it amounts to because people who were obstructing the investigation and potential prosecutions were ministers of state, and there were also other officials in other departments, like the late national commissioner of police [Jackie Selebi], [as well as] people in intelligence services who were opposed."

Pikoli added that these allegedly obstructive officials also included then-justice director-general Menzi Simelane, who led the Mbeki administration's efforts to justify his permanent removal from office, and then-Justice Minister Brigitte Mabandla.

READ | 'Never too late for justice': Pikoli urges NPA to investigate 'blocking' of apartheid cases

For its part, the NPA has not disputed that the evidence of political interference in the TRC cases given by Pikoli, former prosecutor Anton Ackermann and late internationally renowned police officer and Zondo Commission investigator Frank Dutton was all true

In court papers, senior prosecutor Torie Pretorius stated: "The [NPA] does not deny that the executive branch of the state took what one can describe as political steps to manage

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the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders."

In an affidavit filed in 2015, Pikoli detailed how he was subjected to pressure from various ministers – mainly Mabandla – to drop the apartheid-era prosecutions.

"I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of a TRC case since my suspension and the removal of TRC cases from advocate Ackermann," he stated at the time.

After being suspended by Mbeki after he pursued an ultimately successful corruption prosecution against Selebi, Pikoli was charged, during the Ginwala Inquiry into his fitness to hold office, over his insistence on pursuing post-TRC prosecutions.

But that charge would be dropped during the inquiry hearings, he believes, because "it was going to embarrass them".

"One can take a cue from that. Why did they subsequently drop that charge after the inquiry had started and also following what I had said in the commission? They felt it was going to embarrass [the] government if they were to proceed with that charge. It stands to reason," he told News24.

The testimony given by Pikoli, Ackermann and Dutton in TRC prosecution litigation has also laid bare how Mbeki administration ministers tried to stop the NPA from pursuing an attempted murder case against apartheid minister of law and order Adriaan Vlok, who would ultimately enter into a plea deal with the State over his role in the attempted poisoning of Reverend Frank Chikane.

Vlok had also been identified as one of four suspects in the murders of the Cradock 4 – activist teachers Matthew Goniwe and Fort Calata, school principal Sicelo Mhlauli and railway worker Sparrow Mkhonto – who were butchered by apartheid police on 27 June 1985.

READ | **Cradock Four: Lamola reopens inquest into the deaths of anti-apartheid activists**

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Calata's son, Lukhanyo, says undisputed evidence revealed that Vlok had visited Cradock on 5 June 1985, when he was shown the houses that Calata and Goniwe lived in with their respective young families.

Vlok then led an Eastern Province Joint Management Centre meeting that discussed what to do about Goniwe, whose activism had become a significant thorn on the side of the oppressive apartheid regime.

A day after that meeting, the Joint Management Centre sent a military signal to the high-level State Security Council (which included then-education minister FW de Klerk) recommending the "permanent removal from society as a matter of urgency" of Goniwe.

The Cradock 4 were killed less than three weeks later.

In an interview with Al Jazeera, which was broadcast in May 2021, Vlok admitted that the words "permanent removal from society" were probably an instruction to murder.

"You know, we in the Security Council, we were very careful not to tell, not to say and [not] to have in the minutes to 'kill' anybody," he said.

"So, we would say, 'remove a person from the society, remove him'. And, you know, nobody said killing. But ... it meant if you can't solve the problem by removing the guy, then you could kill him."

It does not appear that Vlok was ever questioned about these comments by law enforcement authorities.

Instead, after years of NPA delays in deciding on the possible prosecution of the Cradock 4's alleged killers, Vlok died on 8 January 2023.

Lukhanyo told News24 on Tuesday he had assumed that Ntsebeza and his team would "replace" a commission of inquiry by conducting a thorough investigation and "coming up with names of people who should be held accountable in some way or the other" for the NPA's failure to seek the truth about his father's murder.

Instead, he said, Ntsebeza's report had only confirmed the SCA's instruction that there needed to be a proper investigation into the allegations of political interference in TRC cases made by Pikoli and other senior NPA officials.

"Now we are right back at square one," he said.

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According to Lukhanyo, Justice Minister Ronald Lamola had previously told him that his department was unable to afford a commission of inquiry into alleged political interference in apartheid prosecutions.

He said:

The minister made it clear to me on a few occasions that, based on the amount of money that they had spent on the State Capture Commission, they simply didn't have money for yet another commission of inquiry.

Lamola's spokesperson Chrispin Phiri did not respond to requests for comment on the decision not to ask for a commission of inquiry into the apparent suppression of TRC prosecutions rather than the investigation that has now called for that commission. He also did not indicate whether Lamola would support such a commission now.

Instead, Phiri said: "We are in the process of studying the report that advocate Ntsebeza has compiled. We are pleased that the NPA has taken active steps to find a mechanism to establish a process of how to address allegations of political interference in TRC matters. We all have a duty to ensure that the independence of the National Prosecuting Authority is not compromised."

Asked if he believed that the Ntsebeza investigation had been deliberately limited in its powers and scope to limit potential political fallout to the ANC in an election year, Lukhanyo responded that, if this was the case, it would be "really, really sad because it would show ultimately that they are not the leaders we thought they were and that they are not the party that should be leading us".

"If that was the case, then it's clear that they are more interested in protecting the party than actually forging the kind of society for which my father sacrificed his life," he said.

READ | 'Cradock Four' families sue NPA, police over failure to prosecute their killers, cite De Klerk

He added that, should the terms of reference for the Ntsebeza investigation have been designed to "protect and shield members of the ANC from being held accountable for the criminality they perpetuated by denying us justice and politically interfering in these matters, then maybe the ANC is not who we need to have in government and maybe they aren't the leaders they proclaim to be".

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"The interests of the ANC can never surpass the interests of society," he stressed.

"The real question that matters for us as the families of the victims is: Who was it within government, between 2003 and 2023, who interfered to the extent that it completely denied us justice? That's really what we want to know, and we'd also like those individuals to be held criminally accountable for what they've done because what they did was criminal."

The Thabo Mbeki Foundation was asked to respond to questions about the former president's response to the Ntsebeza report recommendation that there should be a commission of inquiry into the allegations of political interference made by Pikoli and others against his administration.

The foundation responded: "As you well know, government functions under the principle of legal continuity. The answers to your questions can best be answered by the government, as it has done on many other instances."

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Thabo Mbeki
FOUNDATION

Statement by former President Thabo Mbeki on allegations of NPA interference by the Executive.

01 March 2024

As a general rule, I subscribe to the understanding that government functions on the basis of legal continuity. I therefore always defer to government to clarify policies and programmes adopted and implemented while I was in government.

Accordingly, it is with some reluctance that I respond to Ms Karyn Maughan's article: "Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials" published on News24 on February 21. However, failure to challenge some of what Ms Maughan has written would assist to perpetuate various falsehoods.

During the years I was in government, we never interfered in the work of the National Prosecuting Authority (NPA). The executive never prevented the prosecutors from pursuing the cases referred to the NPA by the Truth and Reconciliation Commission.

I insist on this despite a 2021 Supreme Court of Appeal judgment which found, on the strength of uncontested submissions by former National Director of Public Prosecutions (NDPP), Advocate Vusi Pikoli, that the NPA "investigations into the TRC cases were stopped as a result of an executive decision" which amounted to "interference with the NPA."

I repeat, no such interference ever took place. If the investigations Adv Pikoli referred to were stopped, they were stopped by the NPA and not at the behest of the Government as alleged by the Advocate. There is no record of a single instance when the NPA stopped investigating and prosecuting any case on account of the so-called "executive interference" – at least not during the period 1999 - 2008.

There are some questions which the NPA must answer honestly.

Who in the executive instructed the NPA not to do its work? Will the NPA publish this 'instruction' which, presumably, will be in its archives? Why did the NPA accept and respect what would have patently been an illegal instruction?

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Instead of propagating falsehoods, the NPA must investigate and prosecute the cases referred to it by the TRC.

I also recall that the same Pikoli who allegedly buckled under pressure of "executive interference" concerning the TRC cases, earned a lot of respect by portraying himself as an independent and principled NDPP who defied an "all too powerful" President Mbeki, who was supposedly hell-bent on stopping him from investigating and arresting the late former National Commissioner of Police, Jackie Selebi.

The question arises, what happened to his cherished independence and commitment to principle when he acquiesced to 'members of the executive' on the TRC cases?

In her article Ms Maughan also refers to so-called "back door amnesties".

What happened in this regard is that years after the dissolution of the TRC, some prisoners approached the Government arguing that they had been imprisoned for political activities – and were therefore political prisoners – but had not had the opportunity to apply for amnesty with the TRC.

The Government thought that rather than ignore these approaches, it should institute a process akin to what was pursued by the TRC Amnesty Committee to allow these prisoners to make presentations. After studying the submissions and using his Constitutional powers, the President would decide whether to grant amnesty to any of the prisoners.

Ultimately, this did not happen because the courts ruled that the intervention would violate the TRC Act. But there was nothing "back door" about the process. I addressed a joint sitting of the Houses of Parliament on this matter on November 21, 2007.

Conveniently, some people forget that the ANC was the principal architect of the Constitution of the Republic. During the years when I served as Deputy President and President of the Republic, I, together with my colleagues in Government, always bore this in mind and acted knowing that the Constitutional prescripts we helped to negotiate were binding on us.

There was never any Minister of Justice during those years who was ever authorised to instruct any NDPP to act in one way or another. No NDPP, including Pikoli, ever approached me to complain that he/she had been instructed by a Minister, or any other official, to violate the independence of the NPA as prescribed by the Constitution.

The NPA must demonstrate enough integrity by apologising for not processing the TRC cases, rather than engage in dishonourable behaviour of trying to hide behind a fig leaf which is nothing more than pure fabrication.

Issued by the Office of former President Thabo Mbeki

Johannesburg

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Attention : Adv Abrahams

Attention: Adv Pretorius SC

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Dear Advocates Abrahams and Pretorius

APARTHEID ERA CASES:

1. **STATE v MSEBENZI TIMOTHY RADEBE & 3 ORS, CASE NO.: CC 16/2016**
2. **INQUEST INTO DEATH OF AHMED ESSOP TIMOL: CASE NO: I01-2017**
3. **LATE NEIL AGGETT**
4. **LATE MATTHEWS MABELANE**
5. **LATE HOOSEN HAFFEJEE**
6. **LATE SULIMAN BABLA SALOOJEE**
7. **OTHER UNRESOLVED DEATHS**
8. **SERIOUS CASES WHERE AMNESTY WAS REFUSED OR NO APPLICATION WAS MADE**

1. We seek a meeting with you discuss the abovementioned cases.

   Case 1: Late Nokuthula Simelane

2. In respect of case 1, which deals with the late Nokuthula Simelane, we have received no responses to our letter to Advocates Mathenjwa and Barnard dated 24 October 2016 and our letter to you dated 28 February 2017.

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3. In these letters we raised grave concerns about the prosecutorial strategy adopted in this case, which in our view serves to undermine the prospects of a successful prosecution. Indeed we pointed out that our client has lost faith in the ability of this prosecutorial team to conduct a serious and vigorous prosecution. We accordingly seek the appointment of fresh prosecutors to take this matter forward.

Case 2: Late Ahmed Timol

4. Our letter to Adv Pretorius SC dated 25 October 2017 refers. Judge Mothle recommended that criminal charges be pursued against former Sergeant Joao Anastacio Rodrigues, former Warrant Officer Neville Els and former Colonel Seth Sons. We wish to discuss progress in these investigations and the prosecutorial approach to be taken.

Case 3: Late Neil Aggett

5. In case 2, the Neil Aggett matter, we are concerned that to date, no request has been made to the Minister of Justice to seek the reopening of the inquest into Aggett's death.

6. We have engaged in extensive correspondence with you in relation to this matter. In these communications we have pointed out why an early decision is important, including the fact that some witnesses are now elderly and sickly.

7. We have repeatedly pointed out that there is already more than sufficient new evidence to warrant the reopening. Moreover, there would be a time lapse of several months between such decision and the hearing, during which outstanding investigations could be concluded. In particular we refer you to:

7.1 Our presentation provided to you on 19 January 2016;

7.2 Our email dated 21 June 2016 and letter to you dated 8 July 2016;

7.3 Our letter to you dated 23 August 2016;

7.4 Our letter to you dated 21 February 2017.

8. Advocate T Pretorius SC has advised our investigators, Messrs Dutton and Bursik that he may not make available the files of the relevant detainees or SAPS members until the Minister of Justice had agreed to re-open the Inquest. The late delivery of such files in the Timol inquest placed enormous pressure on the legal teams in that matter.

9. We also place on record that our investigators are still waiting for a number of ID numbers of detainees and former SAP members.

10. We accordingly seek a firm date upon which the NDPP will recommend to the Minister of Justice to reopen the Aggett Inquest in terms of s 17A of the Inquest Act 58 of 1959.

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Case 4: Late Matthews Mabelane

11. In this matter the late Matthews Mabelane fell to his death on 15 February 1977 from the tenth floor of John Vorster Square following 23 days of Security Branch detention. The Legal Resources Centre are the attorneys of record in this case.

12. We wish to discuss the progress of investigations in this case and what paperwork has been uncovered so far.

Case 5: Late Hoosen Mia Haffejee

13. In this matter the late Dr Hoosen Haffejee died on 3 August 1977 at the Brighton Police Station in Durban after 1 day of Security Branch detention. According to the police he committed suicide by hanging.

14. We understand that the NPA is seized with this matter and that investigations are proceeding. We would be pleased to hear of the progress in these investigations. We also wish to ensure that the Haffejee family is legally represented.

Case 6: Late Suliman Babla Saloojee

15. The police claim that Babla Saloojee, who died on 9 September 1964, committed suicide by jumping from the 7th floor of the Greys Building in Johannesburg following 65 days in detention. Imtiaz Cajee is in touch with the wife of the late Saloojee who has indicated a desire to have the inquest reopened.

16. We wish to enquire whether this matter is on your books, and if so the state of the investigations.

Other cases

17. We would be pleased to hear whether the NPA is seized with any other apartheid-era cases. When we met with Advocate Abrahams after the launch of civil proceedings in the Nokuthula Simelane matter in 2015 he indicated that the NPA was pursuing an additional 10 cases.

18. Mr. Imtiaz Cajee is also in contact with the families of:

18.1 Nicodemus Kgoathe: He died in detention 4 February 1969 after "slipping in the shower' at the Silverton Police Station;

18.2 Solomon Modipane: He was arrested with Kgoathe and died on 28 February 1969 after "slipping on a piece of soap" at the Silverton Police Station;

18.3 Jacob Monnakgotla: He was arrested with the above and died in Pretoria Prison on 10 September 1969, apparently of natural causes.

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18.4 Dr Albert Luthuli: He died on 21 July 1967 in Groutville, near Durban, after apparently being run over by a train.

19. Other deaths in detention which ought to be followed up include:

19.1 Imran Haroon: After being held incommunicado for 123 days by the Security Branch Imam Haron died on 27 September 1969. During an inquest into his death, police claimed that his injuries were from falling down a flight of stairs at the Maitland police station. At his post mortem several pre-death injuries were found. Haroon had 28 bruises on his legs as well as other injuries inconsistent with a fall down stairs. The inquest predictably found that nobody was to blame for his death.

19.2 The well-known case of Bantu Stephen Biko who died in Security Branch detention on 12 September 1977.

20. We also wish to raise the possibility of opening or reopening the inquests into the abovenamed.

Serious cases where amnesty was refused or no application made

21. Eleven cases have been selected following an analysis of the amnesty records of the TRC.

22. All the crimes are serious. They include murder, conspiracy to murder, attempted murder, kidnapping and torture. In all the matters listed the evidence is either available or can be secure through the most basic investigative steps. The 11 cases are:

22.1 Murders of Eustice "Bimbo" Madikela, Ntshingo Mataboge & Fanyana Nhlapo

22.2 Murders of Sipho Charles Hashe; Qaqawuli Godolozi & Champion Galela (Pebco 3)

22.3 Murders of Matthew Goniwe, Sparrow Mkhonto, Fort Calata & Sicelo Mhlauli (Cradock 4)

22.4 Kidnapping, Torture & Disappearance of Peter Thabuleka

22.5 Kidnapping & Murder of Ntombikayise Khubeka

22.6 Murder of Richard Motisi & Irene Motisi

22.7 Kidnapping & Disappearance of Moses Morudi

22.8 Kidnapping, Torture & Murder of Jameson Ngoloyi Mngomezulu

22.9 Murder of Johannes Sweet Sambo

22.10 Murder of Adriaano Louis Bambo

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22.11 Murder of Welcome Khanyile

23. The potential accused are those persons who were denied amnesty by the Truth and Reconciliation Commission (TRC) or who declined to apply for amnesty. Details of these cases are annexed hereto in a memorandum marked "A".

24. The 11 cases set out in Annex A are ripe for investigation and possible prosecution, and have been so for many years, if not decades. Where prosecutions are not possible inquests should be held or reopened.

25. Aside from discussing each case mentioned in this letter we also wish to discuss the possibility of these cases being handled by a small group of dedicated and committed prosecutors within the NPA, supported by carefully selected investigators.

26. In the circumstances we seek a meeting with you at your earliest convenience.

Yours faithfully

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FA67 FORT CALATA FOUNDATION

Date: 27 June 2023

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Executive Director,
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Email: lukhanyo.calata@gmail.com

To: Mr Gratitude Bulelani Magwanishe
Chairperson,
Portfolio Committee on Justice and Constitutional Services
Committee Secretariat:
Siyabamkela Mthonjeni
Email: smthonjeni@parliament.gov.za
Vhonani Ramaano
Email: vramaano@parliament.gov.za

Dear Mr Magwanishe,

RE: DEVELOPMENTS IN THE CRADOCK FOUR CASE

I write on behalf of the Fort Calata Foundation and the families of Fort Calata, Matthew Goniwe, Sicelo Mhlauli, and Sparrow Mkonto, who have been struggling for truth and justice for decades. We wish to bring to the attention of the Portfolio Committee on Justice and Correctional Services recent developments in the Cradock Four case.

On the morning of Thursday 22 June 2023, the families, together with their legal representatives, were meant to meet with the Cradock 4 prosecution team at 10.30 am. About an hour before the meeting was due to start, the NPA advised attorneys Cliffe Decker Hofmeyr (CDH) that the meeting was cancelled. The meeting had been long awaited. The last meeting with the NPA had been in October 2022 and requests for a further meeting had been made from March 2023 onwards. The attorneys were advised that the prosecutors were tied up until June, and eventually a meeting date of 22 June was agreed upon.

It was a particularly important meeting about the future of the case, given the recent death of the last remaining key suspect, Hermanus Barend du Plessis. Family members had set aside

FORT CALATA FOUNDATION (NPC 2020/088489/08)
Directors: Nomonde Calata, Dorothy Calata,
Lukhanyo Calata, Tumani Calata, Abigail Calata
Company Secretary: Mary-Faith Saku, Sidumo Nyamezele, Mziwenqaba Ntshangase, Martina Della Togna.
https://fortcalatafoundation.org/

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time to attend the meeting. Not only was the last-minute cancellation of the meeting downright discourteous to all involved, but it was also deeply offensive to the families.

It is the typical practice of the attorneys to circulate a proposed agenda a day or so before a meeting. The draft agenda is then considered before the meeting starts and it is either accepted or adjustments are made. The proposed agenda circulated the day before was:

1. Welcomes
2. Inputs by families
3. NPA update since receipt of our analysis on 2 March
4. NPA explanation for legal basis of refusing to prosecute Du Plessis (as set out in their press statement)
5. NPA strategy going forward
    a. Is it their intention to still hold a 3rd inquest, and if so, what they aim to achieve thereby?
    b. Response of families
6. Closure

In any event, it was no mystery what had to be discussed given the presentation of certain documents in March, together with subsequent communications, and of course the death of Du Plessis. However, around 9.30 am, the NPA wrote to CDH saying "*This is a very short notice to discuss the items on the agenda, as such the meeting cannot proceed. The items on the agenda call for internal consultation with our DPP, the Legal Affairs Division, and our National Office.*"

The NPA should have attended the meeting and if they felt uncomfortable or not ready to deal with any item, they should simply have said so and explained why. In refusing to do so, they displayed considerable discourtesy to the families and legal representatives. It also suggested that they were not familiar with the reasons behind decisions that had been made in relation to the case, or they were uncomfortable in dealing with such questions.

It is somewhat breath-taking that the NPA team were not willing or ready to discuss these basic issues, especially since the decisions in question had already been taken last year. Indeed, the decision not to prosecute anyone and to proceed with a 3rd inquest was communicated by the DPP (Eastern Cape) to the families on 23 June 2022. The legal representatives then asked the NPA to hold back on a final decision until further representations could be made. To this end a presentation was made to the NPA on 26 October 2022, and written representations (including an analysis) was supplied on 2 March 2023.

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FORT CALATA FOUNDATION

Regrettably, the conduct of the NPA is consistent with the general malaise plaguing the TRC cases. We also wish to discuss the possibility of involving families and their representatives in future Justice Portfolio Committee meetings in relation to the TRC Cases. So far only the NPA has been invited to provide briefings. We believe it is high time for the Portfolio Committee to hear the side of the victims and the families.

We are available to meet at the earliest convenience of the Portfolio Committee.

We look forward to hearing from you.

Yours sincerely,

Lukhanyo Calata
Executive Director

Nomonde Calata, Dorothy Calata
Lukhanyo Calata, Tumani Calata, Abigail Calata
Mary-Faith Saku, Sidumo Nyamezele, Mziwenqaba Ntshangase, Martina Della Togna
https://fortcalatafoundation.org/

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Former Commissioners of the Truth and Reconciliation Commission

Office of Yasmin Sooka
Foundation for Human Rights
yasmin.sooka@gmail.com
+2711593-4002

His Excellency, President Cyril Ramaphosa
Private Office of President
Union Buildings (Pretoria)
Fax: +27 (0)12 323 8246

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Fax: +27 (0)21 462 2838
Email: President@rsa.gov.za;
MaleboS@presidency.gov.za
CC. **Honourable Minister Mike Masutha**
Email: Minister@justice.gov.za
Shafrika@justice.gov.za

Deputy Minister John Jeffery
Email: JJeffery@justice.gov.za
BlWilliams@justice.gov.za
JMhlarhi@justice.gov.za

5 February 2019

Dear Mr. President,

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We write to you as former Members of the Truth and Reconciliation Commission (TRC) to call on you to appoint a commission of inquiry into the political interference that has stopped the investigation and prosecution of virtually all the cases referred by the TRC to the National Prosecuting Authority (NPA). We also call on you, in your capacity as President of South

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Africa, to apologise to victims of apartheid-era atrocities who have been denied justice for several decades and suffered considerable trauma as a result.

Thembi Nkadimeng, the sister of Nokuthula Simelane, Lukhanyo Calata, the son of Fort Calata, Imtiaz Cajee, nephew of Ahmed Timol, and Jill Burger, sister of Neil Aggett have been struggling for justice and closure over several decades. Their struggles are symbolic of those waged by countless other families. The sacrifices made by their loved ones laid the basis for South Africa's democracy with its enshrined freedoms. The families feel justifiably betrayed by South Africa's post-apartheid state which, to date, has turned its back on them. We owe them answers and we owe them an apology.

Amnesty process

The historic compromises made during our negotiations for a peaceful transition demand that justice be pursued for serious apartheid-era crimes, such as murder. This was encapsulated in the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the TRC Act"). The constitutional and statutory design of the amnesty process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to pursue justice where perpetrators were not amnestied.

In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of *"a bold prosecution policy"* in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.[1] Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened.

Political interference

Post the TRC, the story of post-apartheid justice in South Africa is a shameful story of terrible neglect. Both the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid era cases. Even though the TRC had handed over a list of

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[1] Vol 6, Section 5, Ch 1 at para 24

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several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for (the TRC cases).

The reasons for the inaction on the TRC cases were exposed in the 2015 legal proceedings launched by Thembi Nkadimeng who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane, by Security Branch officers.[2] This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former NDPP, Adv. Vusi Pikoli and Anton Ackermann SC, former Special Director of Public Prosecutions in the Office of the NDPP and former head of the PCLU. The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases.

A secret Amnesty Task Team was established in 2004 to address "*the absence of any guarantee that alleged offenders will not be prosecuted*",[3] which resulted in amendments to the NPA's Prosecution Policy to allow for a backdoor amnesty as well the launch of President Mbeki's Special Dispensation on Political Pardons. Both initiatives had to be stopped in the courts. [4] The Nkadimeng case disclosed a memorandum addressed by Pikoli to the then Justice Minister, Bridgett Mabandla, in which Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. [5]

As a result, when Imtiaz Cajee approached the NPA in 2003 to investigate the death in detention of Ahmed Timol no investigation took place. The NPA pretended that the matter had been investigated when in fact it was not.[6] Had it been investigated the lead interrogators could have been held to account, since the last suspect only died in 2012. This amounted to a travesty of justice. Indeed, the NPA had to be threatened with litigation to have the Timol inquest reopened in 2017.[7]

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[2] *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/2015

[3] Undated Secret Report: Amnesty Task Team.

[4] *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422; *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC).

[5] 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 (classified secret).

[6] The speaking to one journalist does not amount to an investigation. See "*History, suppressed: What didn't get revealed at the Timol inquest*" by Kevin Bloom published in the Daily Maverick on 22 September 2017

[7] Para 114 and sub-paras read with annexes IC21 – 24 of the answering affidavit of Imtiaz Cajee, *Rodrigues v NDPP & Others*, Case No.: 76755/18, Gauteng Division.

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Pikoli and Ackermann stated in 2015 that it was no coincidence that there had not been a single prosecution of any TRC matter since September 2007. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case. Needless to say, the Simelane and Timol families had to conduct the investigations themselves and rely on the services of pro bono lawyers in order to make these modest advances.

Emboldened by the outcome of the reopened Timol Inquest, human rights activists placed 20 more cases (including the Cradock 4 and Pebco 3 murders) before the NPA and the Hawks in January 2018. Although the Hawks appointed investigating officers it was subsequently discovered that the officers leading the investigations were former Security Branch (SB) or associated with the SB. The most senior investigator had been implicated in the torture of a political detainee in the 1980s. This detainee, together with his wife, were subsequently shot dead by the SB, after he sued the SAP for damages. Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that no progress has been made in any of these 20 cases. As recent as 2018 it is still business as usual with the TRC cases ultimately controlled by forces from the past.

We note with alarm that the real decision makers behind the atrocities committed by the erstwhile SB have not been investigated and prosecuted. Individuals, such as Eugene de Kock and those recently indicted in the Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible speaks volumes about the captured state of our criminal justice system.

Need for a commission of inquiry

In our view it can be safely concluded that the SAPS and the NPA became captured by political forces in respect of the TRC cases. The few prosecutors with the courage to stand up to the political interference were either removed from their positions or frozen out from these cases. The rest acquiesced and ensured that the TRC cases never saw the light of day.

We contend that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Indeed, those behind the suppression of these cases may very well have been involved in a conspiracy to obstruct or defeat the course of justice, which is a very serious crime in South African law.

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In the application brought by Joao Jan Rodrigues to permanently stay the prosecution against him for his role in the murder of Timol, the NPA and the SAPS in papers filed on 4 February 2019, admitted to the political interference described above.

We accordingly request that you appoint a commission of inquiry to investigate the political interference set out in this document and identify those responsible, within and outside the NPA and SAPS, for suppressing the TRC cases. The terms of reference should consider whether such persons have acted unlawfully, committed any crimes and what steps, if any, should be taken against them. The terms should also include the making of recommendations to prevent such manipulation taking place in the future.

Alternatively, since the political interference has taken the form of state capture you could instruct the *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (also referred to as the Zondo Commission) to carry out this inquiry. Further alternatively you could expand the mandate of the *Mokgoro Commission of Inquiry* – which is already seized with a probe into the NPA, to handle this inquiry.

Need for apology

The failure to investigate and prosecute those who were not amnestied represents a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure stands as a betrayal of victims who have been waiting for the criminal justice process to take its course and has added considerably to their trauma. Indeed, the policy or approach to allow perpetrators to escape justice adds insult to the suffering endured by victims.

Above all, the failure stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

We as former Commissioners are deeply outraged by the actions of those who purport to serve the State and who in fact are compromising it. So far nobody in authority has acknowledged that the role of the NPA and SAPS amounted to the most fundamental violations of the Constitution and the law. No expression of regret, remorse or apology has been offered by anybody in authority for the deep betrayal of victims of past atrocities.

We respectfully call on you to apologize to the victims in your State of the Nation Address for the dereliction of duty by those who were meant to serve.

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Yours faithfully



Yasmin Sooka and Advocate Dumisa Ntsebeza SC
On behalf of the Commissioners who have endorsed this letter

Ms Yasmin Sooka
Adv. Dumisa Ntsebeza SC
Ms. Mary Burton
Ms. Glenda Wildschut
Dr Fazel Randera
Mr Richard Lyster
Revd Bongani Finca
Adv Denzil Potgieter
Dr Wendy Orr
Desmond and Leah Tutu Legacy Foundation on behalf of Archbishop Emeritus Desmond Mpilo Tutu

Former Committee Members
Dr Russell Ally
Prof Piet Meiring.
Ms Pumla Gobodo-Madikizela

This letter is also endorsed by the South African Coalition for Transitional Justice constituted by the below-mentioned organisations and individuals:

Centre for the Study of Violence and Reconciliation(CSVR)
Khulumani Victims Support Group
Institute for Justice and Reconciliation(IJR)

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Foundation for Human Rights(FHR)
Ahmed Timol Family Trust
Legal Resources Centre
Human Rights Media Centre
Imam Haron Family
Ms Shamela Shamis
Mr. Muhammed Haron
Mr. Imtiaz Cajee
Ms Fatima Haron Masoet
Mr. Lukhanya Calata
Mr Tshepo Madlingozi
South African History Archives (SAHA)
Ms. Jill Burger
Ms. Shirley Gunn
Mr. Hugo van der Merwe
Ms Valdi van Reenen-le Roux
Ms. Maxine Rubin
Ms. Judy Seidman
Mr. Stanley Henkerman
Ms. Sufiya Bray Freislaar
Ms Geraldine
Mr. Piers Pigou

WEBBER WENTZEL
in alliance with > Linklaters

Chairperson: Deputy Chief Justice Zondo

Hillside House
17 Empire Road
ParkTown
Johannesburg, 2193

AND TO:

Acting Secretary of the Commission, Peter Pedlar;
Head of Investigation, Terence Nombembe;
Head of Legal Team, Paul Pretorius SC; and
Senior Investigator, Frank Dutton.

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Your reference	Our reference	Date
	M Hathorn / S Robb 3033110	17 April 2019

Dear Sir

REPRESENTATIONS OF LUKHANYO CALATA TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE

1. We note the delivery of five files and accompanying letters to the following persons:

1.1 Chairperson: Deputy Chief Justice Zondo;

1.2 Acting Secretary of the Commission, Peter Pedlar;

1.3 Head of Investigation, Terence Nombembe;

1.4 Head of Legal Team, Paul Pretorius SC; and

1.5 Senior Investigator, Frank Dutton.

2. Please acknowledge receipt by singing below:

Acknowledgement of receipt

Name: Boipelo Ratshikanai
Position: Executive Assistant
Date: 17 April 2019 1:48pm

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa M Adderley NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair DHL Booysen AR Bowley MS Burger RJ Carrim T Cassim SJ Chong A Christie KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland JH Davies PM Daya L de Bruyn PU Dela JHB de Lange M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue HJ du Preez CP du Toit SK Edmundson KH Eiser AF Esterhuizen MJR Evans AA Felekis G Fitzmaurice JB Forman C Gabriel CP Gaul KL Gawith OH Geldenhuys MM Gibson N Goolam CI Gouws PD Grealy JM Harvey MH Hathorn JS Henning KR Hillis S Hockey CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings CM Junker S Jooste IA Kahn ACR Katzke M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle J Lamb E Louw L Marais S McCafferty MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu M Molor LE Mostert VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane BA Phillips MA Phillips D Ramjettan GI Rapson Z Rawoot K Rew SA Pitchie NJA Robb DC Rudman WJ Rystergon G Sader M Sader H Samsodien JW Schultz KE Shepherd AJ Simpson N Singh N Singh Nogueira P Singh J Smit RS Smith MP Spalding PS Stein MW Streeuli LJ Swaine Z Swanepoel A Thakor TK Thekiso FJ Vanda PP van der Merwe SS van der Meulen CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson N Yudaken Chief Operating Officer: SA Boyd

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Yours faithfully

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AND TO:

Acting Secretary of the Commission, Peter Pedlar;
Head of Investigation, Terence Nombembe;
Head of Legal Team, Paul Pretorius SC; and
Senior Investigator, Frank Dutton.

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17 April 2019

Your reference	Our reference	Date
	M Hathorn / S Robb 3033110	17 April 2019

Dear Sir

REPRESENTATIONS OF LUKHANYO CALATA TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE

1. We act for Mr Lukhanyo Calata.

2. We attach his representations to the Judicial Commission of Inquiry into Allegations of State of Capture, Corruption and Fraud in the Public Sector including Organs of State.

3. He makes these representations on his behalf personally, and on behalf of his mother, Nomonde Liza Calata, and his sisters, Dorothy Calata-Dombo and Tumani Pauline Calata. His father was the late Fort Calata, who together with Matthew Goniwe, Sicelo Stanely Mhlauli and Sparrow Thomas Mkhonto ("The Cradock Four") were brutally murdered by apartheid era security personnel near Port Elizabeth on 27 August 1985.

4. He also makes these representations on behalf of other victims of apartheid era crimes. These include:

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa M Adderley NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair DHL Bonysen AR Bowley MS Burger RI Carrim T Cassim SJ Chong A Christie KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland JH Davies PM Daya L de Bruyn PU Dela JHB de Lange M Derenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue HJ du Preez CP du Toit SK Edmundson KH Eiser AE Esterhuizen MJR Evans AA Felekis G Fitzmaurice JB Forman C Gabriel CP Gaul KL Gawith OH Geldenhuys MM Gibson H Goolam CJ Gouws PD Grealy JM Harvey MH Hathorn JS Henning KR Hillis S Hockey CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings CN Jonker S Jooste TA Kahn ACR Katzko M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle J Lamb E Louw L Marais S McCafferty MC McIntosh SJ McKenzie CS Meyer AJ Mills D Mlo NP Mngomezulu M Molo LE Mostert VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane BA Phillips MA Phillips D Ramjettan GI Rapson Z Rawoot K Rew SA Ritchie NJA Robb DC Rudman WJ Rysbergen G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh Nogueira P Singh J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor TK Tlhekiso PZ Vanda PP van der Merwe SE van der Meulen CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld LM Visagie EME Warmington J Watson AWR Westwood WJ Wilson M Xudabeni Chief Operating Officer: SA Baird

4.1 Thembi Nkadimeng, the sister of Nokuthula Simelane who was abducted, tortured and allegedly killed by the Security Branch ("SB") in 1983.

4.2 Imtiaz Cajee, nephew of Ahmed Timol who was tortured and murdered by the SB at John Vorster Square in 1971.

4.3 Lasch Mabelane, brother of Mathews Mabelane who was tortured and killed while in SB detention at John Vorster Square in 1977.

4.4 Jill Burger, sister of Neil Aggett, who was tortured and killed while in SB custody in John Vorster Square in 1982;

4.5 Fatima Haron-Masoet and Muhammed Haron, daughter and son of Imam Haron who was tortured and killed in SB detention in Cape Town in 1969;

4.6 Sarah Lall, sister of Dr Hoosen Haffajee, who was tortured and killed at the Brighton Police Station in Durban in 1977.

5. The purpose of our client's representations is to support his request to the Judicial Commission of Inquiry into Allegations of State of Capture, Corruption and Fraud in the Public Sector including Organs of State to investigate the political interference which resulted in the suppression of virtually all the 300 cases, including the cases referred to above, referred by the Truth & Reconciliation Commission to the National Prosecuting Authority.

Yours faithfully

WEBBER WENTZEL
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Partner
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

28 May 2019

Mr Lukhanyo Calata
Webber Wentzel
90 Rivonia Road, Sandton
Johannesburg
2196

Dear Mr Calata

RE: REPRESENTATIONS OF LUKHANYO CALATA TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE

1. I acknowledge receipt of your letters dated 17 April 2019 and 23 April 2019 together with a file which you sent to the Commission in regard to the above subject.

2. By direction of the Chairperson of the Commission, the Deputy Chief Justice, I write to request you to have regard to the terms of reference of the Commission, a copy of which is attached for your convenience, and indicate under which part of the terms of reference you suggest that this matter falls and provide your motivation as to why you think the matter falls under that part of the terms of reference.

3. It does seem to the Chairperson that the matter might fall outside the terms of reference of this Commission, but the Commission will only decide that issue after you have delivered your comments or representations. It will be appreciated if your representations could reach this office on or before 17 June 2019.

Yours Sincerely

Mr. Peter Pedlar

Acting Secretary

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,

CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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PROCLAMATIONS • PROKLAMASIES

PROCLAMATION NO. 3 OF 2018

by the

President of the Republic of South Africa

JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

In terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, I hereby appoint a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state with the terms of reference in the Schedule attached hereto and appoint Honourable Mr Justice Raymond Mnyamezeli Mlungisi Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this the 23rd day of January Two Thousand and Eighteen.

President

By Order of the President-in-Cabinet:

Minister of the Cabinet

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SCHEDULE

TERMS OF REFERENCE

OF THE

JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

A Judicial Commission of Inquiry ("the Commission") is hereby appointed in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud.

1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016: -

1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's. In particular,

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the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;

1.2. whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;

1.3. whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and/or announced, and if so,

whether the President or any member of the National Executive is responsible for such conduct;

1.4. whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;

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1.5. the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended.

1.6. whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;

1.7. whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;

1.8. whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;

1.9 the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In

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particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest;

2. These Terms of Reference may be added to, varied or amended from time to time.

3. All organs of State will be required to cooperate fully with the Commission.

4. The Commissions Act, 1947 (Act No. 8 of 1947) shall apply to the Commission, subject to such amendments and exemptions as may be specified by proclamation from time to time.

5. The Commission shall submit its report and recommendations to the President within 180 days of the commencement of the Commission.

6. Regulations shall be made, after consultations with the presiding judge, in terms of the Commissions Act, 1947 and shall apply to the Commission in order to enable the Commission to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents.

7. The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate

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law enforcement agency, government department or regulator regarding the conduct of a certain person/s.

8. Regulations contemplated above shall also make provision for the resourcing and employment of staff of the Commission.

PROKLAMASIE NO. 3 VAN 2018

deur die

President van die Republiek van Suid-Afrika

GEREGTERLIKE KOMMISSIE VAN ONDERSOEK TEN EINDE ONDERSOEK NA BEWERINGS VAN STAATSKAPING, KORRUPSIE EN BEDROG IN DIE OPENBARE SEKTOR MET INBEGRIP VAN STAATSORGANE, IN TE STEL

1. Ingevolve artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika, 1996 stel ek hierby 'n Kommissie van Ondersoek aan ten einde ondersoek in te stel na bewerings van staatskaping, korrupsie en bedrog in die Openbare Sektor, met inbegrip van staatsorgane, met die opdrag in die Bylae en stel ek hierby die Agbare Regter Raymon Mnyamezeli Mlungisi Zondo as Voorsitter, aan.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria op hierdie 23ste dag van Januarie 2018.

President

By Las van die President-in-Kabinet:

Minister van die Kabinet

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WEBBER WENTZEL
in alliance with > Linklaters

Mr. Peter Pedlar
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State

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Your reference	Our reference	Date
	Mr M Hathorn 3033110	12 June 2019

Dear Sir

REPRESENTATIONS OF LUKHANYO CALATA TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE

1. We thank you for your letter dated 28 May 2019.

2. We are instructed that our client's abovementioned representations do fall within the terms of reference of the Commission of Inquiry into State Capture ("**the Commission**") for the reasons set out below.

State Capture and Corruption is not only about Financial Gain

3. In the first instance the Commission is seized with the subject matters of state capture, corruption and fraud. We submit that all 3 subject matters are not confined purely to conduct, or abuse of power aimed at financial gain but also for undue or illegal advantage.

Terms of reference

4. This is reinforced by paragraph 1.1 of the Commission's Terms of Reference which require the Commission to inquire into the

> "extent and by whom attempts were made through **any form of inducement or for any gain of whatsoever nature** to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state..." (Emphasis added).

5 This indicates that the Commission's scope is not merely confined to matters of financial gain, but to "*any form of inducement or for any gain of whatsoever nature*". This would include, for example, shielding suspects from investigation and prosecution through inducing members of the NPA and SAPS to drop such cases.

Senior Partner: ... Managing Partner: SJ Hutton Partners: EW Abraham RB ... D Addelsky MS Alp PI Appelbaum DC Baymah KL Bayliss AE Beerett AP Blair CHL Boezaart AR Bowley MS Burger RI Canum T Cassim SJ Chang A Christie KL Collier KM Colman KE Coster K Coetzee DB Cron PA Cleveland JH Davies PM Daya ... de Bruyn PJ Dale JHB de Lange ... Dierenja DJV de Villiers EEF Dickerson MA Clermont DA Dingley G Driver M Duse HJ du Plessis CF du Toit SK Edmundson KH Eiser AE Esterhuizen MJR Evans AA Felekis ... Fitzmaurice TB Forman ... Gerber RJ Goldblatt DM Goodall Hoole KM Gordon D Gordon ... Gosling MK Hallatt MP Hattingh JB Hemsley ... Hollander PM Holloway AJ Ismail HE Jones PA Jones JN Jordan S Joseph A Kahn AR Kantor M Kennedy A Keyser MP Kgaphola IC Kramerwerke ... Lacock ... Lewis ... Mackie ... Mahlangu SC Malcolss ... Mayet ... Mbikiwa ... Mkhabela ... Mohamed ... Mokhesi ... Moodley ... Mosdell ... Mpahlwa ... Nair ... Nel ... Nelson ... Ngcaba ... Nkuhlu ... Nyman ... Odendaal ... Olivier ... Pandaram ... Pearson ... Pienaar ... Pillay ... Pitmann ... Pooe ... Prinsloo ... Rabie ... Rajah ... Ramjee ... Rapson ... Reid ... Rens ... Rossouw ... Sacks ... Sarrahwitz ... Schoeman ... Scott ... Seabe ... Shaw ... Sibanyoni ... Smith ... Snyman ... Stein ... Steyn ... Stuart ... Swanepoel ... Taylor ... Thomson ... Tshabalala ... Van Der Merwe ... Van Der Spuy ... Van Niekerk ... Van Rensburg ... Van Zyl ... Vilakazi ... Visser ... Wessels ... Wiese ... Wilson ... Wood ... Yeates ... Yudaken ... Zaloumis ... Zietsman ... Zondi Chief Operating Officer: SA Rose

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Prevention and Combating of Corrupt Activities Act

6. The Prevention and Combating of Corrupt Activities Act 12 of 2004 ("the Act") confirms that corruption is not confined to crimes of greed or financial gain. The Act defines 'gratification' as including the avoiding of punishment or other disadvantage[1] and the providing of "*any other service or favour or advantage of any description, including protection from ... any action or proceedings of a disciplinary, civil or criminal nature*".[2]

7. Section 3 of the Act provides for a general offence of corruption which criminalises the accepting or giving of any gratification that amounts to an abuse of a position of authority; or the violation of a legal duty or which is designed to achieve an unjustified result.[3]

8. Section 4 of the Act specifically prohibits public officers from directly or indirectly accepting any gratification "*whether for the benefit of himself or herself or for the benefit of another person*" in order to act or influence another person to act in a manner as described in section 3. Section 4(2) provides that the words "*to act*" includes:

8.1 performing or not adequately performing any official functions;

8.2 expediting, delaying, hindering or preventing the performance of an official act;

8.3 showing any favour or disfavour to any person in performing a function as a public officer;

8.4 exerting any improper influence over the decision making of any person performing functions in a public body.

9. Section 9 of the Act specifically provides for an offence in respect of corrupt activities relating to members of the prosecuting authority. The elements of the crime are similar to those set out in sections 3 and 4. Section 9(2) provides that the words "*to act*" include:

9.1 not adequately performing a function relating to the institution or conducting of criminal proceedings;

9.2 delaying, hindering or preventing the performance of a prosecutorial function;

9.3 showing any favour or disfavour to any person relating to the institution or conducting of criminal proceedings; or

9.4 exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer.

10. Section 19 of the Act makes it an offence to intentionally interfere with, hinder or obstruct the investigation of an offence.

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1 Section 1(c) of the Act.

2 Section 1(g) of the Act.

3 Section 3 of the Act.

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11. The conduct of those who imposed their will on the NPA and SAPS to stop the investigation and prosecution of several hundred cases of murder and other serious crimes falls within the scope of corruption as provided for in the Act. The same can be said of the prosecutors and police officers who agreed or acquiesced in the suppression of these cases.

12. The result of such corruption is that a large number of perpetrators of some of the worst crimes ever committed in South Africa have been shielded from justice. Those prosecutors who attempted to stand up to this injustice were either removed from the NPA or frozen out of the TRC cases. Those who collaborated or acquiesced flourished in the organisation. It would be up to an inquiry to determine the reasons, benefits and advantages behind such corruption.

Investigation into Capture of the Law Enforcement Agencies

13. At the proceedings of the Commission on 11 April 2019 on Day 81, the head of the Commission's Legal Team, Paul Pretorius SC, set out the scope of the Commission's investigations into the capture of the state's law enforcement agencies. We submit that Mr Calata's application falls squarely within the ambit of this investigation.

14. A key focal point of this investigation is the role and conduct of the Priority Crimes Litigation Unit (PCLU).[4] The PCLU was mandated to take forward the TRC cases in which amnesty had been denied or not applied for (the TRC cases). The affidavit of Anton Ackermann SC, former Head of the PCLU, (attached to the submissions of Mr. Calata) sets out in detail how the TRC cases came to be transferred to the PCLU.[5] The TRC cases were classified as '*priority crimes*' and more than 400 investigation dockets were transferred to the PCLU in 2003.

15. The affidavits of Ackermann, Chris Macadam (currently the Acting Director of the PCLU)[6] and Vusi Pikoli (former NDPP) [7], which are all attached to Calata's submissions, set out the systematic suppression of the TRC cases. According to Pikoli the instructions to stop the cases came from various quarters in the state, including cabinet ministers and the former Commissioner of Police.

16. The investigation into the capture of the law enforcement agencies is one of the most crucial investigations of the Commission as it will explain how these agencies became thoroughly corrupted and how they were subverted to serve unscrupulous elements in society.

An Appropriate Subject Matter for the Commission

17. Even though there have been leadership changes at the NPA and SAPS these institutions cannot be expected to vigorously investigate themselves. Indeed, many of the personnel

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4 See page 93 of the transcript to the proceedings of the Commission on 11 April 2019 on Day 81.

5 Annex LC4

6 Annex LC8

7 Annex LC3

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involved in the collusion described above remain in these institutions, some in powerful positions.

18. In this regard attention is drawn to the response of JP Pretorius SC (former acting head of the PCLU) in his second answering affidavit (attached to Calata's submissions)[8] in the matter of *Rodrigues v National Director of Public Prosecutions of South Africa and Others*[9] where he admitted the political interference but claimed that the NPA was blameless.

19. The Full Court in the *Rodrigues* matter strongly disagreed with the NPA's stance and the Commission is directed to the Court's findings in this regard.[10] The Court specifically affirmed the NPA's obligation to pursue TRC cases and to bring the allegations of political interference into the open. However:

> *"None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part."*[11]

20. The Court in *Rodrigues* saw fit to censure the NPA for its attempt to withhold the affidavit of Macadam, noting that:

> *"The suggestion that it was deliberately withheld from this Court is difficult to refute especially given its seriousness and the detailed allegations contained therein of political interference."*[12]

21. It is also noteworthy that notwithstanding considerable publicity on these matters over several years, neither the Ministers of Justice or Police, nor anyone else in government, has issued a single statement acknowledging the problem, or apologising to victims or undertaking to take expeditious steps. Their silence has been deafening. Indeed, in the *Rodrigues* matter referred to above, the aforesaid ministers, who were both respondents, studiously avoided dealing with the political interference, even though it was a centrepiece of the case and explained the delay and inaction, post the winding up of the TRC.

22. The judgment of the full bench in *Rodrigues* called on the NDPP to consider taking action in terms section 41 (1)[13] of the National Prosecuting Authority Act 32 of 1998.[14] The Court called for a:

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8 Annex LC7

9 (76755/2018) [2019] ZAGPJHC 159 (3 June 2019), available at: http://saflii.org/za/cases/ZAGPJHC/2019/159.html

10 *Rodrigues v National Director of Public Prosecutions of South Africa* [2019] ZAGPJHC 159 paras 57-70.

11 *Rodrigues v National Director of Public Prosecutions of South Africa* [2019] ZAGPJHC 159 para 64.

12 *Id* at para 68. See also paras 66 – 70.

13 Section 41(1) reads: "*Any person who contravenes the provisions of section 32 (1) (b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.*" Section 32 deals with the impartiality by members of the prosecuting authority. Section 32(1)(b) reads: "*Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.*"

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> *"[P]ublic assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution."*[15]

23. To date there has been no response to the recommendations of the Court by the NDPP or any member of the Executive. If past conduct is anything to go by the Executive is likely to maintain its silence and inaction. In relation to the NPA it appears from a statement in the Sunday Times of 9 June 2019 by the NPA's head of communications, Bulelwa Makeke, that the NPA is going to focus on the future rather than the past given that "... *political interference is now a thing of the past*".[16]

24. This all points to the urgent need for an independent investigation rather than leaving it to the institutions themselves.

Conclusion

25. In short, this matter directly implicates the Commission's terms of reference as it deals with both state capture and corruption in two key law enforcement agencies, the NPA and the SAPS.

26. In addition, efficient use of public funds and resources suggests that this Commission, which has demonstrated its independence and capability, take on this matter rather than the State establishing a new commission of inquiry.

27. Perhaps more than any other class of cases, the suppression of the TRC cases, has been almost total in its impact. Virtually all the 400 cases were blocked. The impact this has had on the families of those murdered, their communities and on the fabric of society, is incalculable. This in itself demands an expeditious, thorough and credible inquiry into the machinations that resulted in such a massive denial of justice.

Yours faithfully

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[14] Para 65

[15] Para 65. See also paras 21 – 24 and 57 – 64 of the judgment.

[16] Tymon Smith, *Court tells NPA to stop playing victim and do its job of punishing apartheid crimes*, Sunday Times, 9 June 2019 available at: https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2019-06-09-court-tells-npa-to-stop-playing-victim-and-do-its-job-of-punishing-apartheid-crimes/

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23 June 2019

Dear Respected Mr. President

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We wish you and your newly appointed Cabinet well as your term gets underway to lead our nation. As citizens of this beloved country, we are fully aware of the responsibility that you carry and we do sincerely hope and fervently pray that your respected team under your able leadership will overcome the various challenges that you inherited and that lay ahead.

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While we, as citizens, do value and continue to celebrate the freedom that we have so far experienced since spaces were opened up for us all to elect a democratic government during the early part of 1994, we are still very much haunted by our country's past. It is, we stress, a lingering past that has not disappeared from our memories and one that we all acknowledge remains unforgettable.

Mr. President, as you opened your State of the Nation address, you indeed started off on an important note when you reminded us all about the notorious 'Native Land Act' of 1913 and the 'grave injustice' that it wrought as the decades rolled by thereafter. As a matter of fact, we expected you to have continued in the same vein by recollecting in, at least, a few lines the inhumane apartheid state's atrocities; a series of reprehensible acts that we all know wreaked havoc among our communities and that have severely wounded us all.

So far, we all are fully aware of the fact that the effects of that repressive state's – that never represented any of the oppressed communities - disgraceful deeds most of us have not been able to shake them off psychologically and socially; they are ingrained in our beings. We were, therefore, somewhat dismayed that you made no reference to the battery of dishonorable Acts that the apartheid regime devised and enforced on our communities.

As we collectively pen this letter to you, Mr. President, we wondered why you failed to mention the socio-economic injustices that were perpetrated by that discriminatory regime; a racist administration that had caused permanent social scars and unfathomable inequalities that have deeply harmed our nation. To this very day, we all continue to sadly witness extreme communal disparities across the country; a point that you mentioned in your speech.

Permit us, Mr. President, to ask your Excellency the following question: Why did you not take the opportunity of saying something about that the Truth and Reconciliation Commission's (TRC) unfinished business that still needs urgent attention? On this note honorable President, we have been appalled at the manner in which the TRC's incomplete tasks were handled by our previous governments.

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For the record, when the previous democratically elected governments under Mr. T. Mbeki and Mr. J. Zuma came into power we had faith that they would ardently tackle the string of terrible apartheid cases to, at least, try and overcome the past's misconducts. We, in fact, had the confidence that these democratically appointed governments would give particular attention to all apartheid's victims especially those who were killed at the hands of the infamous Security Branch. Mr. President it is as a result of their deliberate – if we may describe it as such – inaction that our current status has been sorely affected on different levels. At present we, as family and friends of apartheid victims, are of the view that 'justice delayed is indeed justice denied.'

Returning to your speech Mr. President we thus wish to pose a few other questions: How can we, as a nation, become a socially safe & cohesive society and an ethically conscious nation if we haven't appropriately dealt with the past? Would it ever be possible to clearly define ourselves as a nation when we cognizant of the fact that we did not effectively tackle past crimes? In which way would we be able to truly transform and actually attain Vision 2030's noble goals when the past offences, which have caused so many traumas, still stay within our nation? And while we definitely agree with you Mr. President that 'through our collective action we determine our collective destiny', do you honestly think that this would be achievable when our former representative governments shrewdly sidelined and calculatingly canceled the racist state's wrongdoings of the past?

In the light of these remarks that include an array of unanswered questions, we take this opportunity of genuinely imploring you and your esteemed cabinet to consider prioritizing the more than 300 TRC cases that were - for some uncanny reason - ignored and that were forwarded to the National Prosecution Authority (NPA) for further investigation and prosecution.

Since this is our honest request, we want to draw your attention to an extract from the letter **(attached)** dated 5th of February 2019; it was issued by former members of the South African TRC and herein they made the following plea:

...We write to you as former Members of the ... TRC to call on you to appoint a commission of inquiry into the political interference that has stopped the investigation and prosecution of

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virtually all the cases referred by the TRC to ... NPA. We also call on you, in your capacity as President of South Africa, to apologize to victims of apartheid-era atrocities who have been denied justice for several decades and suffered considerable trauma as a result....

According to our information, it was observed that these members have to date not received any response to the above correspondence and for us, being family and friends of victims of that vicious inhumane system that disregarded our family members and friends' human rights, this is somewhat very disconcerting.

Nonetheless, very recently the nation publicly heard and read the decisive Judgment **(attached and PR from the Steve Biko Foundation)** that was issued by a Full Bench of the South Gauteng High Court on the 3rd of June 2019, Case Number 76755/2018; this was a matter between JOAO RODRIGUES (Applicant) and THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS and others in relation to the murder of Ahmed Timol during 1971. Here again we note with concern the following pertinent extracts:

"The court was faced with the issue of political interference in the National Prosecution Authority in finalising the prosecution of the applicant. The period in question was considered to be the period between 2003 and 2007. The court directed that the conduct of the relevant officials and others at the time needed to be brought to the attention of the National Director of Public Prosecutions for her consideration so that she may take any necessary action. The court concluded that although there was political interference, investigating it further in this court was not necessary."

On top of this historical verdict, a submission has been made to the Zondo Commission **(see attached)** by Lukhanyo Calata (dated 17th of April 2019); he, representing other victims of apartheid-era crimes too, made a special request that an investigation be undertaken regarding the political interference that resulted in the suppression of virtually all the 300 cases; you might recall that this was an issue that was already referred to by the TRC to the NPA.

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We, family and friends of apartheid's victims who were unjustly killed, thus use this opportunity to petition you, as our country's State President, to do the very least and that is to honor the souls of our country's martyrs; individuals who had valiantly sacrificed their lives to attain social justice for us all. Although we only remind you of the names of Imam Abdullah Haron, Nicodemus Kgoathe, Simon Modipane, James Lenkoe, Caleb Mayekiso, Michael Shivute and Jacob Monnakgotla since this year (2019) is the 50th year of their killings while they were held in detention, we should not forget the names of many others such as Steve Biko, Mapetla Mohapi, Matthews Mabelane, and Neil Agget.

Essentially, we would like to drive home - now that you have addressed the nation – the point that as a nation that we not only repeatedly recall the critical contributions of, inter alia. Chief Albert Luthuli, Oliver Tambo, Nelson Mandela, and Robert Sobukwe, but that we too remember all of the martyred men and women; however, in order for us to do the latter we genuinely beseech you and your cabinet to take immediate action by opening their cases and all other related ones so that they may help to reconcile the festered injuries and heal the grief-stricken hearts.

So we, the undersigned, as victims' families and friends openly demand that you firmly intervene so that your office can assist to bring about some form of justice to many of the affected families and friends. More importantly, however, we want you, as our State President, to bring some measure of closure to not only the traumatized families and friends but to help heal our deeply troubled nation.

We want you to pursue these basic socio-legal obligations in order that we all may continue to enjoy the fruits of our democratic South Africa; a country wherein accountability should be one of our nation's hallmarks in all social sectors and one in which you, as our elected president, demonstrate audacious leadership from which we all can draw courage by giving 'hope to the hopeless' and offering genuine comfort to those who had lost their dear ones throughout the apartheid era.

Let us end off by stating that we subscribe to the view that we should all strive together towards constructing a protective and safe society within a secure environment and - drawing on your wise

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words - 'working together ... (to) build a country in which all may know (and harmonize their lives with) peace and (in which they may reside in reasonable) comfort and (ample) contentment.'

SIGNED BY THE FOLLOWING:

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Letter to President Ramaphosa: Call for an apology....

June 23, 2020 News

RE: CALL FOR AN APOLOGY TO VICTIMS & REQUEST FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

A year has passed since we, as the families of the victims of apartheid wrote to your office, and to the Department of Justice and Constitutional Development, regarding the 'Unfinished Business' of the Truth and Reconciliation Commission (TRC). We were hopeful that you would offer a reply since the issues we highlighted were and remain a major concern for us as a nation. Media coverage recorded our humble plea: *"20 years on, apartheid victims' families ask Cyril Ramaphosa for closure"*).[1]

Our correspondence followed a letter that was sent to government by former TRC commissioners dated 05 February 2019 urging you to appoint a commission of inquiry "into the political interference that has stopped the investigation and prosecution of virtually all the cases referred by the TRC to the National Prosecuting Authority (NPA)". Media coverage of their plea to you: *"'No justice for apartheid victims' – Apologise and appoint inquiry, TRC members tell Ramaphosa"*).***[2]***

It is our urgent wish that you give your full and immediate attention to our request. We have had no response to our correspondence from your esteemed office or from that of the Minister of Justice and Constitutional Development (DOJ&CD). As we're sure you can imagine, it's led to us as victims' families questioning why our democratically elected government continues to neglect addressing our matters leading to our perception that the government of the African National Congress (ANC) has adopted an attitude of no concern to what was a matter of life and death for our loved ones. A matter indeed that should never have been ignored or abandoned from the start.

During the past two weeks, we have witnessed the cold-blooded killing of Mr. George Floyd in Minneapolis, It has since been followed by the murder of Mr. Rayshard Brookes this past weekend. The President will also know that a number of similar deaths have occurred in South Africa that are a cause for concern. The most recent of which include Collins Khosa as well as 11 other South Africans who died questionably at the hands of SANDF and the SAPS.

Mr. President, as you know such murders have been condemned locally and globally by governments and civil society groups. The reason for this response underlines the fact that police brutality against

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African communities has and continues to be unrelenting.

Mr President, on the 05th June 2020 we watched as you officially launched the anti-racism campaign dubbed "Black Friday" led by the ANC. In your speech you eloquently and extensively quoted one of our fallen and respected leaders, namely Bantu Stephen Biko; a leader who was brutally killed while in an Eastern Cape prison cell during 1977. On the occasion of the launch you correctly pointed out that here was *"a black man (who was) murdered by (the) white law enforcement officers"*; you continued, *"And it is important that we remember this as the whole world unites against the death of George Floyd. His death and the death of so many others have not diminished our quest for a true humanity. They have not weakened our resolve, instead they have brought forth from within our collective being a relentless desire for justice, for peace, for understanding and for equality."*

If we may follow your reference more completely Mr President, on 14 September 1977 the apartheid Minister of Justice, Mr. Jimmy Kruger addressed a Nationalist Party congress in which he arrogantly denied any police involvement in the brutal killing of Bantu Stephen Biko. He flippantly stated that Biko 'died' as a result of a hunger strike. Two months later, on 14 November 1977, the 13 day inquest into Biko's 'unnatural death' began in Pretoria's Old Synagogue; Sydney Kentridge, who was the Biko family's appointed lawyer, led the prosecution. The post-mortem revealed that there were major injuries to the brain. Yet, despite empirical evidence indicating that Biko was brutally murdered, Magistrate Prins, like many of his peers during that era, chose to look the other way and conveniently sided with the apartheid regime's position and gave a three-minute ruling that 'no-one was to blame'. This ruling like that of Imam Haron, Ahmed Timol and others, attracted international condemnation of the apartheid regime.[3] The question that all of us who were involved in the anti-apartheid struggle asked then and continue to ask now: 'How often have we heard that 'no-one was to blame' for the deaths of so many of our activists?' For clarity, the annals of history and the extant judgements continue to misrepresent the truth by incorrectly reflecting that 'nobody' could be held accountable for the murder of Biko and many other activists.

Future generations will pose the same questions that we currently raise:

- 'What did democratic South Africa do to find justice for the family of Steve Biko and the families of so many others?'
- 'Why have the inquest findings not been revisited and investigated? and
- 'What reasons have been given for not having reversed those untruthful judgements?'

These are indeed weighty questions Mr. President and none of them can be wished away. We suggest that unless your office and related structures act to address the matter, they will remain unanswered. In fact, as you noted in the 2018 Steve Biko Memorial Lecture, Bantu Stephen Biko was once your leader as of many others who currently sit in parliament; he was, as you stated, someone who

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influenced the development of your political consciousness during the period when you and others were detained without trial; a committed and dedicated cadre who sacrificed his life for justice.

Mr. President, permit us to ask that if you were in the shoes of one of us: 'Would you not have been anxious in wanting to know the actual truth?' 'Would you not do the same as ourselves in pushing for an inquest?' 'Would you not be as frustrated as we are with the way your predecessors and our current government have dragged their feet up until now? And as disappointingly let down by the democratic principles that we observe and abide by?'

The Priority Crimes Litigation Unit (PCLU) was created by Presidential proclamation[4] on 23 March 2003; a proclamation, we are sure that you are aware of. Since then, it's been located in the office of the National Director of Public Prosecutions (NDPP). Its mandate Mr President, pertains to matters emanating from TRC findings. These include addressing the 'missing persons' and prosecuting those who were refused amnesty for having committed heinous crimes against our humanity in communities throughout country.

It is regrettable that when, on different occasions, attempts were made by victims' families to bring to book those unpardoned Security Branch officers, none of them was brought to court. We were informed that government officials intervened to prevent this from taking place.

On different occasions some among us have made attempts to see that those Security Branch officers, who were denied amnesty, be brought to book; yet for reasons unknown to us, none of them have ever been brought to court. Instead we've been reliably informed that government and ANC officials have intervened to stop such justice from taking place. Related to this, we want to bring to your attention, Mr. President, a decisive judgment recently handed down for your record, we attach it herewith.

On 3 June 2019 a full Bench of the South Gauteng High Court [Case Number 76755/2018] dealt with a matter between JOAO RODRIGUES (Applicant) and THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS and others in relation to the murder of Ahmed Timol in 1971. The following extract is pertinent:

"The court was faced with the issue of political interference in the National Prosecution Authority in finalising the prosecution of the applicant. The period in question was considered to be the period between 2003 and 2007. The court directed that the conduct of the relevant officials and others at the time needed to be brought to the attention of the National Director of Public Prosecutions for her consideration so that she may take any necessary action. The court concluded that although there was political interference, investigating it further in this court was not necessary."

At paragraph 64 it held that *"...society as a whole had an ongoing interest in the work of the TRC and the follow up that the government committed itself to. Parliament, which ultimately represents the*

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legislative authority of the state had a right to know when the letter and spirit of legislation that it had passed was being deliberately undermined. None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part."

At paragraph 65 it held that *"it is also for these reasons that conduct of the relevant officials and others outside of the NPA at the time must be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular to consider whether any action in terms of Section 41(1) of the NPA Act is warranted."*

Considering these developments, Mr. President, as families and friends of victims, we request an assurance from both your administration and the NPA that the kind of political interference that had occurred and continues to occur in all matters of TRC cases will never happen again. We would also like to hear about the necessary measures, including checks and balances, which will be put in place in order to prevent a recurrence of these unacceptable breaches of our rights and our Constitution.

Perhaps it is also opportune to advise that an open letter (dated 18 February 2020) was sent to the office of the National Director of Public Prosecutions (NDPP) Shamila Batohi by the nephew of Ahmed Timol, Imtiaz Ahmed Cajee. In the letter, he drew her attention to the above ruling of the South Gauteng Full Bench. Sadly, Mr. President, so far there has been no response from her desk or any other official from the NDPP to date. We are forced to assume that political interference is continuing until we can be proven wrong.

In fact, as we penned this letter to you Mr. President, we eagerly await Lukhanyo Calata (son of Fort Calata) testifying before the Zondo Commission. He had made a submission (dated 17 April 2019). For your information, Mr President, Lukhanyo Calata also represents other families of victims of apartheid-era crimes; he made a special request that an investigation be undertaken with regard to the political interference which has resulted in the suppression of virtually all of the 300 TRC cases referred to the NPA.

Mr. President, we note (rather worryingly) that to date our democratic government has neither heeded the call made by families, nor the call made by the former TRC commissioners for justice. Apartheid-era perpetrators continue to enjoy their lives while others die without any of them being ever held accountable for their dastardly crimes against our humanity. Many of our family members, some key witnesses, are elderly; and they too are passing on without ever learning the truth or finding closure about the deaths of their loved ones. One such tragic death is that of Mrs. Galiema Haron who waited literally for fifty years and never saw justice for her husband, Imam Haron, despite her desperate pleas to successive ANC governments.

We boldly and frankly state, Mr. President, that the deafening silence of the ANC and the government that leads to our pleas is an insult to us and all the memory of all fallen comrades. Men and women

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who were callously murdered by the apartheid regime. The country and the democracy that you lead today was not handed to us by Mr. F W de Klerk and his ilk. It was gained through the blood of our martyrs. Men and women who your government has today apparently decided to banish to the dustbin of our history.

Mr. President, we can no longer continue to remember our martyrs only during the elections cycle or when the anniversaries of their brutal killings roll around or when Presidents confer upon them posthumous awards, or renaming streets. We believe that our loved ones can only be respectably honoured when the truth around their deaths is completely revealed. We ache to know how and why they were murdered and most importantly who ordered their deaths and then murdered them. As far as we their families are concerned, it is the reversal of apartheid-era inquest findings so that those that were complicit in their deaths should be held accountable and whose names should be publicly shamed.

Mr. President, we, the undersigned Apartheid Era Victims' Families Group (AVFG) once again openly and humbly appeal to you, to make a decisive intervention while you hold this prestigious position of responsibility. We ask that you firmly, if not forcefully, intervene so that justice may bring about familial solace to the affected families and societal satisfaction. We ask that you note our adopted Charter **(see attached)** in which we outline who we are; the contribution we can provide in assisting the government and the demands we make to bring justice and closure to these matters. Such closure is not only for the traumatized families but also for our deeply troubled nation in order that we all and our future generations, may enjoy the fruits of our democracy.

Mr. President, we do not want future generations to look back at us and our democracy with disdain for not having addressed the TRC's unfinished business. If you heed our sincere call, then we shall be standing alongside you to see these processes through and reach an agreeable conclusion. We leave our request and our plea in your generous hands; and we hope for a timeous reply that will chart our democratic government's undivided attention forward for every TRC case.

SIGNED BY THE FOLLOWING:

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Distributed by Apartheid-era Victims' Family Group – For all Media Enquiries, contact

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[1] 19 June 2019, BY ERNEST MABUZA; https://www.timeslive.co.za/news/south-africa/2019-06-19-20-years-on-apartheid-victims-families-ask-cyril-ramaphosa-for-closure/

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[2] 06 February 2019, City Press Staff Reporter, https://www.news24.com/citypress/News/no-justice-for-apartheid-victims-apologise-and-appoint-inquiry-trc-members-tell-ramaphosa-20190206

[3] https://artsandculture.google.com/exhibit/steve-biko-the-inquest-steve-biko-foundation/AQqnVp5h?hl=en

[4] http://www.npa.gov.za/UploadedFiles/About PCLU signedoff.doc

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Mr Mike Louw,
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25 March 2021

Dear Mr President,

CALL FOR THE APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We, the former Commissioners of the Truth and Reconciliation Commission (TRC), called on you in early 2019 to establish a commission of inquiry into the suppression of the investigation and prosecution of apartheid-era crimes that had been referred by the TRC to the National Prosecuting Authority (NPA) (the TRC cases). A copy of our letter dated 5 February 2019 is

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attached for your ease of reference as appendix A. Aside from an acknowledgment of receipt you did not respond to this request.

We also refer to the letters dated 23 June 2019 and 23 June 2020 addressed to you by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Dr Neil Aggett, Imam Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Nicodemus Kgoathe, Solomon Modipane, Jacob Monagotla, Mapetla Mohapi, Mxolisi 'Dicky" Jacob, Caiphus Nyoka, Anton Fransch, Moshin Jeena, Haroon Aziz, Coline Williams and Robert Waterwitch. These families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. They also called for a commission of inquiry into the suppression of the TRC cases. Their letters were ignored.

In the light of your failure to respond, representatives of several families of victims of apartheid-era crimes, including the families of the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Haron and Hoosen Haffejee approached the Judicial Commission of Inquiry into Allegations of State Capture with the request that it inquire into the capture of state institutions meant to pursue justice in respect of the TRC cases. Regrettably the commission was unable to complete its investigations into this matter and it will close on 30 June 2021. We understand that the bulk of the remaining period is to be devoted to the preparation of the Commission's final report.

Accordingly, the former TRC Commissioners, the undersigned organisations and family representatives renew their call for a standalone independent commission of inquiry to investigate the suppression of some 400 serious cases, including murders and disappearances, from South Africa's past.

The need for a Commission of Inquiry

There is no longer any dispute that political interference blocked several hundred serious criminal cases in which amnesty had been denied or not sought. A former National Director of Public Prosecutions and a former head of the NPA's Priority Crimes Litigation Unit have provided affidavits to this effect in the 2015 matter of *Nkadimeng v. National Director of Public Prosecutions.*[1] Senior officials representing the NPA admitted under oath in 2019 that the Authority succumbed to political interference in respect of the TRC cases in *Rodrigues v National Director of Public Prosecutions of South Africa*.[2] The Full Court in that matter expressed its dismay at how such interference could take place in the new constitutional order. It called on the Executive and the NPA to take appropriate action to ensure that such breaches of the Constitution do not recur.[3] To date, neither the government, nor the NPA have taken such action. In our respectful view, appropriate action to prevent recurrence can only be based on a full and thorough inquiry.

While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such

[1] T.P.D. Case No. 3554/2015), Gauteng Division
[2] 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019
[3] Para 65. See also paras 21 – 24 and 57 – 64.

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interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on the NPA and the South African Police Service (SAPS) is yet to be exposed. It is not known how institutions with firm constitutional and statutory obligations to uphold justice so easily abandoned their legal duties in respect of the TRC cases.

The suppression of the TRC cases involved multiple entities and individuals across the public sector. The secret Amnesty Task Team created by the Director-General's Forum in early 2004 to explore means of guaranteeing impunity for apartheid-era perpetrators involved multiple departments including the Department of Justice and Correctional Services, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.

It is accordingly not sufficient for there to be separate internal or departmental inquiries by the different institutions. Such inquiries will not be able to deliver the full history of the interference as it unfolded over time over multiple entities. Moreover, such inquiries will not be able to compel the production of testimony and evidence from other departments. In any event, there appears to be considerable resistance to carrying out meaningful investigations at these levels; and it goes without saying that departmental officials should not be investigating themselves or their colleagues.

The subject matter is of great public concern

Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the 400 cases were blocked. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.

Commissions of inquiry are investigative tools which the President may invoke for purposes of investigating matters of public concern or for gathering information considered necessary for formulating policy. In addition, there is a critically important need to restore public confidence in the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost all trust and confidence in the SAPS and NPA.

A further objective of the proposed commission is to reveal the truth pertaining to the suppression of the TRC cases, which gives it a deeper public purpose. This is necessary given the extent of disquiet and discontent around such serious lapses by public organs meant to uphold the rule of law. There can be little doubt that such lapses have provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance.

The Constitution requires that the notion of 'public concern' be interpreted to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of

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human dignity, equality and freedom. In respect of the suppression of the TRC cases, these democratic values have been obliterated. We scarcely need to point out that the human dignity of Lukhanyo Calata and the Cradock 4 families, together with the families of hundreds of other victims of apartheid crimes, have been deeply offended. Their right to equality before the law has been grossly disrespected. The TRC cases have been treated differently from other serious criminal cases for purposes of serving undisclosed political and ulterior ends. Such brazen arbitrariness should have no place in South Africa's constitutional order.

Appoint a commission

We accordingly request that you appoint, without further delay, an independent commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence. We have prepared draft terms of reference to assist you in your deliberations, which are annexed to this letter as appendix B.

The late Mr Justice Arthur Chaskalson, then President of the Constitutional Court, later Chief Justice of South Africa, said a few months after South Africa's democratic elections in 1994:

> *"We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened..."*

Should you not announce a decision of your intention to establish a commission of inquiry by 30 April 2021 we will refer this matter to our attorneys. They will be instructed to vindicate the constitutional rights of families of apartheid-era crimes and to bring an appropriate application to court.

Yours sincerely,



Yasmin Sooka o.b.o the former TRC Commissioners
Archbishop Emeritus Desmond Tutu
Advocate Dumisa Ntsebeza SC
Ms Mary Burton
Dr Fazel Randera
Ms Glenda Wildschut
Mr Richard Lyster

The Committee Members
Ms Joyce Piliso-Seroke
Prof Piet Meiring

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Mr Ilan Lax
Dr Russell Ally

Organisations
Desmond and Leah Tutu Legacy Foundation
Foundation for Human Rights
Apartheid Era Victims' Families Group
Centre for the Study of Violence and Reconciliation
Khulumani Victims Support Group
Institute for Justice and Reconciliation
Ahmed Timol Family Trust
Centre for Applied Legal Studies
Imam Haron Foundation
Fort Calata Foundation
Steve Biko Foundation
Human Rights Media Centre
Open Secrets
South African History Archive
Southern African Litigation Centre
Violence Prevention Agency
Legal Resources Centre (LRC)
Lawyers for Human Rights (LHR)

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Appendix B: Proposed Terms of Reference

TERMS OF REFERENCE

OF THE

JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO THE ALLEGED SUPPRESSION OF CASES REFERRED BY THE TRUTH AND RECONCILIATION COMMISSION TO THE NATIONAL PROSECURING AUTHORITY

A Judicial Commission of Inquiry ("the Commission ") is hereby appointed in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate the alleged suppression of cases referred by the Truth and Reconciliation Commission to the National Prosecuting Authority.

1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the court papers filed in *Nkadimeng v. National Director of Public Prosecutions* T.P.D. Case No. 3554/2015, Gauteng Division; the court papers and judgment in *Rodrigues v National Director of Public Prosecutions of South Africa* 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019, relevant information and evidence in possession of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, as well as the Constitution and relevant legislation:

    1.1 whether, and to what extent and by whom efforts or attempts were made through any form of persuasion or inducement for any purpose, advantage or gain of whatever nature to influence or pressure members of the National Prosecuting Authority (NPA) and/ or the South African Police Service (SAPS) to refrain or stop investigating and/ or prosecuting apartheid-era cases referred by the Truth and Reconciliation Commission (TRC) to the NPA (the TRC cases), or to abandon or undermine such cases (the interference).

    1.2 the role played in the alleged interference by any person within or outside government, including any current or former members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state, including but not limited to the Department of Justice and Correctional Services, the Presidency, the National Intelligence Agency, the Department of Defence and the former Directorate of Special Operations.

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1.3 whether, and to what extent, any current or former member or functionary of the NPA and SAPS colluded in the alleged interference, or agreed, acquiesced, or succumbed to the alleged interference by:

1.3.1 not adequately performing a function relating to the institution or conducting of criminal investigations or proceedings,
1.3.2 delaying, hindering, or preventing the performance of an investigative or prosecutorial function,
1.3.3 showing any favour or disfavour to any person relating to the institution or conducting of criminal investigations or proceedings,
1.3.4 exerting any improper influence over the decision making of any person, including another member of the SAPS or the NPA,
1.3.5 any other act or omission that promoted the interference.

1.4 the nature and extent of the interference, if any, including:

1.4.1 the reasons or motivation behind the interference,
1.4.2 whether any person within or outside government issued formal or informal, written, or unwritten instructions or directions for the interference to proceed,
1.4.3 whether any formal or informal arrangements or agreements were made between persons within and/ or outside government to carry out the interference,
1.4.4 how the interference was imposed on the NPA and the SAPS.
1.4.5 how members of the SAPS and NPA were persuaded, influenced, or forced to cooperate in the interference.

1.5 whether any person breached or violated the Constitution, any law, guideline, or ethical code by engaging in or facilitating the interference or failing to stop or expose such interference.

1.6 whether any conduct committed during the interference, *prima facie*, amounts to the crime of defeating or obstructing the course of justice, or a crime in terms of the National Prosecuting Authority Act 32 of 1998, or the crime of corruption, particularly as framed in sections 9 and 19 of the Prevention and Combating of Corrupt Activities Act, 12 of 2005 or a crime under any other law.

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1.7 the impact, if any, on victims, families, communities, the rule of law, the criminal justice system and related institutions, and South Africa as a whole.

1.8 the steps, measures and reforms needed to prevent a recurrence of the interference.

2. These terms of references may be added to, varied, or amended from time to time

3. All organs of state must cooperate fully with the Commission.

4. The Commissions Act,1947 (Act No. 8 of 1947) shall apply to the Commission, subject to such amendments and exemptions as may be specified by proclamation from time to time.

5. The Commission shall submit its report and recommendations to the President within 180 days of the commencement of the Commission.

6. Regulations shall be made, after consultations with the presiding judge, in terms of the Commissions Act, 1947 and shall apply to the Commission in order to enable the Commission to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents.

7. The Commission shall where appropriate, refer any matter for prosecution, further investigation, or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of certain persons.

8. Regulations contemplated above shall also make provision for the resourcing and employment of staff of the Commission.

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THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Our ref: URN0002021OOP000145

Former Commissioners of the TRC
Foundation for Human Rights
Tel: 011 593 4002

By email: yasmin.sooka@gmail.com

Dear Ms Sooka and Adv Ntsebeza SC,

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

With reference to the above we hereby wish to acknowledge receipt of your letter pertaining thereto.

In addition, we wish to confirm that the matter has been referred to the Department of Justice and Correctional Services for further attention and reply.

Trusting you find it in order.

Yours faithfully,

Mr Geofrey Mphaphuli
Acting Head: Legal and Executive Services
Date: 06/05/2021

Mr Geofrey Mphaphuli
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Email: Geofrey@presidency.gov.za

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Your reference	Our reference	Date
URN0002021OOP000145 Mr Georffrey Mphaphuli/ Acting Head Legal and Executive Services	Mr M Hathorn 3048523	8 June 2021

Dear Mr President,

REQUEST FOR A COMMISSION OF INQUIRY INTO THE SUPPRESSION OF THE TRC CASES

We refer to the TRC Commissioners' letter to you dated 25 March 2021 and your letter addressed to them dated 6 May 2021, in which your office indicated that the matter has been referred to the Department of Justice and Correctional Services. We attach copies of these letters for your easy reference.

In the TRC Commissioners' letter to you dated 25 March 2021 you were requested to indicate whether you intended to appoint a commission of inquiry into the suppression of the TRC cases by 30 April 2021, failing which the matter would be referred to attorneys.

The matter was referred to us. We have been furnished with an opinion from eminent senior counsel indicating that the issue in question is one of significant public concern; and that in these

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa NG Alp RL Appelbaum DC Bayman KL Bellings AE Bennett AP Blair DHL Booysen AR Bowley J Braum MS Burger M Bux RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies PM Daya I de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley MS Dladla G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen MJR Evans K Fazel AA Felekis G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson CI Gouws PD Grealy S Haroun IM Harvey JS Henning KR Hillis Z Hlophe CM Holfeld FM Holloway AV Ismail ME Jarvis CA Jennings JC Jones CM Jonker S Jooste LA Kahn ACR Katzke M Kenredy KE Kiner A Keyser MD Kota JC Kraamwinkel J Lamb KJ Lebea E Louw M Mahlangu V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu P Mohanlall M Molori N Moodley LE Mostert VM Movshovich C Murphy RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba A October L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel N Pather GR Penfold SE Phajane M Philippides BA Phillips MA Phillips DJ Rafferty D Ramjettan CI Rapson K Rew SA Ritchie NJA Robb J Roberts G Sader M Sader H Samsudien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor T Theessen IK Thekiso C Theodosiou T Theunissen R Tlhavoni G Truter PZ Varda SE van der Meulen JP van der Poel CS Vanmali IE Veeran P Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson KD Wolmarans DJ Wright M Yudaken

Chief Operating Officer: SA Boyd

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specific circumstances, your failure to make a decision, or your refusal to appoint a commission, is susceptible to review under the legality principle as well as a Bill of Rights challenge.

We have now been instructed by several families of apartheid-era victims (including members of the Cradock Four and Biko families) as well as multiple organisations to prepare an application to court for the appropriate relief. Counsel has been duly briefed in this regard.

Our instructions are to place you formally on terms. Should we not hear from you within 10 days of receipt of this letter we will proceed to launch an application to court for an order compelling you to fulfil your obligations under the Constitution and to appoint a commission to inquire into the suppression of the TRC cases.

Yours faithfully

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Former Commissioners of the Truth and Reconciliation Commission

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Mr Ronald Lamola
Minister of Justice and Correctional Services
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25 March 2021

Dear Mr President,

CALL FOR THE APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We, the former Commissioners of the Truth and Reconciliation Commission (TRC), called on you in early 2019 to establish a commission of inquiry into the suppression of the investigation and prosecution of apartheid-era crimes that had been referred by the TRC to the National Prosecuting Authority (NPA) (the TRC cases). A copy of our letter dated 5 February 2019 is

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attached for your ease of reference as appendix A. Aside from an acknowledgment of receipt you did not respond to this request.

We also refer to the letters dated 23 June 2019 and 23 June 2020 addressed to you by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Dr Neil Aggett, Imam Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Nicodemus Kgoathe, Solomon Modipane, Jacob Monagotla, Mapetla Mohapi, Mxolisi 'Dicky" Jacob, Caiphus Nyoka, Anton Fransch, Moshin Jeena, Haroon Aziz, Coline Williams and Robert Waterwitch. These families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. They also called for a commission of inquiry into the suppression of the TRC cases. Their letters were ignored.

In the light of your failure to respond, representatives of several families of victims of apartheid-era crimes, including the families of the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Haron and Hoosen Haffejee approached the Judicial Commission of Inquiry into Allegations of State Capture with the request that it inquire into the capture of state institutions meant to pursue justice in respect of the TRC cases. Regrettably the commission was unable to complete its investigations into this matter and it will close on 30 June 2021. We understand that the bulk of the remaining period is to be devoted to the preparation of the Commission's final report.

Accordingly, the former TRC Commissioners, the undersigned organisations and family representatives renew their call for a standalone independent commission of inquiry to investigate the suppression of some 400 serious cases, including murders and disappearances, from South Africa's past.

The need for a Commission of Inquiry

There is no longer any dispute that political interference blocked several hundred serious criminal cases in which amnesty had been denied or not sought. A former National Director of Public Prosecutions and a former head of the NPA's Priority Crimes Litigation Unit have provided affidavits to this effect in the 2015 matter of *Nkadimeng v. National Director of Public Prosecutions*.[1] Senior officials representing the NPA admitted under oath in 2019 that the Authority succumbed to political interference in respect of the TRC cases in *Rodrigues v National Director of Public Prosecutions of South Africa*.[2] The Full Court in that matter expressed its dismay at how such interference could take place in the new constitutional order. It called on the Executive and the NPA to take appropriate action to ensure that such breaches of the Constitution do not recur.[3] To date, neither the government, nor the NPA have taken such action. In our respectful view, appropriate action to prevent recurrence can only be based on a full and thorough inquiry.

While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such

[1] T.P.D. Case No. 3554/2015), Gauteng Division
[2] 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019
[3] Para 65. See also paras 21 – 24 and 57 – 64

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interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on the NPA and the South African Police Service (SAPS) is yet to be exposed. It is not known how institutions with firm constitutional and statutory obligations to uphold justice so easily abandoned their legal duties in respect of the TRC cases.

The suppression of the TRC cases involved multiple entities and individuals across the public sector. The secret Amnesty Task Team created by the Director-General's Forum in early 2004 to explore means of guaranteeing impunity for apartheid-era perpetrators involved multiple departments including the Department of Justice and Correctional Services, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.

It is accordingly not sufficient for there to be separate internal or departmental inquiries by the different institutions. Such inquiries will not be able to deliver the full history of the interference as it unfolded over time over multiple entities. Moreover, such inquiries will not be able to compel the production of testimony and evidence from other departments. In any event, there appears to be considerable resistance to carrying out meaningful investigations at these levels; and it goes without saying that departmental officials should not be investigating themselves or their colleagues.

The subject matter is of great public concern

Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the 400 cases were blocked. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.

Commissions of inquiry are investigative tools which the President may invoke for purposes of investigating matters of public concern or for gathering information considered necessary for formulating policy. In addition, there is a critically important need to restore public confidence in the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost all trust and confidence in the SAPS and NPA.

A further objective of the proposed commission is to reveal the truth pertaining to the suppression of the TRC cases, which gives it a deeper public purpose. This is necessary given the extent of disquiet and discontent around such serious lapses by public organs meant to uphold the rule of law. There can be little doubt that such lapses have provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance.

The Constitution requires that the notion of 'public concern' be interpreted to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of

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human dignity, equality and freedom. In respect of the suppression of the TRC cases, these democratic values have been obliterated. We scarcely need to point out that the human dignity of Lukhanyo Calata and the Cradock 4 families, together with the families of hundreds of other victims of apartheid crimes, have been deeply offended. Their right to equality before the law has been grossly disrespected. The TRC cases have been treated differently from other serious criminal cases for purposes of serving undisclosed political and ulterior ends. Such brazen arbitrariness should have no place in South Africa's constitutional order.

Appoint a commission

We accordingly request that you appoint, without further delay, an independent commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence. We have prepared draft terms of reference to assist you in your deliberations, which are annexed to this letter as appendix B.

The late Mr Justice Arthur Chaskalson, then President of the Constitutional Court, later Chief Justice of South Africa, said a few months after South Africa's democratic elections in 1994:

> *"We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened..."*

Should you not announce a decision of your intention to establish a commission of inquiry by 30 April 2021 we will refer this matter to our attorneys. They will be instructed to vindicate the constitutional rights of families of apartheid-era crimes and to bring an appropriate application to court.

Yours sincerely,



Yasmin Sooka o.b.o the former TRC Commissioners
Archbishop Emeritus Desmond Tutu
Advocate Dumisa Ntsebeza SC
Ms Mary Burton
Dr Fazel Randera
Ms Glenda Wildschut
Mr Richard Lyster

The Committee Members
Ms Joyce Piliso-Seroke
Prof Piet Meiring

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Mr Ilan Lax
Dr Russell Ally

Organisations
Desmond and Leah Tutu Legacy Foundation
Foundation for Human Rights
Apartheid Era Victims' Families Group
Centre for the Study of Violence and Reconciliation
Khulumani Victims Support Group
Institute for Justice and Reconciliation
Ahmed Timol Family Trust
Centre for Applied Legal Studies
Imam Haron Foundation
Fort Calata Foundation
Steve Biko Foundation
Human Rights Media Centre
Open Secrets
South African History Archive
Southern African Litigation Centre
Violence Prevention Agency
Legal Resources Centre (LRC)
Lawyers for Human Rights (LHR)

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THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Our ref: URN0002021OOP000145

Former Commissioners of the TRC
Foundation for Human Rights
Tel: 011 593 4002

By email: yasmin.sooka@gmail.com

Dear Ms Sooka and Adv Ntsebeza SC,

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

With reference to the above we hereby wish to acknowledge receipt of your letter pertaining thereto.

In addition, we wish to confirm that the matter has been referred to the Department of Justice and Correctional Services for further attention and reply.

Trusting you find it in order.

Yours faithfully,

Mr Geofrey Mphaphuli
Acting Head: Legal and Executive Services
Date: 05/05/2021

Mr Geofrey Mphaphuli
Legal and Executive Services
Email: Geofrey@presidency.gov.za

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23 Jun 2021

Karyn Maughan | ANC government owes South Africa answers about why it protected apartheid killers

Karyn Maughan

news24



Ahmed Timol (Source: ahmedtimol.co.za)

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The failed permanent stay of prosecution application by anti-apartheid activist Ahmed Timol's accused murderer confirms that the ANC government blocked criminal cases against apartheid killers. It is now crucial that it explain why, writes **Karyn Maughan.**

There is no longer any doubt that the ANC government actively blocked the prosecutions of alleged apartheid-era murderers - but up until today, it has never explained why.

Now, following a hard-hitting ruling by the Supreme Court of Appeal (SCA), the party may soon be forced to. On Monday, the SCA confirmed what the North Gauteng High Court in Pretoria had stated in 2019; there was undisputed evidence from the National Prosecuting Authority (NPA) that, between 2003 and 2017, "the executive adopted a policy position" that apartheid atrocity cases recommended for prosecution by the Truth and Reconciliation Commission (TRC) would not be pursued.

As part of its final report, the TRC had urged the NPA to pursue criminal action against more than 300 alleged perpetrators who had not applied for amnesty or lied about the murders they were allegedly implicated in. But these prosecutions never happened because the executive - including government ministers - successfully blocked these cases from proceeding.

READ | Ahmed Timol murder: Apartheid cop's application for permanent stay of prosecution fails

In a ruling that dismissed former apartheid policeman Joao Rodrigues' bid to secure a permanent stay of his prosecution for the 1971 murder of anti-apartheid activist and teacher Ahmed Timol, the SCA said it was "perplexing and inexplicable why such a stance was taken".

This, Judge Aubrey Ledwaba wrote, was particularly "in light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes".

Legal considerations

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All these considerations, the judge said, "should have stood in the way of any such moratorium on the prosecution of TRC-era cases".

"That it happened despite the constitutional, legal and other considerations suggests disdain for those important considerations and interests," he added, before stating the High Court had "rightly recommended" that National Director of Public Prosecutions (NDPP) Shamila Batohi conducted a "proper investigation into these issues" to determine whether "any action ... was necessary".

That investigation will be pursued under the provisions of the NPA Act, which stated "no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions".

From the evidence already given by former prosecutions head Vusi Pikoli and senior prosecutor Torie Pretorius, it is apparent there was manifest political interference in the prosecution of TRC-linked cases - most blatantly by the administration of then-president Thabo Mbeki.

"The [NPA] does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders," Pretorius stated in court papers in the Rodrigues case.

As part of his application for a permanent stay of prosecution, Rodrigues - who stands accused of pushing the severely beaten and tortured Timol from the 10th floor of John Vorster Square police station - argued his prosecution had been unduly delayed, largely as a consequence of political interference in the TRC cases.

Murder of Ahmed Timol

While Rodrigues and other apartheid police officials claimed Timol had taken his own life, it was only in 2017 that an inquest court found he has been, in fact, been murdered. In other words, it took the NPA more than two decades to ensure the young teacher's family finally had official confirmation he had not taken his own life.

In another 2015 court case to compel law enforcement to conduct a proper investigation into the 1983 abduction, torture and presumed murder of Umkhonto weSizwe activist Nokuthula Simelane, Pikoli revealed how he had been placed under pressure by then-justice and constitutional development minister Brigette Mabandla, among others, to drop the TRC cases.

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READ | Ahmed Timol's death shattered the family, broke his father

"I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me," Pikoli said.

He was suspended by Mbeki in 2008, largely as a consequence of his efforts to pursue then-national police commissioner Jackie Selebi for corruption.

"It is no coincidence that there has not been a single prosecution of a TRC case since my suspension and the removal of TRC cases from advocate [Anton] Ackermann," Pikoli stated in a 2015 affidavit.

Ackermann, who eventually left the NPA in 2013, detailed how he had experienced interference and obstruction with his attempt to go after the apartheid police officers who had tried to kill Reverend Frank Chikane as well in his team's efforts to uncover what had happened to Simelane.

Undermining of rule of law

He said he believed investigations of TRC cases "have been effectively stopped by machinations that took place above the level of the NPA". These machinations, he stated, undermined the rule of law and constituted a "deep injustice against the family of the late Simelane as well as the families of other victims of apartheid-era crimes".

Pikoli further revealed how, during a 6 February 2007 meeting with Mabandla, she appeared to gain the impression that he had agreed not to pursue the TRC cases, when he had not done so.

The following day, the she sent Pikoli a letter, where she stated: "I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise.

"In our discussions, you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

Pikoli said he was at a loss to explain how she reached such a conclusion and found her assumption that the TRC cases would not be prosecuted disturbing. This pointed to an expectation from the political level

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that he would not prosecute the TRC cases, he added, saying he regarded such an expectation as unwarranted interference in his constitutional duty to prosecute without fear, favour or prejudice.

Arguing for Timol family in the Rodrigues permanent stay of prosecution application, advocate Howard Varney slammed the NPA for failing to explain why - following Pikoli's suspension - it had acquiesced with instructions that the TRC cases not be pursued.

READ | NPA not pursuing charges against security branch officers implicated in Ahmed Timol murder

Instead, the prosecuting authority stated "the only conclusion to arrive at is that the delay in prosecuting [Rodrigues] was not as a result of the first respondent's [the NPA] own doing or its malice - it was as a result of the political interference and severe political constraints to which the first respondent [the NPA] was subjected".

Varney said this claim was "utterly breathtaking".

"It defies all logic. Essentially, the NPA appears to be saying that as unfortunate and unlawful as the suppression of the TRC cases may be, it was not the NPA's *'own doing'*, and its officials had little or no say in the matter.

"Once the politicians leaned on them, they were obliged to comply with their demands and accordingly cannot be held accountable. That this claim is made by an organisation comprising almost entirely of lawyers makes it even more astonishing in the light of the prevailing law."

An investigation into the interference

Speaking to News24 on Tuesday, Justice Minister Ronald Lamola's spokesperson, Chrispin Phiri, confirmed that, in accordance with the SCA's ruling in the Rodrigues case, the NPA would pursue an investigation into the executive's apparent political interference in the TRC prosecutions and the resultant failure of officials to pursue these cases.

He said a retired judge would be appointed to "assist the NDPP to consider whether the conduct of the relevant officials and others outside of the NPA warrants any action in terms of Section 41[1] of the NPA Act".

In other words, whether anyone can and should be criminally prosecuted for blocking the TRC cases from going ahead.

"This is will give effect to the Rodrigues judgment which requires a public assurance from both the executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again," Phiri added.

> **"In this regard, they [the investigation body] should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution".**

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That, however, is not good enough for the former TRC commissioners and families of murdered activists who have spent the last two years lobbying President Cyril Ramaphosa for a public commission of inquiry into why the TRC prosecutions were not pursued.

The NPA's inquiry will almost certainly happen behind closed doors, with little prospect that the public will be given insight into how and why the executive interfered with these prosecutions.

Importantly, a judicial commission of inquiry would force role players like Mbeki and Mabandla to finally answer to claims that they used their positions to ensure that those accused of heinous apartheid crimes were never bought to book. It will also force the ANC, which has maintained an almost deathly silence about the aborted pursuit of apartheid perpetrators, to finally account for the conduct of its functionaries in allegedly interfering with these cases.

As French philosopher Voltaire famously stated: "To the living we owe respect, but to the dead, we owe only the truth."

Those who sacrificed their lives for South Africa's freedom are not just owed the truth about who murdered them and why. They and their families - and South Africa itself - deserve to know why the country's liberation movement seems to have done everything it could to prevent that truth from ever being uncovered.

Why did it protect those who tried to kill democracy rather than those who died for it?

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Statement: Call For an Independent Public & Open Commission of Inquiry into the Suppression of the TRC Cases

Press releases

Former Commissioners of the

Truth and Reconciliation Commission

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MEDIA RELEASE
TO: All Media
ATT: News Editors, Human Rights Reporters
For immediate release

Tuesday, 09 November 2021

CALL FOR AN INDEPENDENT PUBLIC & OPEN COMMISSION OF INQUIRY INTO THE SUPPRESSION OF THE TRC CASES

Statement by the Former TRC Commissioners, Apartheid-Era Victims' Family Members and Civil Society Organisations

On Friday, 5 November 2021, the Minister of Justice, Mr Ronald Lamola, in his address to the Inaugural Fort Calata Foundation Memorial Lecture, indicated that he had appointed an inquiry to investigate the suppression of the cases referred by the TRC to the NPA, which were more than 300 serious crimes that were not amnestied, mostly murder cases ("the TRC cases"). He indicated that the investigation would be presided over by a judge.

The Minister did not disclose the terms of reference of the inquiry or the identity of the judge. No indication was given as to how the judge was appointed and under what legal authority. When asked whether the inquiry would be open or closed the Minister said he would have to discuss this with the

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judge. He declined to give his own view on the matter stating it would amount to a policy statement.

Since the President is not involved in this appointment and no mention was made of the Commissions Act, the envisaged inquiry can only be an internal inquiry. Internal inquiries are held behind closed doors. If it was intended to be an open and transparent inquiry the Minister would have not hesitated to say so. Normally judges are not appointed to oversee internal inquiries launched by the executive and it must be asked why the Minister has taken this extraordinary step in this instance.

The Minister's decision to appoint an internal inquiry must be seen in the context of the fact that the former TRC Commissioners and the Apartheid Era Families' Victim Group (AFVG) have requested the President and Minister of Justice on no less than 4 occasions since early 2019 to appoint an open and public commission of inquiry into the suppression of the TRC Cases.[1] Aside from letters of acknowledgment the requests were ignored. Given that the Minister has announced an internal inquiry, it can be deduced that an effective decision has been taken not to hold a commission of inquiry, which are typically public in nature.

Avoiding public scrutiny

It appears that the State wishes to avoid an open and public inquiry into the suppression of the TRC Cases. This may be for purposes of damage control to ensure that the truth behind the suppression is carefully managed by a closed-door inquiry, away from the glare of public scrutiny. This is unsurprising given the role of senior members of the executive, NPA and SAPS in the suppression of the TRC Cases. Since a closed inquiry will be viewed with great suspicion, the inescapable conclusion to be drawn is that a judge is being asked to oversee an effective secret investigation to give it an air of respectability.

Typically, a commission of inquiry includes public hearings, the power to subpoena witnesses and documents, the calling of witnesses, cross examination and the participation of victims and other stakeholders. While it is possible that attempts will be made to deflect criticism by allowing victims to make submissions and requiring the Judge to issue a report, it will remain a closed inquiry. There will be no public hearings and no opportunity for victim representatives to ask tough questions to those who shut down justice. Victims, the media and the public will be effectively shut out of this inquiry.

An inference will almost certainly be drawn that the inquiry has been so designed to protect powerful elements in society and shield them from scrutiny and embarrassment.

The executive investigating the executive

The Minister is appointing an executive inquiry to investigate members of the executive. The suppression of the TRC cases involved multiple entities and individuals across the public sector, including the Department of Justice, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior

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civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.

An internal inquiry cannot hope to get to the bottom of a problem of this magnitude and sensitivity. An internal investigation will not be able to deliver the full history of the interference as it unfolded over time over multiple departments and within and outside government.

An internal inquiry, unlike a commission of inquiry, will have no power to compel the production of testimony and evidence and will have to rely on requests and cooperation of individuals and different government departments.

The track record of the SAPS and NPA in relation to the TRC Cases speaks for itself. It is well known that there remains considerable resistance to carrying out meaningful investigations of the TRC Cases, let alone investigations into the suppression of the cases. In these circumstances it is disturbing that the Minister has seen fit to reject a public commission of inquiry in favour of an internal investigation. Members of the executive will be expected to investigate their own colleagues. Such an inquiry will have little or no credibility in the eyes of the public, and the gloss of an 'oversight' role of a judge will not change this.

It is particularly disturbing that a Judicial Officer is required to lend judicial legitimacy to an investigation conducted by the executive. Not only is such an expedient function well outside the functions of the judiciary, but it is also harmful to that institution and is a breach of the separation of powers principle, rendering such an appointment unconstitutional, as the Constitutional Court has ruled.

The need for a Commission of Inquiry

There is no longer any dispute that political interference blocked several hundred serious criminal cases in which amnesty had been denied or not sought. A former National Director of Public Prosecutions and a former head of the NPA's Priority Crimes Litigation Unit have provided affidavits to this effect in the 2015 matter of *Nkadimeng v. National Director of Public Prosecutions*.[2] Senior officials representing the NPA admitted under oath in 2019 that the Authority succumbed to political interference in respect of the TRC cases in *Rodrigues v National Director of Public Prosecutions of South Africa*.[3] The High Court and the Supreme Court of Appeal expressed their dismay at how such interference could take place in the new constitutional order.

While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on institutions such as the NPA and the SAPS is yet to be exposed. It is not known how institutions with firm

constitutional and statutory obligations to uphold justice so easily abandoned their duties in respect of these cases.

The subject matter is of great public concern

Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the cases were blocked. Most of the cases cannot be resuscitated as many perpetrators, witnesses and family members have died over the past 20 years. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.

There is a critically important need to restore public confidence in the government as a whole and the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost trust in the government, especially the SAPS and NPA. An investigation held behind closed doors is likely to destroy all confidence and trust in the state.

A closed-door inquiry will undermine the effort to reveal the full truth behind the suppression of the TRC cases. This will add considerable anxiety to the affected families and communities who have been waiting decades for the truth. The suppression of the TRC Cases deeply violated their rights to human dignity, equality and the rule of law. The refusal to hold an open and public commission of inquiry only exacerbates the violation of these rights.

The cost of a commission

It will no doubt be argued that the country is suffering "commission fatigue" and cannot afford yet another commission of inquiry, particularly after the State Capture Commission which cost some R1 billion. Such an argument is deeply insulting to the families who endured apartheid-era crimes. Their loved ones laid down their lives for our democracy and its enshrined freedoms. Not only has the post-apartheid state turned its back on them and suppressed their cases, but in raising such an argument, it says they are not worthy of a rigorous public inquiry. It is also insulting to the families given the readiness of state officials to squander billions on mismanagement, corruption and nepotism.

In any event, the State Capture Commission cannot be compared to an inquiry into the suppression of the TRC Cases. Unlike the State Capture Commission, there is an extremely limited set of witnesses and a very limited set of facts to explore. Whereas the State Capture Commission required years to complete its work, a commission into the suppression of the TRC Cases could be wrapped up in few months.

Call for a public and open commission of inquiry

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The late Mr Justice Arthur Chaskalson, then President of the Constitutional Court, later Chief Justice of South Africa, said a few months after South Africa's democratic elections in 1994:

"*We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened...*"

The post-apartheid state engineered multiple incursions into the rights of victims of apartheid-era crimes over the last 20 years. The holding of a closed-door inquiry will constitute yet another incursion into their rights. This cannot be allowed to happen.

The families of apartheid-era victims deserve nothing less than a fully open, public and transparent inquiry. This must include public hearings, the power to subpoena and compel the production of evidence, and the right of victims to be represented in the commission and to lead evidence and put questions to witnesses. Only a commission of inquiry can allow provide for such accountability.

Accordingly, we the undersigned former TRC Commissioners, families and organisations again call on you to work with the President to speedily appoint an independent and public commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence.

Signed by Yasmin Sooka on behalf of:



Former TRC Commissioners

Ms Yasmin Sooka
Adv Dumisa Ntsebeza SC
Ms Wendy Orr
Ms Glenda Wildschut
Dr Fazel Randera
Ms Mary Burton
Mr Richard Lyster

Former TRC Committee Members

Prof Piet Meiring
Mr Ilan Lax
Dr Russel Ally

Family members

Mr Lukhanyo Calata, son of the late Fort Calata
Ms Thembi Nkadimeng, sister of the late Nokuthula Simelane
Mr Mohammad Timol, brother of the late Ahmed Timol
Ms Jill Burger and Mr Stephen Aggett, sister and nephew of the late Dr Neil Aggett
Ms Fatima Haron and Prof Muhammed Haron, daughter and son of the late Imam Haron
Ms Nation Nyoka, niece of the late Caiphus Nyoka
The family of Mxolisi Dicky Jacobs
Mr Nkosinathi Biko

Organisations

Nelson Mandela Foundation
Desmond and Leah Tutu Legacy Foundation
Foundation for Human Rights (FHR)
Fort Calata Foundation
Khulumani Support Group
Imam Haron Foundation
Human Rights Media Centre (HRMC)
Centre for Applied Legal Studies (CALS)
Institute for the Healing of Memories
Centre for the Study of Violence and Reconciliation (CSVR)
Open Secrets
Violence Prevention Agency
Steve Biko Foundation
Apartheid-Era Victims' Families Group (AVFG)
South African Coalition for Transitional Justice (SACTJ)

For media enquiries contact:

Lindiwe Sibiya, Media and Communication Officer, **Foundation for Human Rights** at lsibiya@fhr.org.za and 082 634 7154

Fort Calata Foundation

Lukhanyo Calata, 082 394 6481

South African Coalition for Transitional Justice (SACTJ)
Shirley Gunn, Executive Director of the Human Rights Media Centre
director@hrmc.org.za

[1] On 5 February 2019, former TRC Commissioners addressed a letter to the President, calling on him to establish a commission of inquiry into the political interference. Calls for a commission of

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inquiry were also made in letters to the President on 23 June 2019 and 23 June 2020 by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Dr Neil Aggett, Imam Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Caiphus Nyoka and several other families. The former TRC Commissioners again wrote to the President on 18 March 2021 requesting a commission of inquiry. This letter attached proposed terms of reference for a commission of inquiry.

[2] T.P.D. Case No. 3554/2015), Gauteng Division

[3] 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019

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NPA Further Enhances Efforts To Ensure Effective Handling And Prosecution Of TRC Cases

on13TH JAN 2023

National Prosecuting Authority of South Africa

The National Prosecuting Authority (NPA) has taken an important step to further enhance its efforts to deal with and prosecute cases stemming from the Truth andReconciliation Commission (TRC). Over the last couple of years, the NPA has focused on reopening and pursuing priority cases, and enhancing its internal capacity andprocesses both to ensure effective handling of these cases and to prevent any undue political influence. 64 new cases have been registered for investigation. 25 prosecutors and 40 investigators have been appointed within the various divisions to deal specifically with TRC matters. A detailed overview of these measures was presented to Parliament in November 2022.

As part of this effort, the NPA has appointed Adv D Ntsebeza SC to review the measures that have been adopted to deal with and prosecute TRC matters and to provide recommendations as needed. This is in line with the remarks made by the Full Bench in Rodrigues v National Director of Public Prosecutions of South Africa and Others 76755/2018)(2019) in the South Gauteng High Court in 2019 where the court held:
"It is also for these reasons that the conduct of the relevant officials and others outside the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted. Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. recurrence of these unacceptable breaches of the Constitution."

The Senior Counsel will conduct a thorough assessment and make recommendations, if necessary, to strengthen the NPA's handling of TRC cases. Further, if Counsel finds evidence or information that could amount to a violation of Section 41(1) of the NPA Act, such issues will be escalated to the National Director of Public Prosecutions (NDPP) to take forward as appropriate. If necessary, the NPA will refer relevant matters for criminal investigation.

Senior Counsel has three months to finalise his report and recommendations. The NPA will provide the necessary support to ensure that this timeline is kept andrelevant interventions and improvements are implemented without delay.

The NPA has engaged with the Executive as appropriate on this matter. The Executive is expected to release its own statement in due course, as per the remarks by the Court highlighted above.

Adv Mthunzi Mhaga

NPA Spokesperson

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2023 - Letter to request release of Advocate Ntsebeza's report

The University of the Witwatersrand, Johannesburg

11 October 2023 - South African Coalition for Transitional Justice

Survivors and civil society organisations request the release of Dumisa Ntsebeza SC's report into the NPA's approach towards prosecutions of TRC cases

Dear Advocate Shamila Batohi

We write to you as survivors and the families of victims of apartheid era gross human rights violations to request that your office publicly releases the report by Advocate Dumisa Ntsebeza SC to the National Prosecuting Authority (NPA). Ntsebeza was appointed to review the measures adopted by the NPA to deal with and prosecute Truth and Reconciliation Commission (TRC) cases and provide recommendations as needed.

Our rights to justice, truth recovery and reparations, were brutally compromised when the NPA, the South African Police Services and other state institutions succumbed to political interference by the Executive. As a result, they neither investigated nor prosecuted apartheid era political crimes, and those complicit in them. Many of these crimes were investigated by the TRC, which recommended further investigation and prosecution in the instances when amnesty had been denied or not applied for. The South African state is responsible under both international and domestic law for ensuring our rights to truth, justice, reparations and the guarantee of non-recurrence.

The failure to duly and timely investigate and prosecute apartheid era political crimes has led to a massive injustice, and is a flagrant violation of our rights to accountability including criminal justice. High-profile apartheid era perpetrators and foot soldiers went to their graves without having ever faced justice. Similarly, many of our family members died in pain without knowing the truth about of what had happened to our loved ones. These actions of the state, the NPA and the SAPS have deepened impunity in our country. In Rodrigues v NDPP ([2021] 3 All SA 775 (SCA)), the Supreme Court of Appeal found it "perplexing and inexplicable" why such a stance on prosecutions of the TRC cases was taken in the new constitutional order.

In June 2021, the NPA and the Directorate for Priority Crimes Investigations (DPCI, Hawks) issued a joint press statement. They announced a new approach to the investigations and prosecutions of the cases arising from the TRC. The change in the state's approach to apartheid-era cases was a result of sustained pressure from survivors, victims' families and civil society, which have been demanding

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justice since the wrapping up of the TRC in 2003.

We felt encouraged by the appointment of Advocate Dumisa Ntsebeza SC and welcomed this decision by the NPA with much hope and anticipation. However, nine months have now passed since the NPA announced this three-month inquiry by Advocate Ntsebeza SC and we are yet to see the fruits of the process. We assume that by now the inquiry has concluded its work and submitted its report. It is in this context that we are reaching out to you to request the release of the report to the public.

First and foremost, the release of the inquiry report is essential to uphold the principles of transparency and justice. As victims' families and survivors we have endured unimaginable pain and suffering. We have an inherent right to know the truth about what transpired during the inquiry and the recommendations that have arisen from the inquiry's investigation. We also wish to know what steps, if any, the NPA is taking in response to the inquiry's recommendations.

Furthermore, releasing the report is crucial for rebuilding trust in the NPA. The scars of the past are deep, and the only way to heal them is through transparency and accountability. By making the inquiry report public, the NPA would signal its intent to face and acknowledge the shortcomings and challenges in its past approach to TRC cases. It would also demonstrate its commitment to ensuring prompt investigations and prosecutions.

The release of the report is also vital to ensure public accountability. The widespread access to the report's findings and recommendations would allow us and the general public to hold the NPA accountable for the implementation of these recommendations. Accountability is a foundation of the rule of law, and there can be no accountability without full and open access to this information.

We therefore request that you release the report to the public by the of end October 2023: to serve the cause of justice and truth, and to demonstrate your commitment to rebuilding trust among the people in South Africa by upholding the principles of accountability and transparency.

Thank you for your attention to this matter, and we look forward to your positive response.

Yours sincerely,

Survivors and families of victims including:

Muhammed Haron, on behalf of the family of the late Imam Haron

Lyndene Page, on behalf of the family of the late Deon Harris

Neville Beling, a survivor of the Highgate Hotel Massacre in 1993

Karl Weber, a survivor of the Highgate Hotel Massacre in 1993

Tshidiso Motasi, on behalf of the family of the late Irene and Richard Motasi

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Fowzia Rahiman, on behalf of the family of the late Dr Hoosen Haffejee

Thuli Kubheka, on behalf of the family of the late Ntombikayise Kubheka

Marc Fransch, on behalf of the family of the late Anton Fransch

Alegria Nyoka, on behalf of the family of the late Caiphus Nyoka

Theledi Tlhapi, on behalf of the family of the late Ramatua Tlhapi

Mbulelo Goniwe, on behalf of the family of the late Matthew Goniwe

Mbusowesizwe Khoza, on behalf of the family of the late Musawakhe Phewa

Nombuyiselo Mhlauli on behalf of the family of the late Sicelo Mhlauli

Tshepo Matabane, on behalf of the family of the late Peter Matabane

Maide Selebi, on behalf of the family of the late Eustice Madikela

Tryphina Mokgatle, on behalf of the family of the late Zandisile Musi

Thandi Nhlapo, on behalf of the family of the late Fanyana Nhlapo

Mkhontowesizwe Godolozi, on behalf of the family of the late Qaqawuli Godolozi

Mohammad Timol, on behalf of the family of the late Ahmed Timol

Lonwabo Mkonto, on behalf of the family of the late Sparrow Mkonto

Mandisa Hashe, on behalf of the family of the late Sipho Hashe

Hlekani Rikhotso and Edgar Mushwana, on behalf of the family of the late Ignatius Mtebule

Stephen Mabelane, on behalf of the family of the late Matthews Mabelane

Nontombi Nama, on behalf of the family of the late Champion Galela

Lukhanyo Calata, on behalf of the family of the late Fort Calata

Bonakele Jacobs, on behalf of the family of the late Mxolisi Jacobs

Stephen Aggett, on behalf of the family of the late Dr Neil Aggett

Imraan Valodia, on behalf of the family of the late Dr Rick Turner

Thembi Nkadimeng, on behalf of the family of the late Nokuthula Simelane

The letter has been further endorsed by the following civil society organisations:

Foundation for Human Rights (FHR)

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Khulumani Galela Campaign

Human Rights Media Centre (HRMC)

Open Secrets (OS)

Centre for Applied Legal Studies (CALS)

Fort Calata Foundation

Imam Haron Foundation

Helen Suzman Foundation (HSF)

Legal Resources Centre (LRC)

Institute for Healing of Memories

Institute for Justice and Reconciliation (IJR)

The Southern African Catholic Bishops' Conference Justice and Peace Commission

South African Coalition for Transitional Justice (SACTJ)

For media queries, please contact:

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Your reference	Our reference	Date
	O Geldenhuys / 4005095	10 July 2024

Dear Mr President,

INTERFERENCE IN THE PROSECUTION OF CASES REFERRED TO THE NPA BY THE TRUTH AND RECONCILIATION COMMISSION

1. We act on behalf of survivors and the families of victims of apartheid era gross human rights violations (**"our clients"**). Our clients are:

Partners in office at Cape Town: Office Managing Partner: G Fitzmaurice **Partners:** RB Africa C Alexander AK Allie TB Ball AE Bennett AR Bowley SJ Chong KM Colman PA Crosland R Cruywagen HM de Villiers ST Dias BEC Dickinson HJ du Preez LF Egypt AF Esterhuizen OH Geldenhuys MM Gibson PM Holloway SJ Hutton KT Inglis ME Jarvis S Jooste LA Kahn A Keyser KE Kilner LC Lambrechts CS Meyer A Mhlongo LE Mostert A Muir P Naidoo C Nothling PD Novotny A October CH Prenaar K Rew G Richards-Smith H Samsodien J Smit WV Tembedza PZ Vanda SE van der Meulen L van Tonder T Viljoen DM Visagie AWR Westwood

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa C Alexander AK Allie NG Alp TB Ball DC Bayman AE Bennett AP Blair K Blom AR Bowley M Bux V Campos RI Carrim T Cassim SJ Chong ME Claassens KL Collier KM Colman KF Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies KM Davis PM Daya HM de Villiers ST Dias L de Bruyn A de Meyer PU Dela M Denenga C Dennehy CW de Villiers BEC Dickinson DA Dingley G Driver W Drue GP Duncan HJ du Preez CP du Toit TC Dye SK Edmundson LF Egypt KH Eiser AE Esterhuizen K Fazel G Fitzmaurice JB Forman L França M Garden OH Geldenhuys MM Gibson H Goolam C Gopal CI Gouws PD Grealy L Green JM Harvey JS Henning KR Hillis CM Holfeld PM Holloway KT Inglis ME Jarvis JC Jones CM Jonker S Jooste LA Kahn L Kamukwamba M Kennedy A Keyser MT Kgoadi A Khumalo KE Kilner MD Kota JC Kraamwinkel AC Kruger J Lamb LC Lambrechts LM Lamola B Lotter E Louw M Mahlangu S Manley V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer A Mhlongo AJ Mills D Milo M Mkhabela DR Mogapi P Mohanlall N Moodley L Moolman LE Mostert VM Movshovich M Mpungose A Muir C Murphy D Naidoo P Naidoo DC Nchabeleng DP Ndiweni C Nothling M Nxumalo AN Nyatsumba MB Nzimande A October L Odendaal N Paige AS Parry S Patel N Pather GR Penfold SE Phajane MN Phala M Philippides BA Phillips MA Phillips CH Prenaar MP Pool DJ Rafferty C Ramjettan GI Rapson K Rew G Richards-Smith SA Ritchie J Roberts Y Robbertse S Rule G Sader H Samsodien DA Serumula KE Shepherd ZK Sibeko N Singh N Singh-Nogueira P Singh S Sithole J Smit MP Spalding MW Straeuli LJ Swaine Z Swanepoel WV Tembedza A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tlhavani G Truter PZ Vanda SE van der Meulen JP van der Poel MS van der Walt CS Vanmali L van Tonder N van Vuuren JE Veeran HM Venter B Versfeld MG Versfeld TA Versfeld C Vertue T Viljoen DM Visagie EME Warmington J Watson AWR Westwood RH Wilson KD Wolmarans

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1.1 The families of Fort Calata, Matthew Goniwe, Sicelo Mhlauli, and Sparrow Mkhonto (the Cradock Four)

1.2 The families of Eustice 'Bimbo' Madikela, Peter 'Ntshingo' Matabane, Fanyana Nhlapo, and Zandisile Musi (the COSAS 4)

1.3 The family of Caiphus Nyoka

1.4 The family of Mxolisi 'Dicky' Jacobs

1.5 The family of Imam Abdullah Haron

1.6 The family of Ahmed Timol

1.7 The family of Dr Hoosen Mia Haffejee

1.8 The family of Musawakhe 'Sbho' Phewa

1.9 The family of Ntombikayise 'Ntombi' Khubeka

1.10 The family of Dr Richard 'Rick' Turner

1.11 The family of Deon Harris (victim of the Highgate Hotel Massacre)

1.12 Karl Webber (survivor of the Highgate Hotel Massacre)

1.13 Neville Beling (survivor of the Highgate Hotel Massacre)

1.14 Ernestina Simelane, the mother of Nokuthula Simelane

1.15 Tshidiso Motasi, the son of Richard and Irene Motasi

2. We refer to our letter addressed to your office, dated 8 June 2021, which is attached as Annexure "**A**" ("**our letter**"). Our letter was the last in a series of correspondence that was exchanged between your office, former commissioners of the Truth and Reconciliation Commission ("**TRC**") and ourselves on behalf of clients regarding the appointment of a commission of inquiry into the suppression of the TRC cases (the "**TRC cases**").

3. In our letter, we informed you of our instructions to prepare an application to court for an order compelling you to fulfil your obligations under section 84(2)(f) of the Constitution and to appoint such a commission.

4. Since the delivery of our letter to you more than three years ago, you have not appointed a commission of inquiry despite numerous requests from clients, other victims of apartheid-era gross human rights violations, former TRC commissioners, and civil society organisations.

5. On 6 March 2023, the National Director of Public Prosecutions, Adv Shamila Batohi, briefed former TRC commissioner, Adv Dumisa Ntsebeza SC to:

5.1 review the measures adopted by the NPA to deal with the TRC cases and related matters;

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5.2 assess whether the measures put in place are adequate and, if the measures are not adequate, to make recommendations to strengthen the measures; and

5.3 determine whether, in relation to the TRC cases, there is reason to believe that organ(s) of state and/or member(s) or employee(s) of organ(s) of state or any other person, improperly interfered with, hindered or obstructed the NPA or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions, which amounts to a violation of section 41(1) of the NPA Act.

6. The brief to Adv Ntsebeza SC to determine whether the TRC cases were improperly interfered with, hindered or obstructed, emanated from the findings of the High Court and Supreme Court of Appeal of high-level political interference in TRC cases during the period 2003 to 2017 by the South African government, including former Presidents, members of the national executive and other high ranking government officials.

7. The findings of political interference were made by the Johannesburg High Court in the case of *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ). These findings were confirmed by the Supreme Court of Appeal in the case of *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 (SCA). It is now well established that the political interference culminated in delays in investigating and prosecuting the TRC cases, resulting in the demise of most of the cases as many suspects and witnesses died in the intervening years.

8. Adv Ntsebeza SC delivered his opinion to the NDPP, and it was made public on or about 15 February 2024.

9. In his opinion, Adv Ntsebeza SC stated that a commission of inquiry is "*the only sensible way forward in order to get to the bottom of why the TRC cases were never investigated or prosecuted with zeal*".[1] Thus, the establishment of a commission of inquiry to investigate whether the political interference in TRC cases between 2003 and 2017 amounts an offence under section 41(1) of the NPA Act is justified.[2] Adv Ntsebeza SC recommended that:

> "*150.9 The NPA must pursue the establishment of an independent commission of inquiry under either section 84(2)(f) of the Constitution, or the Commissions Act, 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017.*
>
> *150.9.1 The inquiry should take into consideration the multiple state entities involved, including the executive, the SAPS, South African intelligence agencies and politically exposed (connected) persons (PEPs) and specifically the 16 individuals named in the Calata affidavit filed before the Zondo Commission.*
>
> *150.9.2 It is important that any inquiry is public and is empowered with sufficient authority to carry out the investigation and is clothed with powers of search and seizure and is able to subpoena people of interest.*

[1] Ntsebeza opinion at paragraph 149.

[2] Ntsebeza opinion at paragraph 142

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150.9.3 The inquiry must be empowered to make recommendations of possible prosecution under section 41(1) of the NPA Act."[3]

10. We understand from questions that were answered in Parliament in April 2024 that the former Minister of Justice, Mr Ronald Lamola, considered the recommendations of Adv Ntsebeza SC. However, by the expiry of the sixth administration's term at the end of May 2024, the Ntsebeza recommendations had not been implemented.

11. In light of the above, we have been instructed to resubmit our clients' previous demands for the appointment of a commission of inquiry into the suppression of TRC cases to you as the President of the seventh administration, which we hereby do.

12. In the circumstances, we demand that you exercise your powers under section 84(2)(f) of the Constitution to appoint a commission of inquiry in line with the recommendations of Adv Ntsebeza SC and publicly announce the appointment thereof by **31 July 2024**, failing which we hold instructions to institute proceedings to compel the appointment of such a commission.

13. We further wish to inform you that we have been instructed to seek an additional order for constitutional damages against the government to vindicate the constitutional rights of our clients which have been breached by the suppression of the TRC cases.

14. If the government agrees that constitutional damages are warranted to vindicate the rights of our clients and other similarly affected victims, we recommend that we meet in order to commence negotiations on the nature, extent and quantum of such damages.

15. We kindly request that you provide us with a response to this letter by close of business on **Friday, 26 July 2024**. Failing your response, we will proceed to initiate the legal proceedings outlined above.

Yours faithfully

WEBBER WENTZEL
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[3] Ntsebeza opinion at paragraph 150.9.

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Mr Ronald Lamola
Minister of Justice and Correctional Services
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Your reference	Our reference	Date
URN0002021OOP000145 Mr Georffrey Mphaphuli/ Acting Head Legal and Executive Services	Mr M Hathorn 3048523	8 June 2021

Dear Mr President,

REQUEST FOR A COMMISSION OF INQUIRY INTO THE SUPPRESSION OF THE TRC CASES

We refer to the TRC Commissioners' letter to you dated 25 March 2021 and your letter addressed to them dated 6 May 2021, in which your office indicated that the matter has been referred to the Department of Justice and Correctional Services. We attach copies of these letters for your easy reference.

In the TRC Commissioners' letter to you dated 25 March 2021 you were requested to indicate whether you intended to appoint a commission of inquiry into the suppression of the TRC cases by 30 April 2021, failing which the matter would be referred to attorneys.

The matter was referred to us. We have been furnished with an opinion from eminent senior counsel indicating that the issue in question is one of significant public concern; and that in these

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa NG Alp RL Appelbaum DC Bayman KL Bellings AE Bennett AP Blair DHL Booysen AR Bowley J Braum MS Burger M Bux RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies PN Daya L de Bruyn PL Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley MS Dladla G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AF Esterhuizen MJR Evans K Fazel AA Felekis G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson CJ Gouws PD Grealy S Haroun JM Harvey JS Henning KR Hillis Z Hlophe CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings JC Jones CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy KE Kilner A Keyser ND Kota JC Kraemwinkel J Lamb KJ Lebea F Louw M Mahlangu V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu P Mohanlall M Molobi N Moodley LE Mostert VM Movshovich C Murphy RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyalsumba A Ortobet I Odendaal GJP Oliver N Paige AMT Pardini AS Parry S Patel N Pather GR Penfold SE Phajane M Philippides BA Phillips MA Phillips DJ Rafferty D Ramjettan GJ Rapson K Rew SA Ritchie NJA Robb J Roberts G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tlhavan G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson KD Wolmarans DJ Wright M Yudaken

Chief Operating Officer: SA Boyd

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specific circumstances, your failure to make a decision, or your refusal to appoint a commission, is susceptible to review under the legality principle as well as a Bill of Rights challenge.

We have now been instructed by several families of apartheid-era victims (including members of the Cradock Four and Biko families) as well as multiple organisations to prepare an application to court for the appropriate relief. Counsel has been duly briefed in this regard.

Our instructions are to place you formally on terms. Should we not hear from you within 10 days of receipt of this letter we will proceed to launch an application to court for an order compelling you to fulfil your obligations under the Constitution and to appoint a commission to inquire into the suppression of the TRC cases.

Yours faithfully

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Mr Ronald Lamola
Minister of Justice and Correctional Services
Email: ZaneNdlovu@justice.gov.za / Ministry@justice.gov.za

25 March 2021

Dear Mr President,

CALL FOR THE APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We, the former Commissioners of the Truth and Reconciliation Commission (TRC), called on you in early 2019 to establish a commission of inquiry into the suppression of the investigation and prosecution of apartheid-era crimes that had been referred by the TRC to the National Prosecuting Authority (NPA) (the TRC cases). A copy of our letter dated 5 February 2019 is

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attached for your ease of reference as appendix A. Aside from an acknowledgment of receipt you did not respond to this request.

We also refer to the letters dated 23 June 2019 and 23 June 2020 addressed to you by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Dr Neil Aggett, Imam Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Nicodemus Kgoathe, Solomon Modipane, Jacob Monagotla, Mapetla Mohapi, Mxolisi 'Dicky" Jacob, Caiphus Nyoka, Anton Fransch, Moshin Jeena, Haroon Aziz, Coline Williams and Robert Waterwitch. These families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. They also called for a commission of inquiry into the suppression of the TRC cases. Their letters were ignored.

In the light of your failure to respond, representatives of several families of victims of apartheid-era crimes, including the families of the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Haron and Hoosen Haffejee approached the Judicial Commission of Inquiry into Allegations of State Capture with the request that it inquire into the capture of state institutions meant to pursue justice in respect of the TRC cases. Regrettably the commission was unable to complete its investigations into this matter and it will close on 30 June 2021. We understand that the bulk of the remaining period is to be devoted to the preparation of the Commission's final report.

Accordingly, the former TRC Commissioners, the undersigned organisations and family representatives renew their call for a standalone independent commission of inquiry to investigate the suppression of some 400 serious cases, including murders and disappearances, from South Africa's past.

The need for a Commission of Inquiry

There is no longer any dispute that political interference blocked several hundred serious criminal cases in which amnesty had been denied or not sought. A former National Director of Public Prosecutions and a former head of the NPA's Priority Crimes Litigation Unit have provided affidavits to this effect in the 2015 matter of *Nkadimeng v. National Director of Public Prosecutions.*[1] Senior officials representing the NPA admitted under oath in 2019 that the Authority succumbed to political interference in respect of the TRC cases in *Rodrigues v National Director of Public Prosecutions of South Africa*.[2] The Full Court in that matter expressed its dismay at how such interference could take place in the new constitutional order. It called on the Executive and the NPA to take appropriate action to ensure that such breaches of the Constitution do not recur.[3] To date, neither the government, nor the NPA have taken such action. In our respectful view, appropriate action to prevent recurrence can only be based on a full and thorough inquiry.

While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such

[1] T.P.D. Case No. 3554/2015), Gauteng Division
[2] 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019
[3] Para 65. See also paras 21 – 24 and 57 – 64

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interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on the NPA and the South African Police Service (SAPS) is yet to be exposed. It is not known how institutions with firm constitutional and statutory obligations to uphold justice so easily abandoned their legal duties in respect of the TRC cases.

The suppression of the TRC cases involved multiple entities and individuals across the public sector. The secret Amnesty Task Team created by the Director-General's Forum in early 2004 to explore means of guaranteeing impunity for apartheid-era perpetrators involved multiple departments including the Department of Justice and Correctional Services, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.

It is accordingly not sufficient for there to be separate internal or departmental inquiries by the different institutions. Such inquiries will not be able to deliver the full history of the interference as it unfolded over time over multiple entities. Moreover, such inquiries will not be able to compel the production of testimony and evidence from other departments. In any event, there appears to be considerable resistance to carrying out meaningful investigations at these levels; and it goes without saying that departmental officials should not be investigating themselves or their colleagues.

The subject matter is of great public concern

Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the 400 cases were blocked. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.

Commissions of inquiry are investigative tools which the President may invoke for purposes of investigating matters of public concern or for gathering information considered necessary for formulating policy. In addition, there is a critically important need to restore public confidence in the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost all trust and confidence in the SAPS and NPA.

A further objective of the proposed commission is to reveal the truth pertaining to the suppression of the TRC cases, which gives it a deeper public purpose. This is necessary given the extent of disquiet and discontent around such serious lapses by public organs meant to uphold the rule of law. There can be little doubt that such lapses have provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance.

The Constitution requires that the notion of 'public concern' be interpreted to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of

human dignity, equality and freedom. In respect of the suppression of the TRC cases, these democratic values have been obliterated. We scarcely need to point out that the human dignity of Lukhanyo Calata and the Cradock 4 families, together with the families of hundreds of other victims of apartheid crimes, have been deeply offended. Their right to equality before the law has been grossly disrespected. The TRC cases have been treated differently from other serious criminal cases for purposes of serving undisclosed political and ulterior ends. Such brazen arbitrariness should have no place in South Africa's constitutional order.

Appoint a commission

We accordingly request that you appoint, without further delay, an independent commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence. We have prepared draft terms of reference to assist you in your deliberations, which are annexed to this letter as appendix B.

The late Mr Justice Arthur Chaskalson, then President of the Constitutional Court, later Chief Justice of South Africa, said a few months after South Africa's democratic elections in 1994:

> *"We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened..."*

Should you not announce a decision of your intention to establish a commission of inquiry by 30 April 2021 we will refer this matter to our attorneys. They will be instructed to vindicate the constitutional rights of families of apartheid-era crimes and to bring an appropriate application to court.

Yours sincerely,

Yasmin Sooka o.b.o the former TRC Commissioners
Archbishop Emeritus Desmond Tutu
Advocate Dumisa Ntsebeza SC
Ms Mary Burton
Dr Fazel Randera
Ms Glenda Wildschut
Mr Richard Lyster

The Committee Members
Ms Joyce Piliso-Seroke
Prof Piet Meiring

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Mr Ilan Lax
Dr Russell Ally

Organisations
Desmond and Leah Tutu Legacy Foundation
Foundation for Human Rights
Apartheid Era Victims' Families Group
Centre for the Study of Violence and Reconciliation
Khulumani Victims Support Group
Institute for Justice and Reconciliation
Ahmed Timol Family Trust
Centre for Applied Legal Studies
Imam Haron Foundation
Fort Calata Foundation
Steve Biko Foundation
Human Rights Media Centre
Open Secrets
South African History Archive
Southern African Litigation Centre
Violence Prevention Agency
Legal Resources Centre (LRC)
Lawyers for Human Rights (LHR)

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THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Our ref: URN0002021OOP000145

Former Commissioners of the TRC
Foundation for Human Rights
Tel: 011 593 4002

By email: yasmin.sooka@gmail.com

Dear Ms Sooka and Adv Ntsebeza SC,

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

With reference to the above we hereby wish to acknowledge receipt of your letter pertaining thereto.

In addition, we wish to confirm that the matter has been referred to the Department of Justice and Correctional Services for further attention and reply.

Trusting you find it in order.

Yours faithfully,

Mr Geofrey Mphaphuli
Acting Head: Legal and Executive Services
Date: 06/05/2021

Mr Geofrey Mphaphuli
Legal and Executive Services
Email: Geofrey@presidency.gov.za

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Jos Venter

From:	Jos Venter
Sent:	10 July 2024 18:10
To:	presidentrsa@presidency.gov.za; VincentM@presidency.gov.za; malebo@presidency.gov.za; nokukhanya@presidency.gov.za; didy@presidency.gov.za; Humbelani@presidency.gov.za; Akhona@presidency.gov.za; Ministry@justice.gov.za; DeMoraba@justice.gov.za; BSarela@justice.gov.za; MZenzile@justice.gov.za; blwilliams@justice.gov.za
Cc:	Odette Geldenhuys; Nkosinathi Thema; Lize-Mari Doubell; Tasneem Kathrada; Refilwe Riba
Subject:	INTERFERENCE IN THE PROSECUTION OF CASES REFERRED TO THE NPA BY THE TRUTH AND RECONCILIATION COMMISSION
Attachments:	WW letter to the President of the Republic of South Africa 2024-07-10.pdf
Importance:	High

Good day,

Please find attached for the attention of President Cyril Ramaphosa, Minister Khumbudzo Ntshavheni, and Minister Thembisile Nkadimeng our letter dated 10 July 2024.

Kind regards,

Jos Venter | Associate | Webber Wentzel
T:+27115305296 | jos.venter@webberwentzel.com | www.webberwentzel.com

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Jos Venter

From: Microsoft Outlook <MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@webberwentzel.com>
To: presidentrsa@presidency.gov.za; VincentM@presidency.gov.za; malebo@presidency.gov.za; nokukhanya@presidency.gov.za; didy@presidency.gov.za; Humbelani@presidency.gov.za; Akhona@presidency.gov.za; Ministry@justice.gov.za; DeMoraba@justice.gov.za; BSarela@justice.gov.za; MZenzile@justice.gov.za; blwilliams@justice.gov.za
Sent: 10 July 2024 18:11
Subject: Relayed: INTERFERENCE IN THE PROSECUTION OF CASES REFERRED TO THE NPA BY THE TRUTH AND RECONCILIATION COMMISSION

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

presidentrsa@presidency.gov.za (presidentrsa@presidency.gov.za)

VincentM@presidency.gov.za (VincentM@presidency.gov.za)

malebo@presidency.gov.za (malebo@presidency.gov.za)

nokukhanya@presidency.gov.za (nokukhanya@presidency.gov.za)

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MZenzile@justice.gov.za (MZenzile@justice.gov.za)

blwilliams@justice.gov.za (blwilliams@justice.gov.za)

Subject: INTERFERENCE IN THE PROSECUTION OF CASES REFERRED TO THE NPA BY THE TRUTH AND RECONCILIATION COMMISSION



INTERFERENCE IN THE PROSECUTI...

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THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Your ref: O Geldenhuys / 4005095
Our ref: URN0002024OOP000212

Messrs Webber Wentzel
PO Box 3667
Cape Town
8000

By email: odette.geldenhuys@webberwentzel.com

Dear Ms Geldenhuys,

INTERFERENCE IN THE PROSECUTION OF CASES REFERRED TO THE NPA BY THE TRUTH AND RECONCILIATION COMMISSION

1. With reference to the above we hereby wish to acknowledge receipt of your letter pertaining thereto, dated 10 July 2024.

2. Kindly be advised that the Department of Justice and Constitutional Development was requested to consider the matter and advise the Presidency.

3. We will revert to you as soon as we are in receipt of the report/advice from the Department of Justice and Constitutional Development on the matter.

Trusting you find it in order.

Yours faithfully,

Mr Geofrey Mphaphuli
Acting Head: Legal and Executive Services
Date: 13 August 2024

Cc: Mr Sello Chiloane
Department of Justice and Constitutional Development

Mr Geofrey Mphaphuli
Legal and Executive Services
Email: Geofrey@presidency.gov.za

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My sister's heart

news24

On the 30th anniversary of her sister's disappearance, **Thembi Nkadimeng** writes about the MK envoy who refused to turn her back on the cause

The story of my sister, Nokuthula Simelane, is about freedom and betrayal. My sister believed in freedom with every fibre of her being.

It was her unshakeable dedication to freedom that took her to the Carlton Centre in Johannesburg on the morning of September 8 1983.

This year marks the 30th anniversary of her disappearance.

A 23-year-old university graduate at the time, she was a courier for Umkhonto weSizwe (MK), the ANC's armed wing, moving between Swaziland and South Africa. She was betrayed by one of her own.

Instead of a scheduled rendezvous with a comrade, she was met by members of South Africa's hated security police, who shoved her into the boot of a vehicle.

This betrayal was to condemn Nokuthula to a choice between life and death. An informant's life – a betrayal that would crush her spirit – or death with her dignity intact. In reality, there was no real choice for Nokuthula.

A photo of Nokuthula Simelane from the family archives

Her commitment to what she loved most dearly made the first option unthinkable.

My sister's death was not swift and it was not painless. The security police drove her to the police barracks in Johannesburg.

There, they tortured her.

After several days, she was moved to an isolated farm in the north of the then Transvaal, where her abuse intensified. It lasted for some three weeks.

Her torturers were convinced that with enough force this young, inexperienced woman would break and become an informant.

They believed that it was just a question of more violence and more fear: a few more vicious blows to her head, to her face and her body, or perhaps a few more near-drownings in an icy dam.

Maybe more days of solitary confinement shackled in handcuffs and leg irons in filthy conditions

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would push her over the edge.

The black police officers who testified before the Amnesty Committee of the Truth and Reconciliation Commission (TRC) reported that after weeks of torture, my sister was unrecognisable. H

er face was an appalling mess of bruises and swelling. She was too weak to walk.

The last time they saw her was when she was being pushed into the boot of one of the white officer's vehicles.

My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died and where her body is today. We have spent three decades looking for Nokuthula.

We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.

We did not expect the former South African Police to investigate themselves. However, we firmly believed that the new democratic South Africa would take the necessary steps.

We were wrong. This was the second betrayal of Nokuthula and everything she stood for.

This betrayal cut the deepest. My father went to his grave without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing – and without burying Nokuthula's remains with the dignity she deserves.

The Amnesty Committee of the TRC concluded that the white officers had lied to the commission about the degree of torture as well as her ultimate fate. They, nevertheless, granted amnesty to those officers for Nokuthula's kidnapping.

Nobody applied for amnesty for her murder. The committee betrayed its own law, which states that amnesty can only be granted in exchange for the truth and full disclosure.

How could they grant amnesty when they knew that the white officers had lied about what they did to Nokuthula during and after her kidnapping? The Amnesty Committee betrayed our faith in them and in the truth and reconciliation process.

The police and the prosecutors could have taken up the matter. However, they chose not to, though a police docket was opened in 1996.

After the amnesty decision in 2001, the matter was referred to the National Prosecuting Authority.

When I approached them, they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. When the new prosecution policy emerged in late 2005, it essentially created a backdoor amnesty.

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It gave perpetrators, like my sister's killers, a second opportunity to escape justice.

Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy. In 2008 a Pretoria High Court judge struck down the policy, declaring it to be absurd and unconstitutional.

We thought this meant that the path was eventually cleared for justice to take its course. Again, we were wrong.

This time the prosecutors claimed that the police were refusing to provide investigators. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010 – but apparently the docket had gone "missing".

Three years later, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone.

They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, I instructed my lawyers to demand the holding of a judicial inquest into her death.

This request was refused. After 17 years of idleness, the prosecutors advised us that their investigations were still not yet complete. We do not believe them.

We have lost all faith in the prosecutors and police. They have betrayed our trust.

They now claim that they are occupied with inquiries, which could conceivably drag on indefinitely while witnesses and suspects grow old and die. We do not know why the authorities in the new South Africa would turn their backs on one of their own.

Nokuthula's ultimate sacrifice helped to pave the way for the freedom and democracy we now enjoy.

We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete.

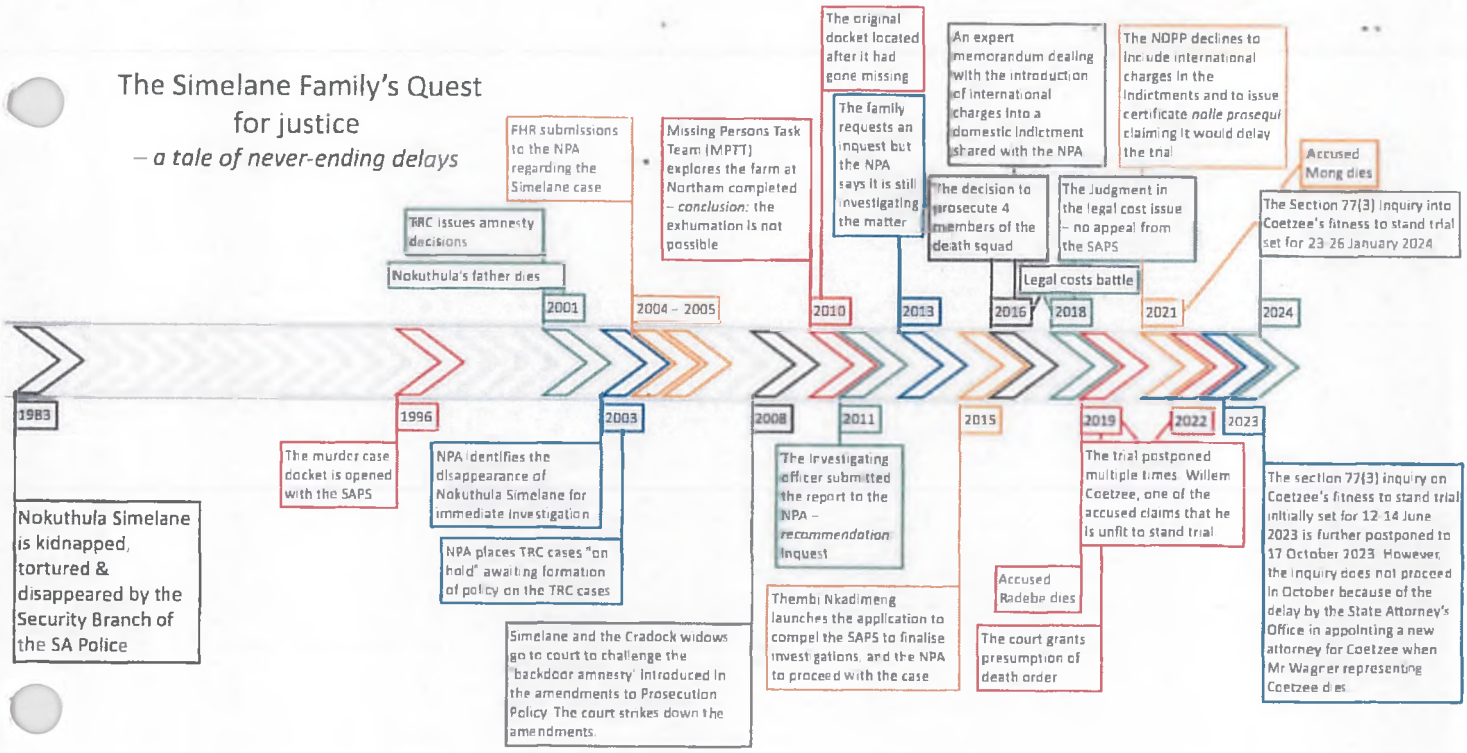
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The Simelane Family's Quest for justice

– a tale of never-ending delays



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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

STATEMENT OF LUKHANYO BRUCE MATTHEWS CALATA

I, the undersigned,

LUKHANYO BRUCE MATTHEWS CALATA,

do hereby make oath and state:

1. I am the son of the late Fort Calata, and I am a journalist, author and filmmaker. I am currently employed as the News Director at eNCA based in Johannesburg.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

4. I also confirm the contents of my founding affidavit dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

5. I confirm that I am the first applicant in the abovenamed High Court case against the Government, the President and other respondents. The Commission was established by the President in direct response to aforesaid legal proceedings.

6. I will rely on paragraphs 1 to 555 of the Calata affidavit and the annexes thereto to address the aforesaid paragraphs of the terms of reference.

LUKHANYO BRUCE MATTHEWS CALATA

Signed and sworn to before me at Dunkeld West on this the 5 day of November **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: Charles Horne

PHYSICAL ADDRESS: 4 Albury Road Dunkeld West

DESIGNATION: CA(SA)

Certified as a true copy of the Original
Commissioner of Oaths (RSA)
Charles Horne CA(SA)
2025 -11- 05
Registered Chartered Accountant
SAICA Membership No: 20034218
4 Albury Road, Dunkeld West 2196
Tel: +27 11 537 9300

Divider 2

Affidavit of Vusumzi Patrick Pikoli

Nkadimeng // National Director of Public Prosecutions and Others

Gauteng Division of the High Court, Pretoria, Case No: 36554/2015

FA22

"TN7" 170

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

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WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

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172

PROFESSIONAL EXPERIENCE

4. Prior to 1990 I was a member of Umkhonto weSizwe and I worked for the ANC's legal and constitutional affairs department in exile.

5. Between 1991 and 1994 I worked as a legal adviser with the Munich Reinsurance Company of Africa Limited Group. From 1994 until 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar. My specific mandate was to help restructure the Department of Justice. At the time, there were eleven departments countrywide and I was tasked with amalgamating those departments into one central department.

6. From 1997 to 1999, I served as Deputy-Director General of the Department of Justice. In 1999, I was appointed Director General of the Department of Justice and Constitutional Development and worked in that role until 2005.

7. On 1 February 2005, I was appointed the National Director of Public Prosecutions ("NDPP") by the President in terms of Section 10 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") as read with Section 179 of the Constitution. My appointment was for a 10 year term as contemplated in Section 12(1) of the NPA Act.

8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty

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by the then President, Mr. T. Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ("TRC") contributed to the decision of President Mbeki to suspend me. The President suspended me from office in terms of section 12(6) of the NPA Act and ordered an Enquiry into my fitness to hold office as the NDPP.

9. During 2008, a commission of enquiry into my fitness to hold office, led Dr. F. Ginwala, found that the Government had failed to substantiate the reasons for my suspension and that I was a fit and proper person to hold the position of National Director of Public Prosecutions. She further recommended that I be restored to the office of the NDPP. Notwithstanding this finding and recommendation, acting President Mr. K Motlhlanthe dismissed me from my post. In 2009 I obtained an order from the High Court restraining President Zuma from appointing a successor to my position. Later that year I accepted a monetary out-of-court settlement from the government.

10. Between 2010 and 2012 I was a partner at SizweNtsalubaGobodo and the director of its Forensic Investigations department.

11. Between 2012 and 2014 I served as a commissioner of the Khayelitsha

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Commission, which investigated allegations of police inefficiency in Khayelitsha as well as allegations of a breakdown in relations between the community of Khayelitsha and the Police. In December 2014 I was appointed as the Western Cape's first police ombudsman.

12. I am a former trustee of the Constitutional Court Trust, a former member of the Magistrate's Commission and a founding member of the International Association of Anti-Corruption Authorities. I am currently an independent director on the board of Cricket South Africa, where I chair the social and ethics committee. Amongst my awards, I was conferred the International Association of Prosecutors Award in 2008.

CONFIRMATION

13. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Anton Ackermann SC ("Ackermann"), insofar as they relate to me.

14. In particular, I confirm the contents of the applicant's affidavit under the heading "Political constraints". I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996

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("the TRC cases").

15. In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority (NPA).

THE INDEPENDENCE OF THE NPA

16. The Office of the NDPP was created on 1 August 1998 in terms of section 179 (1) of the Constitution. The NDPP is the head of the NPA, and manages the directors of public prosecutions, investigating directors, special directors, and other members of the prosecuting authority either appointed or assigned. During my tenure I was duty bound to carry out the responsibilities set out in the NPA Act as well as the Constitution of the Republic of South Africa.

17. As NDPP I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act) which both impose a duty on prosecutors to act "*without fear, favour or prejudice*". These provisions provide both a constitutional and statutory guarantee of independence to the NPA.

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THE TRC CASES

18. In April 2003 President Mbeki received the final TRC report. The President announced in Parliament that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA as part of the "*normal legal processes*". He also said that those perpetrators who were prepared to unearth the truth would be welcome to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in existing legislation. Former President Mbeki's statement to the national houses of Parliament dated 15 April 2003 is annexed hereto marked "VPP1". Regrettably what was to follow in relation to the TRC cases was anything but the "*normal legal processes.*"

19. In my former capacity as Director General ("DG") of the Department of Justice and Constitutional Development ("DoJ") I had previously been involved in the formulation of a policy to deal with the TRC cases, which were regarded as politically sensitive. On 23 February 2004, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives.

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20. It is important to note that the recommendation of the Task Team of a two stage process which would have required a recommendation from an inter-departmental task team before the NDPP could institute any criminal proceedings in the political cases was rejected. This was because such a process would have been a violation of prosecutorial independence enshrined in Section 179 of the Constitution.

21. Some of these developments have been highlighted in the extracts from my affidavit filed before the Ginwala Commission in May 2008, which have been annexed to the founding affidavit. For the sake of completeness I highlight some of these facts in this affidavit.

22. In relation to the steps taken by the NPA with regard to the TRC cases prior to my appointment as NDPP on 1 February 2005 I refer to the affidavit of Anton Ackermann SC filed evenly herewith. On my appointment as NDPP, the Priority Crimes Litigation Unit (PCLU), a sub-unit within the NPA, had already been tasked with handling the TRC cases. The PCLU was headed by Special Director Advocate Anton Ackermann.

23. The decision to prosecute those implicated in the attempted murder, through poisoning, of former church leader and head of the South African Council of Churches, the Reverend Frank Chikane, on 23 April 1989 at the then Jan Smuts Airport, Kempton Park ("the Chikane matter), saw the

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unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

24. The initial decision to prosecute three Security Branch members, former Colonel C L Smith, and former Captains G J L H Otto and H J Van Staden, was taken prior to my appointment as NDPP. This decision was taken in November 2004 by Dr. Silas Ramaite SC in his capacity as Acting National Director of Public Prosecutions. However, he instructed that this matter, and all other TRC cases, be held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.

Developments since 2005

25. Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by the NPA Act, the amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments to the Prosecution Policy were titled: "*PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994*" ("the Prosecution Policy Guidelines' or "the Guidelines"). A copy of the said amendments is annexed to the founding affidavit marked "TN30".

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26. In terms of paragraph B6 of the amended Prosecution Policy it was stipulated that that the PCLU should be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

26.1. The National Intelligence Agency ("NIA");

26.2. The Detective Division of the South African Police Service ("SAPS");

26.3. The Department of Justice and Constitutional Development; and

26.4. The Directorate of Special Operations ("DSO").

27. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects in the Chikane matter, which, in my opinion, was clearly sufficient to justify a prosecution. None had applied for amnesty for this offence. I therefore gave the initial instruction to proceed with the prosecution in February 2006.

28. In response to the said notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. These representations were reviewed by a team within the NPA under the

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leadership of Advocate T. Pretorius who reported to me that the representations did not comply with the requirements set out in the Guidelines, insofar as the suspects declined to disclose the full truth. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

29. Meanwhile in early 2006 I had approached the then Commissioner of Police, the DG of Justice, and the heads of the NIA and the DSO (also known as 'the Scorpions') requesting them to nominate senior officials to assist the PCLU in accordance with the Prosecution Policy guidelines. Unfortunately the SAPS and the NIA never provided the PCLU with the necessary support to conduct its investigations adequately.

30. In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackermann's participation claiming that Ackermann intended to prosecute the leadership of the ANC. This is notwithstanding the formal denial by the NPA that no such plans were in place. I advised Mr. Selebi that Ackermann was appointed as the head of the PCLU under Presidential proclamation and it was not for the SAPS to determine who should discharge the mandate given to the PCLU.

31. I then approached the Presidency in order to secure the necessary

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collaboration of the parties to apply the Prosecution Policy Guidelines. A meeting was arranged in mid-2006 by Reverend Frank Chikane, the then Director General in the Presidency. The meeting was attended by himself, the DGs of Justice and the NIA, Mr. Selebi, the Secretary of the Defence Secretariat, Mr. Jafta from the Presidency and I. Mr. Selebi again complained about Advocate Ackermann's involvement in the process.

32. Later in 2006 I was summoned to a meeting which was convened at the home of Minister Skweyiya, the then Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza and I was advised that it related to the prosecution in the Chikane matter.

33. At this meeting it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members. I quote hereunder from my affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> *"The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to*

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prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.

...The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

34. Also in 2006 a further meeting took place at the office of the Presidency. My recollection of this meeting is that it was decided that the working committee or Task Team would not make recommendations on a decision

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as to whether to prosecute or not, but would be responsible for ensuring that I received all the necessary inputs and information from the various departments so as to assist me to make a well-considered decision.

35. At this meeting I proposed that Dr Silas Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team. I suggested this in order to counter the complaints in regard to Advocate Ackermann and to get the Task Team working. The proposal was accepted.

36. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Mr. Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and accepted.

37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph B6 of the Guidelines.

38. The Task Team met for the first time on 12 October 2006. I attended the opening session of the first meeting together with Ms. Kalyani Pillay (my

adviser), the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Aside from this meeting, I did not participate further in the activities of the Task Team. I received reports from time to time on their activities. These reports led me to believe that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing.

39. Meanwhile I had received further representations from the suspects in the Chikane matter contending that they had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I sought an independent opinion from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006 and concluded that the claimed indemnities were no bar to prosecution and that the said law had been repealed in 1995.

40. Dr Silas Ramaite reported to me that at the Task Team meeting on 25 October 2006 had received an audit report from Advocate Ackermann on all cases in the possession of the PCLU. Dr. Ramaite reported to me further that the Chikane matter was discussed by Task Team for the first time at its meeting on 6 November 2006. Mr. J Lekalakala of the SAPS stated that the National Commissioner believed that Rev. Chikane was not interested in a prosecution. Advocate Ackermann however indicated that Rev. Chikane had left the matter in the hands of the NPA.

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41. In early December 2006 I was informed by Dr Ramaite of the renewed contention by Mr. Selebi that Reverend Chikane had not been consulted. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held discussions with him during the course of interactions during 2006 and 2007. I also met with him separately. Reverend Chikane's advised me that while he may have forgiven his perpetrators, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

42. Although I knew that Ackermann had discussed the matter with Rev. Chikane as far back as 2004, in December 2006 I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position.

43. However, towards the end of 2006 it became clear to me that powerful elements within government structures were determined to impose their will on my prosecutorial decisions. In this regard I quote from my affidavit filed before the Ginwala Commission:

> *"In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors*

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General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

Developments from 2007

44. In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DoJ I informed Mr. Selebi and the Directors General that there was a serious misunderstanding. I resolved to approach the Minister of Justice and request her guidance. Pending such response the functioning of the Task Team was compromised by the uncertainty and it held no further meetings until 8 August 2007.

45. Towards the end of January 2007 Advocate Ackermann and Advocate Mthunzi Mhaga (also of the PCLU) reported to me that they had met with

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Reverend Chikane on 22 January 2007 and that he had reaffirmed his attitude, namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this confirmation I wrote to the legal representatives of Messrs. Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

46. Around this time, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General Johann van der Merwe, had both made representations to me as contemplated in the Guidelines. They both admitted to authorising the murder of Reverend Chikane and requested me not to prosecute them in the light of this disclosure. However, they declined to make full disclosure in response to requests for information. I accordingly declined to accede to their request that they be given immunity from prosecution in terms of the Guidelines.

47. On 6 February 2007 I had a meeting with the Minister of Justice and Constitutional Development, Mrs. B S Mabandla. During this meeting it appears that she had gained the impression that I had agreed not to pursue the TRC cases. On 8 February 2007, she addressed a letter to me titled "TRC MATTERS", a copy of which is annexed hereto marked "VPP2" in which she stated the following:

"I must advise you at the outset that the media articles alleging that

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the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

48. An example of one of the articles in the press is from the Beeld newspaper titled "*Cops up for apartheid crimes*" which was published on 7 February 2007. A copy of this article is annexed hereto marked "VPP3".

49. I am at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters will not be prosecuted. I found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice.

50. It is most likely that I would have clarified my position with the Minister, either through a meeting or a telephone discussion. I would have confirmed to the Minister that it was not my intention to drop the TRC cases.

51. I decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the

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problems experienced in implementing this policy. This memorandum is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

52. In this memorandum I concluded that there had been improper interference in relation to the TRC cases and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.

53. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to this affidavit. I have attached it to an *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release. In this regard I make the following submissions:

53.1. The issues and complaints raised in the memorandum have already been discussed in the body of my affidavit filed before the Ginwala Commission, which has been part of the public record

since 7 May 2008. and which was also part.of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).

53.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

53.3. Since the memorandum points to unlawful and unconstitutional conduct it would in the public interest for this memorandum to be released

53.4. The public interest in the disclosure of the memorandum far outweighs any possible contemplated harm, inconvenience or embarrassment.

54. I never received any response from the Minister to this memorandum. Given the serious issues I was raising in the memorandum, and given that the NPA Act criminalizes obstruction of the work of the prosecuting authority, I would have expected an immediate response from the Minister. The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.

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55. During the course of the next few months the legal representative of Messrs. Otto, Smith and van Staden, Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea and sentencing agreement.

56. The negotiation of the plea and sentencing agreements with the five accused was an extended process and was only concluded in early July 2007. On 10 July 2007 I sent a memorandum to the Minister informing her of the fact that the prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to murder Reverend Chikane by means of poisoning. The memorandum informed her of the fact that plea and sentencing agreements had been entered into. To the best of my recollection the Minister did not respond to this memorandum.

57. On or about 10 July 2007 I went off on compassionate leave because of the illness and subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

58. In August 2007, those implicated in the Chikane case pleaded guilty to the charges in exchange for suspended sentences as per Section 105A of the Criminal Procedure Act, 1977. Vlok and Van der Merwe were sentenced to

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112

ten years in prison suspended for five years, while the other three received five year prison sentences, suspended for five years.

59. I would have preferred a full prosecution in this case because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They largely confined their disclosure to facts that were already in the public domain. They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

60. A full prosecution in the Chikane case would have produced greater truth and accountability. However there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances.

61. Shortly after the plea and sentence agreement had been confirmed in court

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a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The claim was made on the basis of a fabricated document. A copy of this newspaper article is annexed hereto marked "VPP4". The NPA responded to this article by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport article were denied. A copy of this press statement is annexed hereto marked "VPP5".

62. After the newspaper article was published, I was summoned to a meeting of the of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Mr. Selebi. Cabinet Ministers included the Minister for National Intelligence Services, Mr. Ronnie Kasrils, Minister Mabandla, Minister Skweyiya amongst others.

63. During the meeting, Mr. Selebi said to me that the '*gloves are now off*' and that he was '*declaring war*' on me. In response I told him: "*for once in your life can you tell the truth and shame the devil*".

64. Those at the meeting demanded answers from me about TRC prosecutions. They were also particularly concerned that I was instituting an investigation into certain members of the South African Police Service.

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This was in relation to my investigation into who was behind the fabrication of the letter purportedly written by Ackermann SC. Minister Mabandla told me to stop this investigation as we could not be seen to be taking each other to court. I advised the Minister that I would not stop the investigation.

65. I explained that:

65.1. the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

65.2. the NPA was actively preparing for those prosecutions and that we should not be stopped from doing our job.

65.3. It was my role as the NDPP to decide who would be charged.

66. On 28 August 2007 I received a faxed letter from the Minister of Justice, Ms. B S Mabandla. A copy of this letter is annexed hereto marked "VPP6". She referred to the meeting held on 23 August 2007. She noted that the National Commissioner of Police and I had different views on the Rapport article regarding the alleged forgery of certain NPA documents. She noted that I had initiated an investigation into the alleged forgery but she complained that she had not been advised of this decision or the basis thereof. Paragraphs 4 and 5 of the Minister's letter are particularly

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revealing:

> *4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.*
>
> *5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.* (Emphasis added).

67. The Minister's letter was further indication of the view held at ministerial level that I should not enjoy actual discretion to make prosecutorial decisions in relation to the so-called political cases arising from the conflicts of the past.

68. I responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked **"VPP7"**. My copy of this letter is not on an NPA letterhead, but I confirm that the contents thereof were transmitted to the Minister.

69. In this letter I referred to the 23 August 2007 meeting:

> *"....which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."*

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70. I confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*".

71. In relation to paragraph 4 of the Minister's letter I noted that it is:

> "*....clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.*"

72. I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had then briefed the then Minister of Justice, as well as the President. I also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the Director of Public Prosecutions (DPP) in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as then DG of Justice I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.

73. I concluded my letter by requesting an urgent meeting with the Minister and myself and my Deputies. I also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

74. The Minister did not respond to my requests and these meetings never

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took place. On 23 September 2007 I was suspended from office by President Mbeki. Shortly after my suspension I learned that Advocate Ackermann had been relieved of his duties in relation to the TRC cases.

CONCLUSION

75. I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.

76. The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued. It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored.

VUSUMZI PATRICK PIKOLI

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198

I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohohlo
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

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VPP1 199

STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality. Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring.

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It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated.

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls.

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

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Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures...The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors, who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law.

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy. In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

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"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Mpumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once-off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty. A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past,

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but also in the creation of a new ethos within our society.

Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be.

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to

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make a contribution to this Fund. Most of the resources that have been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

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To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

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208

VPP 2

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

6 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
6/2/07
NATIONAL PROSECUTING AUTHORITY

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VPP 3

news24 archives
Breaking News, First

Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan

Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoli, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

Johan Wagener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

Beeld

211

VPP 4

Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuienis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweier is nie.
Rapport het die afgelope week uit onberispelike bronne verneem die polisiedossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiewe poste wat hulle beklee.
Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie.
Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingspan wat die vermeende Boeremaglede aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.
Die nasionale vervolgingsgesag (NV) het die ondersoeke jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.
Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat weinig aan die ondersoeke gedoen het.
Hierna is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.
Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuienis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontploffing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.
In Junie 2004 het mnr. Sipho Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrektiewe dienste, en min. Essop Pahad kan vervolg word nie omdat "daar eenvoudig nie genoeg getuienis is om 'n klagstaat op te stel nie".
Ngwema het destyds gesê die NV weet nie wié het wát gedoen of wie die opdragte gegee het nie. "Indien die NV dit met die getuienis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.
Mnr. Dirk van Eck het reeds aangedui hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.
Die politieke omstredenheid oor vervolgings vir misdade uit die verlede sal uitbrei as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidstak. Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.
Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuienis in die ondersoeke na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweier om te sê of die opdrag nagekom is en wat die vordering daarmee is.
Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phuti Setati, woordvoerder van nasionale speurdiens, verwys.
"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

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212

scarstenss@rapport.co.za
) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear '
Sonja CarstensPretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.
Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services.
The sources' names are withheld at the request because of the sensitive positions that they hold.
According to the sources, no further investigation into the information taken in the case files.
The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.
The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.
Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.
After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state. Ackermann was the prosecutor in the Vlok Van der Merwe trial.
Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.
In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linda Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".
Ngwema said then that the NPA do not know who has what or who did not give the orders.
"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility, "was Ngwema's words.
Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.
The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. Institute. Basie Smit, a former head of the police detective and security branch. One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.
Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.
Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.
"The police want his comments on the case reserved," the RAF said.
scarstenss@rapport.co.za
) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

VPP5 213

http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

* In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
* Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
* Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
Cell: 082 333 3880

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28-AUG-2007 16:40 FROM DEPRT OF JUSTICE TO 0123049329 VPP6 P.01/6

MINISTRY
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
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Our ref: 2/2/0
Enq: Adv. M Sinxiana

Adv V P Pikoli
National Director of Public Prosecutions
Office of the National Director of Public Prosecutions
Private Bag X 752
PRETORIA
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Dear Adv Pikoli

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

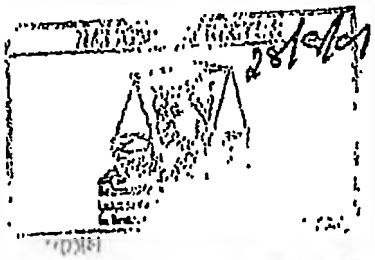
1. I refer to the discussions in the above meeting of 23 August 2007.
2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.
3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.
4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.
5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find the above in order.

Yours sincerely

MS B S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07



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215

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Ref: NDPP/kp

Minister B. Mabandla
Minister of Justice and Constitutional Development
Momentum Building
cnr Prinsloo and Pretorius Streets
PRETORIA

29 August 2007

Dear Minister

MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to your fax of 28 August 2007.

2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.

3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).

4. I confirm and repeat the following:

4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.

4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police. I give the

Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.

6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing.

7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

V.P.

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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

AFFIDAVIT OF VUSUMZI PATRICK PIKOLI

I, the undersigned.

VUSUMZI PATRICK PIKOLI

do hereby make oath and state that:

1. I am an adult male advocate of the High Court of South Africa presently resident in Pretoria, South Africa. I am currently a Special Advisor to the Minister of Police.

2. The facts contained in this affidavit are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

Professional Experience

4. Selected highlights from my career are set out below

4.1 I joined the military wing of the African National Congress in 1980 and remained a member of UMkhonto We Sizwe until it was officially disbanded by the African National Congress. I also worked for the ANC's legal and constitutional affairs department in exile.

4.2 Between 1994 and 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar.

4.3 From 1997 to 1999, I was the Deputy-Director General of the Department of Justice, and between 1999 and 2005 I was the Director General of that

V.P.

department.

4.4 On 1 February 2005 I was appointed the National Director of Public Prosecutions ("**NDPP**").

4.5 As a result of my decision to authorize the prosecution of the then National Commissioner of Police, Jackie Selebi. on corruption charges I was suspended from duty by then President, Mr. T. Mbeki on 23 September 2007.

4.6 My decision to pursue prosecutions of apartheid-era perpetrators who had not been amnestied by the Truth and Reconciliation Commission ("**TRC**") contributed to President Mbeki's decision to suspend me.

4.7 During 2008, the Ginwala Commission of Enquiry found that the Government had failed to demonstrate that I was not a fit and proper person to hold the position of NDPP.

4.8 I was conferred the International Association of Prosecutors Award in 2008.

4.9 Between 2010 and 2012 I was a partner at SizweNtsalubaGobodo and the director of its Forensic Investigations department.

4.10 Between 2012 and 2014 I was a commissioner on the Khayelitsha Commission, which investigated policing matters in Khayelitsha.

4.11 In December 2014 I was appointed as the Western Cape's first Police Ombudsman.

4.12 In 2018-2019, I was the Special Adviser to the Minister of the State Security Agency.

4.13 In 2019, I was appointed as Adjunct Professor at the Nelson Mandela School of Public Governance at the University of Cape Town.

4.14 In 2019-2020, I served as the Chief Legal, Risk and Compliance Officer at the South African Airways.

4.15 In 2020-2021, I was the Special Adviser to the Minister of Public Service and Administration.

4.16 In 2021-2024, I was the Special Adviser to the Minister of Water Affairs.

4.17 I am a member of the Africa Board and a Senior Advisor to the Global Initiative against Transnational Organized Crime and a founding member of the International Association of Anti-Corruption Authorities.

4.18 I am a former trustee of the Constitutional Court Trust and a former member of the Magistrate's Commission.

4.19 I co-authored a book with Mandy Weiner: "My second initiation:The Memoir of Vusi Pikoli" which was published in 2013.The book features the Ginwala Commission, where I also write about the post- TRC prosecutions.

Confirmation of affidavits

5. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

6. I also confirm the contents of my affidavit dated 6 May 2015 filed in the matter of *Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and Others*, Gauteng Division of the High Court, Pretoria, Case No: 36554/2015. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 2 at paginated pages 843 - 889. In this affidavit I set out details of interference by the executive in the work of the NPA in respect of the TRC cases.

7. I further confirm the contents of the founding affidavit of Thembi Nkadimeng (now Simelane) dated 18 May 2015 filed in the matter of *Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and Others*, Gauteng Division of the High Court, Pretoria, Case No: 36554/2015, insofar as it pertains to me. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 4 at paginated pages 908 - 1381.

8. I annex hereto marked **VPP1** a copy of my in-camera affidavit dated 6 May 2015 which was filed in the aforesaid matter with case no. 36554/2015. In that affidavit I attached an "*internal secret memorandum*" addressed to the then Minister of Justice, Ms Bridgitte Mabandla, titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007.

Conclusion

9. I confirm that during my tenure as NDPP political interference seriously undermined the investigation and prosecution of the TRC cases. I regard the interference as deeply unlawful and unconstitutional.

05.11.2025

VUSUMZI PATRICK PIKOLI

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at PRETORIA on 5 NOVEMBER 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS (EX OFFICIO)
MS AJANTA DHEDA
ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
SOUTH AFRICAN RESERVE BANK
370 HELEN JOSEPH STREET PRETORIA 0002
Date: 2025-11-05

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -05- 20
T. MALELE
REGISTRAR/GRIFFIER
SUID-AFRIKAANSE HOË HOF VAN
GAUTENG AFDELING, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELA NKADIMENG — Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE — Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

THE NATIONAL MINISTER OF POLICE — Fourth Respondent

WILLEM HELM COETZEE — Fifth Respondent

ANTON PRETORIUS — Sixth Respondent

FREDERICK BARNARD MONG — Seventh Respondent

MSEBENZI TIMOTHY RADEBE — Eighth Respondent

WILLEM SCHOON — Ninth Respondent

TP

IN CAMERA SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions. I have provided a supporting affidavit in these proceedings.

2. I refer to the memorandum mentioned in paragraph 51 of my supporting affidavit titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum is annexed hereto marked **"VPP1".** It was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

3. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to my open supporting affidavit. I have attached it this *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release.

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3.1. The issues and complaints raised in the memorandum have already been discussed in my affidavit filed before the Ginwala Commission, which has been part of the public record since 2008.

3.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

3.3. It ought to be released as it points to unlawful and unconstitutional conduct.

4. In this memorandum I pointed out that:

4.1. The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

4.2. The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases. This was one of the tasks that the "Task Team" was required to address.

4.3. There were differences in interpretation in relation to the role of the other state departments in relation to the prosecutorial decision-making process.

5. I concluded by stating that:

I have now reached a point where I honestly believe that there is "improper interference with my work and that I am hindered and/ or obstructed from carrying out my functions on this particular matter.

It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

VUSUMZI PATRICK PIKOLI

I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY ....2015 ~~day of .....~~ the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Andrew Lehlogo Bucky Mohobie
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

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The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.*".

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

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2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

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Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the **normal legal process**;

(ii) in order to reach a well-considered decision, **the NPA should work together with the Intelligence Agencies**, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be **in accordance with standard and normal execution of justice**;

(iv) such agreements should be in accordance with the NPA's **prosecution mandate**; and

(v) such agreements should be in accordance with **existing legislation**.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that **the NPA represents the community and is under an international obligation to prosecute crimes of apartheid.** (See ***The State v Wouter Basson CCT 30/03.)***.[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

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3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU **"shall be assisted in the execution of its duties"** by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C"** and **"D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";

- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken.".

- "In my view a comprehensive report...should be discussed by the Directors-General".

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- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the **"normal legal processes"** and **"prosecuting mandate"** of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15.02.2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

Divider 3

Affidavit of Anton Rossouw Ackermann

Nkadimeng // National Director of Public Prosecutions and Others

Gauteng Division of the High Court, Pretoria, Case No: 36554/2015

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

TP

LC
NGT

WILLEM SCHOON Ninth Respondent

AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

INTRODUCTION

1. I am a senior counsel, a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (the first respondent in this matter, hereinafter referred to as the "first respondent" or the "NDPP"). I am currently retired.

2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 ("the Act") I was appointed by President T M Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit ("PCLU"). A copy of this proclamation is annexed to the founding affidavit marked "TN28". I served as head of the PCLU between 2003 and 31 March 2013. I retired from the National Prosecuting Authority on 31 March 2013.

TP LC NGI

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. As I have not studied all the relevant official documentation I stand to be corrected on certain details, such as dates.

4. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

EXPERIENCE

5. I have worked as a prosecutor for more than 40 years. I have prosecuted several high profile cases in South Africa. I set out hereunder an outline of my professional career:

5.1. Joined the Department of Justice in 1970.

5.2. Graduated from the University of Potchefstroom with the degrees of B Juris and LLB in 1975.

5.3. Admitted as an advocate in 1976.

5.4. Served with the office of the Attorney-General in Pietermaritzburg between 1977 and 1989.

5.5. Appointed Deputy Attorney General: Transvaal in 1989 and served in this post until 2003.

TP

LC NGI

BACKGROUND

9. If my memory serves me correctly, in 1998 the investigation dockets held by the Unit headed up by Transvaal Attorney General Dr. Jan D'Oliveira Unit were transferred to the National Prosecuting Authority ("NPA"). In terms of a directive issued in 1999 by the then National Director of Public Prosecutions ("NDPP"), the TRC related cases were transferred from the then Directorate of Special Operations ("DSO"), and from the various offices of the Directors of Public Prosecutions ("DPP") and the South African Police Service ("SAPS") to the office of the NDPP.

10. In 1999, a working group called the Human Rights Investigative Unit ("HRIU") was established within the NPA by the then National Director of Public Prosecutions ("NDPP"), Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The head of the Unit was Vincent Saldanha. It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, however it instituted no prosecutions.

11. In 2000, the dockets held by the HRIU were transferred to the Directorate of

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Special Operations ("DSO"), more widely known as the Scorpions. An entity was established within the DSO to handle the TRC cases known as the Special National Projects Unit ("SNPU"), which was headed by Advocate Chris Macadam. The SNPU operated until 2003, but it too instituted no prosecutions.

12. On 24 March 2003 I was appointed to head up the newly established PCLU. The mandate of the PCLU is to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national and international crimes, such as terrorism, sabotage, high treason, sedition, foreign military crimes and other priority crimes as determined by the NDPP.

13. On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.

14. In May 2003 the then NDPP, Advocate Bulelani Ngcuka, made a determination that all TRC-related cases, in which amnesty had been denied or not applied for, were '*priority crimes*' in terms of the proclamation. This resulted in more than 400 investigation dockets being transferred to my office. Advocate Chris Macadam, attached to my office, and I conducted the initial audit and identified 21 cases as worthy of further investigation.

15. During 2004 and 2005 the PCLU identified 16 cases for further investigation and

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possible prosecution. The Simelane case was one of the cases earmarked for further investigation.

16. In relation to post-TRC prosecutions conducted by the PCLU, only the following cases have been instituted: S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others.

16.1. In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism during the 1990s, entered into a 'plea agreement' with the PCLU in terms of 105A of the Criminal Procedure Act. Terre' Blanche pleaded guilty to five counts of terrorism in contravention of the Internal Security Act and was sentenced to six years of imprisonment, which was wholly suspended. He had not applied for amnesty. This was the first TRC related case taken up by the PCLU.

16.2. During 2004 I came across the docket of Buyile Roni Blani, an ANC member, who was implicated in the mob killing of two people in 1985. Blani was charged with the killings in 1985 but managed to flee to Angola where he remained in exile until his return in 1992. He did not apply for amnesty. Since the evidence was clear and compelling and the case was already fully investigated I instructed that it should proceed. Blani was arrested and granted bail. On 25 April 2005, following a plea and sentence agreement, he was convicted on all charges and sentenced to five years imprisonment,

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four of which were suspended for five years.

16.3. In 2004, Gideon Nieuwoudt (who died in 2005), Johannes Martin van Zyl, and Johannes Koole were each charged with abduction, assault and murder of the 3 anti-apartheid activists, known as the PEBCO 3.

16.3.1. This was the first case that the PCLU brought in respect of perpetrators who had been denied amnesty. Their applications for amnesty had been denied in 1999.

16.3.2. Shortly after their bail hearings in 2004, Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some 5 years because of the failure of the Department of Justice to file its answering papers. Eventually in 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of van Zyl.

16.3.3. The case against the three former security policemen was provisionally withdrawn in 2009. The NPA submitted to the High Court that the prosecution could not proceed while there was an amnesty proceeding pending. The Department of Justice filed an affidavit recommending the provisional withdrawal of the criminal charges against the surviving Johannes Koole, and Martin Van Zyl,

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who was seriously ill. The Amnesty Committee was never reconvened and the case against Van Zyl and Koole was never reinstated.

17. On the morning of 11 November 2004 the police was on the verge of effecting the arrests of three former officers of the Security Police on charges which related to the attempted murder of the Rev. Frank Chikane, the former head of the South African Council of Churches in 1989 by poisoning. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

17.1. On the same morning I received a phone call from Jan Wagenaar, the attorney for the abovenamed suspects. He told me that I would receive a phone call from the Ministry of Justice and I would be advised that the case against his clients must be placed on hold.

17.2. Shortly thereafter I received a phone call from an official in the then Ministry of Justice. I was informed by the said official that a decision had been taken that the Chikane matter should be put on hold pending the development of guidelines to deal with the TRC cases. I told him that that only the NDPP could give me such an instruction.

17.3. A few minutes later the NDPP contacted me and instructed me not to

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proceed with the arrests. I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases.

18. All TRC related investigations and prosecutions were accordingly placed on hold pending the formulation of guidelines in relation to the so-called political cases of the past. These were to be incorporated as amendments to the Prosecution Policy (hereinafter referred to as "the amendments" or "the guidelines"). I was instructed by the NDPP to stop working on all the TRC cases.

19. At least two legal opinions were prepared by my office regarding the constitutionality of the proposed amendments to the Prosecution Policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerard Nel, the legal adviser to the NDPP, who was playing a leading role in formulating the proposed amendments.

20. This suspension of prosecutions amounted to an effective moratorium on the pursuit of TRC related cases.

21. During 2005 I met with representatives of the Simelane family. They raised a number of requests, including that the PCLU should:

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21.1. Investigate with a view to prosecuting Detective Inspector Msebenzi Timothy Radebe, who played a role in the abduction and the torture of Simelane both at Norwood and Northham and who did not apply for amnesty.

21.2. Investigate with a view to bringing defeating the ends of justice charges against Coetzee and Pretorius for intimidating the late Sergeant Lengene into making a false statement and for attempting to coach Norman Mkhonza into making a false statement.

21.3. Follow up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and follow up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.

21.4. Investigate the circumstances of the deaths of two key witnesses, Sergeant Mathibe and Sergeant Lengene.

22. I was not able to assist with these requests as at that stage my hands were tied with the effective moratorium in place pending the issuing of the new Prosecution Policy.

23. In December 2005 the amendments to the Prosecution Policy were issued. These

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amendments permitted the granting of effective indemnities to perpetrators in TRC related cases who did not make use of the erstwhile amnesty process.

23.1. The NDPP was authorised to apply the same amnesty criteria used by the TRC but could also decline to prosecute on other open-ended criteria such as the perpetrator's demonstration of remorse, level of indoctrination sustained, attitude towards reconciliation and/ or his willingness to abide by the Constitution.

23.2. These criteria would entitle the NDPP to decline to prosecute, even where there was adequate evidence to justify a prosecution in a serious case such as kidnapping or murder.

23.3. The PCLU was expected to act under the advisement of a multi-departmental committee which included the National Intelligence Agency and the South African Police Service. The entire process would be carried out behind closed doors.

24. As mentioned above, I was opposed to the amendments to the Prosecution Policy as I felt they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. I again expressed my dissatisfaction with various officials, including the NDPP. In my view the amendments or guidelines were aimed solely at accommodating

perpetrators and providing them with another avenue to escape justice.

25. Once the guidelines were issued in December 2005 I wanted to proceed with the 5 cases I had identified with good prosecution prospects and the 11 cases which required further investigation. These were identified as "*major priorities*" for the PCLU for the 2006 – 07 period. Moreover a press statement issued by the NDPP during 2006 led to additional requests from victims for further investigations in their cases. However, with the exception of the Chikane matter, during the course of 2006 and 2007, the PCLU was unable to pursue any of the TRC cases for various reasons. These included a lack of investigative capacity as well as difficulties encountered in convening the multi-departmental committee that was meant to advise the PCLU on what cases to pursue.

26. In March 2006 I again met with the representatives of the Simelane family. I had to advise them that I was unable to take the investigation forward as there were no investigators attached to the PCLU. Requests I had made to the SAPS and the DSO for competent and experiences investigators, in this matter and the other TRC cases, had fallen on deaf ears. The said representatives also supplied me with a legal opinion which recommended that those involved in the torture of Ms. Simelane be charged with torture, as a crime against humanity or war crime, in terms of customary international law, since such crimes never prescribe.

27. As a result of this meeting the said representatives wrote to the then NDPP, Adv.

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Pikoli, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. In subsequent interactions I advised the said representatives to pursue an inquest rather than a prosecution. I did so because I realized that there was no prospect of a serious investigation or prosecution taking place in the political context that prevailed at the time.

28. During 2006 the then NDPP, Adv Pikoli, appointed a team to review the representations made by the suspects in the Chikane matter who were seeking an indemnity under the amendments to the Prosecution Policy. The team was chaired by Dr. T. Pretorius. I refused to participate in this review as I regarded the said amendments as unconstitutional. After several months the review team concluded that no indemnities should be granted as the full truth had not been disclosed.

29. During 2007 the PCLU eventually returned to the Chikane attempted murder case and in June 2007 the three suspects, together with Adriaan Vlok, former Minister of Police, and Johan van der Merwe, former Commissioner of Police were charged with one count of attempted murder, alternatively conspiracy to murder Chikane. A plea and sentence agreement was agreed upon which the Court confirmed during August 2007. In terms of the plea and sentence agreement the accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced to ten years imprisonment, wholly suspended for five

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years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the condition that that they are not convicted of a similar crime.

30. This case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the Security Branch in October 1988, as well as other senior officers of the both the SAPS and the former South African Defence Force (SADF). However no further cases were pursued which can be attributed to political interference in the work of the NPA.

31. In 2008 the High Court in Pretoria (*Nkadimeng & Others v The National Director of Public Prosecutions & Others*, TPD case no 32709/07) struck down the amendments to the Prosecution Policy as unconstitutional. The Court found that the amendments were a "*copy-cat*" of the TRC amnesty process; that many of the criteria were not relevant in deciding whether or not to prosecute; and that they were moreover "*a recipe for conflict and absurdity*".

POLITICAL INTERFERENCE

32. The first act of political interference which effectively stopped the work of the PCLU into the TRC cases was the suspension of such cases during 2004 pending the issuing of the new prosecution guidelines. This introduced the effective moratorium I referred to above.

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33. Once the guidelines had been issued, and the multi-departmental working committee (subsequently referred to as the Task Team) was established in 2006, it became clear that the SAPS and NIA representatives believed they were part of the prosecutorial decision making process.

33.1. On 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General P C Jacobs, representing the view of the National Commissioner, which indicated that before any prosecutorial decision was made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP in respect of who to prosecute or not.

33.2. In respect of the interactions between the NDPP and other government departments and officials, I refer to the affidavit of Adv. Pikoli, which is filed evenly herewith.

34. The NDPP objected to this approach on the basis that it would constitute an unwarranted interference in the work of the NPA. The NDPP would be obliged to wait for the process to be completed and to receive a recommendation before he could make a decision, even where there were reasonable prospects of a successful prosecution.

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35. During 2007 an office note, purportedly written by me in 2006, was circulated in certain government circles in which it was reflected that I was investigating criminal charges against 37 ANC leaders, including the then President, Thabo Mbeki. This office note was a fabrication. I had written this office note in 2003 but the date of the note had been adjusted to give the false impression that it had been compiled in 2006. I believe it was aimed at discrediting me and ultimately stopping the investigations into the TRC cases. I am firmly of the view that the then National Commissioner, the late Mr. J Selebi, played a conspicuous role in claiming that I was pursuing the said leaders.

36. During this time I was informed by Adv. Pikoli that the then Director-General of the Department of Justice, Menze Simelane, had approached him and raised concerns about my handling of the prosecution of the TRC cases. He asked the NDPP to relieve me of my duties in this regard, which the NDPP declined to do. The NDPP advised me that senior people in the government wanted to fire me because I was still pursuing the TRC cases.

37. Adv. Vusi Pikoli was suspended from his duties as NDPP in September 2007. Shortly after his suspension I was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP. Adv. Mpshe advised me that I was relieved of my duties in relation to the TRC cases with immediate effect. I have no doubt that Adv. Mpshe received a political instruction to remove me from these cases. I

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advised Adv. Mpshe that removing me from the TRC cases would not make the cases go away.

38. At the time, I believed that if I was being removed from the TRC cases, then nobody else would be permitted to pursue the cases boldly and fearlessly. It is no coincidence that there has not been a single further prosecution since I was relieved of my duties in this regard.

CONCLUSION

39. There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.

40. In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes.

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A R ACKERMANN

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at PRETORIA on this the 07TH day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

"I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of his affidavit, that he/she does not have an objection to taking the oath, and that he/she considers it to be binding on his/here conscience, and which was sworn to and signed before me and that the administering oath complied with the regulations contained in Government Gazette No. R 1258 of 21 July 1972, as amended

SIGNATURE

MARIANNE JESSEN

FULL NAMES

Commissioner of Oaths

Designation: Republic of South Africa

Date: 07/05/2015

Place: WOODMEAD

Business Address: WOODMEAD POST OFFICE

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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

AFFIDAVIT OF ANTON ROSSOUW ACKERMANN

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

Introduction

1. I am an adult male, a senior counsel, and a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (**"NDPP"**). I am currently retired and residing in the Western Cape.

2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 (**"the Act"**), I was appointed by President TM Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit (**"PCLU"**), located at the head office of the National Prosecuting Authority (**"NPA"**). I served as head of the PCLU from 2003 to 2013, when I retired.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

S.M

4. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

Confirmation of affidavits

5. I confirm the contents of my affidavit dated 7 May 2015 which was attached as a supporting affidavit in the matter of *Nkadimeng v NDPP and Others* (Gauteng Division, Case No. 36554/2015). I will rely on the full contents of this affidavit to address the aforesaid paragraphs of the terms of reference. A copy of this affidavit was supplied by Webber Wentzel attorneys[1] to the Commission on 10 October 2025 in divider (bundle) 3 at paginated pages 890 - 907.

6. I also confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

6.1 In respect of paragraph 33.1 of my aforesaid affidavit and paragraph 234 of the Calata affidavit I point out that the letter from the SAPS Legal Support Section Maj Gen P C Jacobs was probably addressed to the NDPP not the Priority Crimes Litigation Unit ("**PCLU**").

6.2 I also point out that in respect of paragraph 216 and the first line of paragraph 217 of the Calata affidavit the Senior Superintendent Britz

[1] Attorneys for the 22 families and the Foundation for Human Rights.

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referred to therein is "Hennie Britz" and not "Karel Johannes 'Suiker' Britz".

Reliance on Macadam affidavit and annexes

7. I align myself with the contents of the affidavit of Raymond Christopher Macadam ("**Macadam**") filed in the Joao Rodrigues stay of prosecution case in *Rodrigues v NDPP & Others* (Case No. 76755/18, Gauteng Division). I will rely on the contents of this affidavit, together with the documents attached to that affidavit, to address the aforesaid terms of reference. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 276 - 359.

Provision of new documents

8. I attach to this affidavit two documents that are not currently part of the record provided by Webber Wenzel attorneys on 10 October 2025.

8.1 A letter dated 16 March 2004 I addressed to Raymond Lalla, the Divisional Commissioner of SAPS Crime Intelligence ("**Lalla**"), annexed hereto marked "A".

8.2 An internal memorandum dated 27 September 2007 I addressed to DSO Head, Adv Leonard McCarthy ("**McCarthy**") titled "Project Gnome".

9. In the letter to Lalla, I expressed my displeasure at him secretly videotaping a confidential meeting I held with him on 25 August 2003, in respect of the TRC cases. In that meeting I voiced my frustration and disgust with the refusal of the DSO to take on the TRC cases. That videotape was then handed over to

NDPP Ngcuka, Deputy NDPP Ramaite and DSO Head McCarthy. I was then called into a meeting with them and confronted with the video recording.

10. The internal memorandum sent to McCarthy on 27 September 2007 dealt with the investigation into the fabricated note I referred to in my 2015 affidavit from paragraph 35 (bundle 1, paginated page 905).[2] In this memorandum I explained to McCarthy why the note was definitely forged.

Request to locate documents / evidence

11. I respectfully request the Commission to secure or subpoena the following documents and items of evidence:

11.1 <u>From the Department and Ministry of Justice:</u>

11.1.1 Minutes and records of the following bodies:

11.1.1.1 Special Cabinet Committee on the Post TRC cases / Subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters.

11.1.1.2 Committee of Directors Generals, in respect of their deliberations on the TRC cases.

11.1.1.3 The Amnesty Task Team.

11.1.1.4 The Inter-departmental Task Team on the TRC cases.

11.2 <u>From the NPA</u>:

[2] See also paragraph 260 of the Calata affidavit.

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11.2.1 A copy of the fabricated note referred to in paragraph 10 above.

11.2.2 Relevant documents, including reports and correspondence, from the person commissioned to investigate the hacking of my computer in respect of the fabricated note.

11.2.3 Report on the costs expended for the services of the investigator.

11.3 From the SAPS:

11.3.1 The original fabricated note that was allegedly in the possession of the DSO.

11.3.2 The videotape made by Raymond Lalla of the meeting with me, Torie Pretorius and Chris Macadam on 25 August 2003.

Allegations of Imtiaz Cajee

12. I was sent an undated Notice in terms of Rule 3.3 with various allegations made by Imtiaz Cajee arising from his affidavit dated 30 September 2025.

Paragraph 47: No concerted effort

13. In respect of Cajee's allegation in paragraph 47, I point out that I was only appointed as head of the PCLU on 24 March 2003 and the then NDPP declared the TRC cases to be priority crimes in May 2023. I was not personally involved in the Ahmed Timol case, which was being handled by Adv Chris Macadam, but it was one of the TRC cases falling within our mandate.

14. Extensive efforts to secure investigators for the TRC cases were made from early May 2003 shortly after their designation as priority crimes, as set out in

the Macadam and Calata affidavits. As stated in the aforesaid affidavits both the Directorate for Special Investigations ("**DSO**" or "**Scorpions**") and the South African Police ("**SAPS**") declined to investigate the TRC cases.

15. This effectively blocked the investigation of the TRC cases for several years and severely undermined the prospects of justice in those cases, including the Timol case.

16. I deny that I placed the burden of investigating the Timol case onto Cajee, but I accept that in the absence of investigations by the DSO / SAPS, families, including the Timol family, felt obliged to carry out their own investigations.

Paragraphs 195 - 6: Failure to create mechanism and to approach the President

Paragraph 207: Allegation of no interference

Paragraphs 208-9: Alleged failure to resist

17. I agree that government failed to take steps to investigate the TRC cases. I also agree that the President should have been approached.

18. As I was not the NDPP it was not within my prerogative or power to contact the President.

19. However, after DSO Special Director Adv MG 'Geoph' Ledwaba **("Ledwaba")** refused to sign the section 28(1)(b)[3] notices in respect of the TRC cases, I recall that I approached either Adv Leonard McCarthy, then head of the DSO, or Adv Bulelani Ngcuka, then NDPP, or Adv Silas Ramaite, then Deputy NDPP to expedite the signing of the said notices.

[3] Inquiries by Investigating Director in terms of the National Prosecuting Act 32 of 1998.

20. Regrettably, the said notices were not authorised, notwithstanding my efforts. I did not have the power to take the matter further than that.

21. Within the NPA I raised my concern about the obstruction of the TRC cases. I refused to take part in the amendments to the Prosecution Policy, which I regarded as unconstitutional.

22. On 3 May 2007, NDPP Pikoli and I appeared before the Justice Portfolio Committee in Parliament. I advised that the lack of progress in the TRC cases was not the fault of the PCLU. Pikoli advised the Commission that "*there was politically sensitive issue*", and that "*whenever there was an attempt to charge the former police there was a political intervention and that effectively the NPA was being held to ransom by the former generals.*"[4]

23. From around 2006 I advised families and lawyers that we were struggling to get investigators for the TRC cases and suggested they should pursue inquests rather than prosecutions.

24. I agree with the views of the Full Court in the Rodrigues matter that the NPA should have asserted its authority and independence and resisted the political interference.

25. Because of my opposition to the interference in the TRC cases I was relieved of my duties in respect of these cases in September 2007, and it is also one of the reasons why Pikoli was suspended as NDPP.

26. To the extent that Cajee alleges that there was no interference in the work of prosecutors in the TRC cases, I deny such a claim.

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[4] See para 250 of the Calata affidavit.

SM

27. To the extent that Cajee describes me as an old order prosecutor acting in the interests of the former regime, I point out that I always prosecuted without fear or prejudice, regardless of the nature of the case. I was the lead prosecutor in the prosecution of former apartheid security operatives: Eugene de Kock, Wouter Basson and Ferdi Barnard, amongst others.

28. In this regard I annex hereto marked "**C**" a note I received from George Bizos SC in relation to my role at the inquest of Jabu Vilakazi, in which he also appeared.

ANTON ROSSOUW ACKERMANN

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Hermanus on 25 October 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full names: Sithindile Michael Khuy
Business address: 61 Main Road
Designation:
Capacity: Warrant officer

SUID-AFRIKAANSE POLISIEDIENS
KOMMISSIE VAN EDE SEWORN
25 OCT 2025
SOUTH AFRICAN POLICE SERVICE

Copy

"A"

P O Box 10036
MORELETA PLAZA
0167
16 March 2004

Commissioner Lalla
The Divisional Commissioner
Crime Intelligence
Private Bag X302
PRETORIA
0001

Dear Commissioner Lalla,

With reference to your clandestine audio and visual monitoring of our confidential discussion on 25 August 2003, I wish to convey my utmost disgust at such underhanded conduct.

It is accepted practice amongst professionals, when it is desirable that a meeting be recorded that it be done openly.

The purpose of my meeting with you was to further the interest of justice. You came highly recommended to me by Macadam and Pretorius as a sincere and trustful colleague. Obviously they made a grave error of judgement.

Unfortunately because of this experience I am left with the firm impression that the only difference between your division and the old security regime is the change in surnames. (See the attached documents indicating previous attempts "to get rid of me"). Only time will tell if you have succeeded and whether the end justify the means.

In closing I wish to echo the answer by Oscar Wilde during his cross-examination: "Don't you have any decency?"

AR ACKERMANN
HEAD: PCLU

SM

"B"

/Z56 forms

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Priority Crimes Litigation Unit
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INTERNAL MEMORANDUM

TO : **ADV LEONARD McCARTHY**
DIRECTORATE OF SPECIAL OPERATIONS

FROM : **ADV AR ACKERMANN**
PRIORITY CRIMES LITIGATION UNIT

DATE : **27 SEPTEMBER 2007**

SUBJECT : **PROJECT GNOME**

Dear Leonard

1. I shall be brief.

2. I am adamant and 100% sure that the figure "6" as reflected in the handwriting expert's document, FDC 0095/07 (Annexure "E") is not in my handwriting.

3. I am of the view that you do not need a handwriting expert to establish that fact.

4. Furthermore, it is important to note that the handwriting expert made no such finding and merely remarked:

   "*...with no alteration to the last figure '6'.*"

5. Within minutes after I had received the said memorandum from Commissioner Jacobs, I phoned him and informed him that the memorandum was forged and requested him to furnish me with the original. To date, I have not had sight of the original.

6. It is incomprehensible that somebody will post-date by three

years the year on a document. To pre-date the year during the months of January or February is quite common.

7. I have never, on any occasion, written to Dr Ramaite in Afrikaans.

8. The crucial question is whether any person in SAPS had a motive or reason to produce a document, emanating from the NPA, to the effect that the NPA was still investigating ANC office bearers during 2006.

9. If no such motive exists, I must accept that the *gravamen* of the disputed document falls away.

10. Kindly find attached hereto a letter from the Minister to Adv Pikoli.

11. I am very interested to know which documents the National Commissioner "*... produced to support his argument that indeed there is an investigation by the NPA on certain political office bearers.*"

12. If the disputed document is relied on by the National Commissioner to prove that there is indeed an investigation by the NPA on ANC office bearers, then this will contradict the explanation given by Commissioners de Beer and Jacobs to the effect that since 2003, SAPS were fully aware that the disputed document had been compiled in 2003 and that an incorrect date had been inserted on it.

13. I will not bore you with the numerous improbabilities which exist.

14. Adv Macadam stated in his report, addressed to you and others, that I had informed him on 25 August 2007 that the disputed report had been discussed between the NDPP and the National Commissioner. That is not correct. Macadam further stated that the NDPP had informed me that the disputed report had been shown to various Ministers. That is also not correct. The NDPP and I surmised that the disputed report had probably been the document shown to the Ministers in the light of the National Commissioner's assertion that he had written proof that I was still investigating the ANC leadership. The Minister's letter sheds more light on this matter.

Regards

AR ACKERMANN

GEORGE BIZOS S.C.

Office Address:
4th Floor, Elizabeth House
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Your Ref:

Our Ref: George Bizos/JK

14 January 1998

TO WHOM IT MAY CONCERN:

During 1976 - 1977 I appeared at a formal inquest in the Magistrate's Court, Johannesburg on behalf of the family of Jabu Vilakazi who was killed by members of the South African Police. The prosecutor who led the evidence was Mr A R Ackermann now senior counsel in the office of the Attorney-General in Pretoria. It was contended by us on behalf of the family that members of the Brixton Murder and Robbery Unit arrested the late Vilakazi, took him for a so-called pointing out and then shot him in cold blood and that their story that they did so because he tried to escape was a fabrication. It was customary during that period for prosecutors to defend the police irrespective of the weight of evidence against them. To our surprise, Mr Ackermann's objectivity was demonstrated by submitting that the members of the Brixton Murder and Robbery Unit were criminally responsible for the death of the deceased. In my view, this was a breath of fresh air and gave one hope that despite the pressures that must have existed on a comparatively junior member of the profession, he courageously and correctly submitted what he believed to be in accordance with his oath of office. We were not alone in that belief. The Magistrate made a positive finding in accordance with Mr Ackermann's and our submissions. I have always singled him out as the outstanding exception amongst those who thought that protecting the police was more important than serving justice. Although we have lost touch, I am reliably informed that he has continued to behave in an objective and proper manner throughout his professional career. I am pleased to place on record what has been in my mind for so long.

George Bizos

Divider 4

Affidavit of Thembisile Phumelele Nkadimeng

Nkadimeng // National Director of Public Prosecutions and Others

Gauteng Division of the High Court, Pretoria, Case No: 36554/2015

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



Case Number: 35554/2015

In the matter between:

THEMBISILE PHUMELELE NKADIMENG — Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE — Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

THE NATIONAL MINISTER OF POLICE — Fourth Respondent

WILLEM HELM COETZEE — Fifth Respondent

ANTON PRETORIUS — Sixth Respondent

FREDERICK BARNARD MONG — Seventh Respondent

MSEBENZI TIMOTHY RADEBE — Eighth Respondent

WILLEM SCHOON Ninth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT on a date and at a time to be arranged with the Registrar, the applicants intend to apply to this Honourable Court for an order in the following terms:

1. The rules relating to forms and service are dispensed with and the application is heard in terms of shortened time periods.

2. Compelling the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping, torture, disappearance and murder of NOKUTHULA AURELIA SIMELANE ("the deceased") (Priority Investigation: JV Plein: 1469/02/1996) in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice.

3. Declaring that:

3.1 the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;

3.2 the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,

3.3 the ongoing failure or refusal of the first respondent to refer the abovenamed case to a formal judicial inquest.

is a gross violation of my rights to human dignity and equality; and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

4. Declaring that the conduct referred to in paragraphs 3.1 and 3.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy Directives issued in terms

of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.

5. Declaring that the conduct referred to in paragraph 3.3 above is inconsistent with the provisions of the Inquests Act 58 of 1959 ("the Act") and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated.

6. Alternatively to prayer 2 above, reviewing and setting aside the refusal to take the decisions referred to in paragraphs 3.2 and 3.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

7. *Alternatively* to prayers 2 and 6 above:

7.1 Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

7.2 Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

8. Ordering the public release of the memorandum titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development.

9. Ordering the first to fourth respondents to pay the costs of this application and that such of the other respondents who may oppose the matter to pay the applicant's costs.

10. Granting the applicant further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the affidavits of the **Applicant, Sizakele Ernestina Simelane, Antonio Lungelo Simelane, Junior Mzwandile Nkosinathi Simelane, Frank Dutton, Vusi Pikoli, Anton Ackermann, Dumisa Ntsebeza, and Alexander Boraine** and the annexures thereto will be used in support of this application.

KINDLY TAKE NOTICE FURTHER that the *in camera* founding affidavit of the **Applicant** and the *in camera* supporting affidavit of **Vusi Pikoli** and the annexures thereto will be used in support of this application. The former affidavit is to be served only on the first respondent (the National Director of Public Prosecutions) and the latter affidavit is to be served only on the first and third respondents (the Minister of Justice and Correctional Services). The aforesaid affidavits are to be held by the Registrar of this honourable Court as part of an *in camera* record and only to be released to the other respondents or the public on the order of this honourable Court.

TAKE NOTICE FURTHER THAT the Applicant has appointed the **LEGAL**

RESOURCES CENTRE as its attorneys of record at whose address the Applicant will accept service of all process in these proceedings.

TAKE NOTICE FUTHER THAT that should you intend opposing this application you are required:

a) to notify the Applicant's attorneys in writing within 15 (fifteen) court days of service of this application on you;

b) within 30 (thirty) court days after having given such notice to oppose this application to deliver your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given, the application will be made to the above Honourable Court as soon as counsel for the Applicant may be heard.

DATED AT JOHANNESBURG ON THIS 19th **DAY OF** May **2015.**

LEGAL RESOURCES CENTRE

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Ref: J56

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA

AND TO:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
c/o The State Attorney
SALU Building
316 Thabo Sehume Street
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GAUTENG

SERVICE PER SHERIFF

THE NATIONAL COMMISIONER OF POLICE

Second Respondent
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229 Pretorius Street
Pretoria
GAUTENG

SERVICE PER SHERIFF

THE MINISTER OF JUSTICE
Third Respondent
c/o The State Attorney
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GAUTENG

SERVICE PER SHERIFF

THE NATIONAL MINISTER OF POLICE
Fourth Respondent
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SERVICE PER SHERIFF

WILLEM HELM COETZEE
Fifth Respondent
28 Augusta

SERVICE PER SHERIFF

Helderkruin
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Sixth Respondent
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SERVICE PER SHERIFF

FREDERICK B MONG
Seventh Respondent
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831 Mortimer Avenue
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0084
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SERVICE PER SHERIFF

MSEBENZI TIMOTHY RADEBE
Eight Respondent
8 Roma Street
Carenvale
Honeyhills
1724

SERVICE PER SHERIFF

GAUTENG

alternatively

36 Stumke Street
Witpoortjie
Roodepoort
1724
GAUTENG

WILLEM SCHOON
Ninth Respondent
689 Verecunda Street
Dorandia Ext 2
0182
GAUTENG

SERVICE PER SHERIFF

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

FOUNDING AFFIDAVIT

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Table of Contents

INTRODUCTION **3**
Organisation of this affidavit 6
Overview of Nokuthula's story 7
Relief sought 13
Approach of this affidavit 16
THE PARTIES **17**
Applicant 17
Respondents 17
DETAILED BACKGROUND **19**
Attempts to seek justice 32
The request for a formal judicial inquest 38
Investigative Timeline 40
Political constraints 55
Public release of the Pikoli Memorandum 61
LEGAL FRAMEWORK GOVERNING PROSECUTIONS AND INQUESTS **63**
Inquests 66
THE DELAY IS UNREASONABLE **68**
GROUNDS FOR RELIEF **70**
The interests of justice 71
Constitutional obligation to act without delay 72
Human Dignity 73
Right to life 75
Right to freedom and security of the person 75
Right to equality 75
Rule of law 76
Principle of Legality 77
The delay is in conflict with PAJA 79
Obligations arising from the TRC process 82
Violation of South Africa's international law obligations 84
COMPELLING THE FIRST RESPONDENT **86**
SHORTENED TIME PERIODS **88**

TP

I, the undersigned

THEMBISILE PHUMELELE NKADIMENG

state under oath as follows:

INTRODUCTION

1. I am an adult female. I am the Executive Mayor of City of Polokwane. I reside at 82 General Viljoen Street, Welgelegen, Polokwane. I am the First Applicant in this matter. I act in the interests of myself and my family and I depose to this affidavit on behalf of my wider family. In this regard I attach the confirmatory affidavits of my mother, Sizakele Ernestina Simelane and my two brothers, Antonio Lungelo Simelane and Junior Mzwandile Nkosinathi Simelane, which are annexed to this affidavit marked **TN1, TN2** and **TN3.**

2. This case is about my late sister, Nokuthula Aurelia Simelane, ("Nokuthula") who was abducted, brutally tortured and enforcedly disappeared by the South African Security Branch ("SB") of the former South African Police ("SAP") in 1983. The police case number is: Priority Investigation: JV Plein: 1469/02/1996. More than 30 years later, and notwithstanding countless pleas, my family and I are still

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waiting for the National Prosecuting Authority ("NPA") to take a decision whether to prosecute the known suspects or not, or refer the matter to an inquest.

3. Although I only represent myself and my family in this application I submit that this case is representative of most cases arising from South Africa's conflicts of the past that were submitted by the Truth and Reconciliation Commission ("TRC") to the first respondent for further investigation and possible prosecution ("the TRC cases"). To the best of my knowledge the bulk of these cases have not been seriously investigated.

4. I submit that this failure represents a deep betrayal of those who gave their lives for the struggle for liberty and democracy in South Africa. It has also added significantly to the emotional trauma and anguish of their families, surviving victims and the wider community. I do not know why the new South African state has turned its back on victims who sacrificed so much, but it appears to me that this approach can only have been the product of a policy or decision to abandon these cases.

5. The supporting affidavits of Frank Dutton, Advocate Dumisa Ntsebeza SC, Alexander Boraine, Advocate Vusi Pikoli and Advocate Anton Ackermann SC are annexed hereto marked **TN4, TN5, TN6, TN7 and**

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TN8.

5.1. The affidavit of Frank Dutton, a private investigator, outlines the inquiries he carried out on behalf of my family and it also includes his assessment of the investigations conducted by the first and second respondents.

5.2. The affidavit of Advocate Dumisa Ntsebeza SC, former TRC Commissioner and Investigation Unit Head, confirms that my sister's case was investigated by the TRC's Investigation Unit.

5.3. Alex Boraine, former Deputy Chairperson of the TRC, outlines in his affidavit the rationale for the TRC's amnesty process and why justice is necessary.

5.4. The supporting and *in camera* affidavits of Advocate Vusi Pikoli, former National Director of Public Prosecutions, set out the political interference that brought an end to the investigation and prosecution of the TRC cases.

5.5. Advocate Anton Ackermann SC, former Director of the Priority Crimes Litigation Unit of the NPA, describes in his supporting affidavit the efforts to purse justice in the TRC cases and how he was stopped from taking these cases forward.

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6. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. Where I make submissions of a legal nature I do so on the advice of my legal representatives.

Organisation of this affidavit

7. The scheme of this affidavit necessitates me setting out –

7.1. An overview of Nokuthula's story;

7.2. The relief sought and the approach of this affidavit;

7.3. A full description of the parties;

7.4. Description of the facts that gave rise to this application, including an overview of the conduct of the authorities under the control of the first to fourth respondents;

7.5. The impact of the failure of the second respondent to investigate Nokuthula's case timeously and of the failure of the first respondent to take a prosecutorial decision.

7.6. The relevant legal framework governing prosecutions and

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inquests.

7.7. The objections to the said delays, including why the delays are unreasonable.

7.8. The grounds of the relief which include upholding the interests of justice; as well as grounds of unconstitutionality, which involves dealing with violations of the rights to dignity, life, freedom and security of the person and to equal protection and benefit of the law; as well as the rule of law;

7.9. The grounds of review which deals with the fact that the delays are in conflict with the principle of legality; various provisions of the Promotion of Administrative Justice Act (PAJA); the special responsibility arising from South Africa's transition and the TRC process; and South Africa's international law obligations.

7.10. The grounds for a final interdict compelling the first respondent to refer my sister's case to an inquest or alternatively to take a prosecutorial decision.

7.11. The grounds of urgency.

Overview of Nokuthula's story

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8. In 1983 Nokuthula was a twenty-three years old university graduate and was a courier for Umkhonto we Sizwe ("MK"), the armed wing of the African National Congress ("ANC"), moving between Swaziland and South Africa. She was betrayed by one of her own and was abducted and brutally tortured by the Security Branch of the former SAP in September of 1983.

9. Nokuthula was never seen again. We know from the TRC hearings that my sister suffered terribly at the hands of the SB. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price.

10. Nokuthula' story is rooted in South Africa's bitter and divided past. She devoted her life to resisting the pernicious system of Apartheid. Notwithstanding the fact that Nokuthula' sacrifices helped to lay the basis for South Africa's democracy with its enshrined freedoms, the new South Africa has turned its back on her. My family and I have been searching for answers for more than 30 years. We have pleaded with authorities to take the necessary action to bring closure to this case. These pleas have fallen on deaf ears. Nonetheless, I have always refused to give up the search for the truth and justice.

11. My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died, and where her body is today. We

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have spent three decades looking for Nokuthula. We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.

12. We did not expect the former South African Police to investigate themselves. However we firmly believed that the new democratic South Africa would take the necessary steps. We were wrong. This was the second betrayal of Nokuthula and everything she stood for. This betrayal cut the deepest. It deprived me and my family of closure and our right to dignity. My father went to his grave in 2001 without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing; and without burying Nokuthula's remains with the dignity she deserves.

13. In 2001 the Amnesty Committee of the TRC concluded that the white SB officers had lied to the Commission about what had happened to Nokuthula during her unlawful captivity, in particular the torture she sustained. They nonetheless granted amnesty to those officers for Nokuthula's kidnapping. The Amnesty Committee betrayed its own law, which states that amnesty can only be granted in exchange for the truth and full disclosure.

14. In relation to the amnesty process it is noteworthy that nobody applied

TP

for amnesty for Nokuthula's murder and not all the perpetrators applied for amnesty for her kidnapping. These included Msebenzi Timothy Radebe, eighth respondent and Willem Schoon, ninth respondent, the latter being the Commander of Security Branch C1 Section, which carried out the offences against Nokuthula.

15. The new police service, the South African Police Service (SAPS) and the NPA could have pursued this case. However, even though a police docket was opened in 1996 little or no official action followed. After the amnesty decision the matter was referred to the NPA. When I approached officials at the NPA's Priority Crimes Litigation Unit ("PCLU"), which was responsible for the TRC cases, they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new 'policy' was issued an effective moratorium on pursuing the TRC cases was in place. When the amendments to the NPA's Prosecution Policy emerged in late 2005 it essentially created a backdoor amnesty for perpetrators of so-called political crimes. It gave such perpetrators, like my sister's killers, a second opportunity to escape justice.

16. Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07) (the Nkadimeng case). The widows of the Cradock Four

TP

are also still waiting for justice. In 2008 the High Court in Pretoria struck down the amendments to the Prosecution Policy, declaring it to be absurd and unconstitutional. In response to the argument of the NPA that dissatisfied victims could pursue private prosecutions, Judge Legodi held at paragraph 16.2.3.3 of the judgment that:

> **"...crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted."**

17. During this case the National Director of Public Prosecutions disclosed a secret 2004 government report titled "*Report of the Amnesty Task Team*". This report, to be discussed below, explored ways of promoting impunity for perpetrators of apartheid-era crimes. In my view this report is one of the clearest reflections of the unstated policy of the Government not to energetically pursue justice in respect of cases where amnesty was denied or not applied for. The supporting affidavit of Advocate Vusi Pikoli serves to confirm that political interference effectively stopped the TRC cases. The many years of inaction and the persistent refusal to finalize my sister's case is entirely consistent with such policy.

18. We thought that the striking down of the amendments to the Prosecution Policy meant that the path was eventually cleared for justice to take its course. Again we were wrong. This time the

TP 17

prosecutors claimed that the police were refusing to provide investigators. Again they said their hands were tied. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010; but the docket had apparently gone "missing".

19. By the end of 2012, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, the 30th year of Nokuthula's disappearance, and 18 years since the opening of the police docket, I gave up on a prosecution and demanded the holding of a judicial inquest into her death. This request was refused. Remarkably, the NPA claimed that their investigations were still not yet complete.

20. My family and I do not believe that the NPA is acting in good faith. Indeed, we have lost all confidence in the prosecutors and police. They have betrayed out trust. Given their past idleness such investigations could drag on indefinitely while witnesses and suspects grow old and die. Since January 2013 my lawyers and I have engaged in extensive communications with the offices of the first and second respondents in an effort to persuade them to finalize their apparent investigations or at least refer the case to a judicial inquest. More than 20 months later these efforts have come to naught.

TP

21. The historic compromise which gave birth to the new South Africa demanded that those perpetrators denied amnesty, or who did not apply for amnesty, would face follow-up. This has not happened. The state has systematically and deliberately dragged its feet or blocked justice in this case and many others. We know who abducted, tortured and murdered Nokuthula. They were meant to face justice or appear before a judicial inquest. More than 30 years have passed since Nokuthula's disappearance, but neither has happened. We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete.

Relief sought

22. This application seeks, among other things, an order to:

22.1. Compel the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping, torture, disappearance and murder of my sister in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice.

22.2. Declaring that:

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22.2.1. the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;

22.2.2. the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,

22.2.3. the ongoing failure or refusal of the first respondent to refer the above named case to a formal judicial inquest,

is a gross violation of my rights to human dignity and equality; and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

22.3. Declaring that the conduct referred to in paragraphs 22.2.1 and 22.2.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy

TP

Directives issued in terms of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.

22.4. Declaring that the conduct referred to in paragraph 22.2.3 above is inconsistent with the provisions of the Inquests Act 58 of 1959 ("the Act") and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated.

22.5. Alternatively to paragraph 22.1 above, reviewing and setting aside the refusal to take the decisions referred to in paragraphs 22.2.2 and 22.2.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

22.6. *Alternatively* to paragraphs 22.1 and 22.5 above:

TP

22.6.1. Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

22.6.2. Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; alternatively compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

22.6.3. Ordering the public release of the memorandum titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development.

Approach of this affidavit

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23. Given the nature of this application, I advance certain legal submissions on the advice of my legal representatives. I set out in this affidavit a range of factual matters and submissions all of which serve to demonstrate the basis of this application. I also set out certain factual matters which are contained in the Truth and Reconciliation Commission report concerning the disappearance and murder of Nokuthula at the hands of apartheid-era security personnel. I also attach certain transcripts of Truth and Reconciliation Commission hearings confirming certain facts concerning the disappearance and murder of Nokuthula.

THE PARTIES

Applicant

24. I am the Applicant. My sister, Nokuthula, disappeared after being abducted by the Security Branch.

Respondents

25. The First Respondent is the National Director of Public Prosecutions ("the NDPP"), appointed by the third respondent in terms of section 10 of the National Prosecution Authority Act 32 of 1998 ("the NPA Act"), and who, in terms of section 5 of the NPA Act, is the head of the Office

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of the National Director of Public Prosecutions, which in turn is a component of the Single National Prosecution Authority ("the NPA") established in terms of section 179 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The First Respondent's address for service is care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

26. The Second Respondent is the National Commissioner of Police acting in her official capacity. The Second Respondent's address for service is Wachthuis, 7th Floor, 229 Pretorius Street, Pretoria.

27. The Third Respondent is the Minister of Justice, the cabinet member responsible for the administration of justice, who, in terms of section 179(6) of the Constitution, exercises final responsibility over the prosecuting authority, including the First Respondent. The Third Respondent's address for service is care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

28. The Fourth Respondent is the National Minister of Police acting in his official capacity. The Fourth Respondent's address for service is Wachthuis, 7th Floor, 229 Pretorius Street, Pretoria.

29. The Fifth Respondent is Willem Helm Coetzee, an adult male with identity number 520409 5090 000 and residing at 28 Augusta Bellini

TP

Street, Wilgeheuwel, 001724, Gauteng.

30. The Sixth Respondent is Anton Pretorius, an adult male with identity number 5804075046086 and residing at 20 Duneden, 152 Malcolm Street, President Ridge, Randburg, 2194, Gauteng.

31. The Seventh Respondent is Frederick Barnard Mong, an adult male with identity number 5805245117004 currently resideing at 12 Pecan Place, 831 Mortimer Avenue, Mayville, Pretoria.

32. The Eighth Respondent is Msebenzi Timothy Radebe, an adult male with identity number 5006165718083 and residing at 8 Roma Street, Honeyhills, 1724, *alternatively*, 36 Stumke Street, Witpoortjie, Roodepoort, 1724, Gauteng.

33. The Ninth Respondent is Willem Schoon, an adult male with identity number 3103015023087, a former Brigadier and Commander of the SAP's Security Branch C1 Section and residing at 689 Verecunda Street, Dorandia Ext 2, 0182, Gauteng.

DETAILED BACKGROUND

34. Nokuthula disappeared after being abducted by the Security Branch on or about 10 September 1983. The brief circumstances of Nokuthula's disappearance which are described in the records of the

TP

TRC Hearings are as follows:

34.1. Nokuthula was a student at the University of Swaziland and also a member of MK, the armed wing of the ANC.

34.2. During 1982, Nokuthula joined the Transvaal Urban Machinery ("the TUM") of MK, of which the Chief of Staff was Gilbert Thwala. Nokuthula operated as a courier for one of the MK units within the TUM.

34.3. It was established during the TRC hearings that Nokuthula disappeared while on a mission in Johannesburg after making contact with a certain Norman L Mkhonza at the Carlton Centre.

34.4. It also emerged that in fact she was abducted by the Security Branch with the help of Mkhonza, whom Nokuthula believed was a fellow MK member when in fact he was an apartheid state "*askari*" (a former MK member turned state operative) connected to the Soweto Intelligence Unit of the South African Security Police.

34.5. Having been alerted to the arranged meeting that was to take place between Nokuthula and her colleagues (although apparently not aware of Nokuthula's identity), the commander of the Soweto Intelligence Unit, Willem H Coetzee (the Fifth

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Respondent), conveyed this information to the overall commander of the Soweto Security Police, the late Brigadier H Muller. Muller ordered that Nokuthula should be abducted with a view to turning her into an agent of the Security Police. Pursuant to this order, Coetzee gathered a group of Security Police officers, including Mkhonza, Anton Pretorius (the Sixth Respondent), J F Williams, J E Ross, Peter Lengene (now deceased), Frederick B Mong (the Seventh Respondent), M L Selamolela and Msebenzi Timothy Radebe (the Eighth Respondent) and prepared them for the operation.

34.6. On the day of the planned meeting, and in accordance with the plan decided upon by the group of police officers mentioned above, Mkhonza lured Nokuthula to the basement of the Carlton Centre where she was apprehended and abducted. She was manhandled, *inter alia* by Radebe, placed in the boot of a police vehicle and transported to the "Custodum" Flats in Norwood, where the Security Police had an operational office in the cleaner's quarters on the roof of the building. Nokuthula was left in one of the police vehicles out of sight of the general public. She was subsequently removed to the operational office where she was kept for a few days.

34.7. It appears from the Amnesty Hearing record that Coetzee stated that Willem Schoon was apprised of the abduction and gave

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authorisation for the '*kopdraai*'. He and Mong accompanied Brigadier Muller (deceased OC of Soweto SB) to Pretoria to brief Schoon on the Saturday afternoon immediately following the Carlton Centre operation.

34.7.1. A TRC news release dated 24 June 1999 said that Brigadier Schoon had also applied for amnesty in respect of the crimes committed against Ms Simelane. A copy of this press release is annexed hereto marked **"TN9"** However this application never proceeded.

34.7.2. Testifying before another Amnesty Committee hearing Schoon stated that the total onslaught of the ANC/SACP forced the Security Branch to operate outside the boundaries of the law (Amnesty Committee hearing in Pretoria on 14 June 1999 into the murders of K. McFadden and Z. Nyanda in Swaziland during 1983.). Schoon commanded Section C of the Security Branch from 1981 until 1990. Amongst the units under his control was the notorious Vlakplaas unit.

34.7.3. The TRC found that Security Branch members were instructed to commit crimes that included murders, cross border raids, kidnappings, poisonings, bombings, illegal detentions, torture and defeating the ends of justice. (TRC

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Report Volume 5).

34.8. It also emerged from the TRC hearings that Nokuthula was kept at the operational office at Custodem, and was interrogated and continuously assaulted by Coetzee, Pretorius, Lengene, Mong, Selamolela, Radebe and MM Veyi (hereinafter referred to as "the perpetrators"). The assaults were of a serious nature and they amounted to torture. (I note that Williams, Ross and Mkhonza had ceased their participation in the incident after the abduction at the Carlton Centre and Veyi was a new addition to the group after the abduction.)

34.9. Nokuthula was subsequently transferred to secluded premises on a farm in the district of Northam in the present North West Province. Here she was detained for a period of approximately 4 to 5 weeks. The interrogation and torture continued on the farm.

34.10. Throughout the period of her detention, which lasted approximately 5 weeks, Nokuthula was interrogated and severely assaulted by the perpetrators. The interrogation and the assaults were conducted under the command of Coetzee who was in overall command of the group of Security Police.

34.11. Towards the end of her stay on the farm, and as a result of severe torture, Nokuthula's physical condition had deteriorated to

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such an extent that she could hardly be recognised. She had great difficulty in walking and her physical condition had generally deteriorated severely.

34.12. Nokuthula never returned to her family in Swaziland after having been abducted by the South African Security Police and has since disappeared.

34.13. It appears from the docket of the police investigation that several witnesses and suspects linked to Nokuthula's disappearance were traced and statements were taken. In particular, the docket indicates that:

34.13.1. A number of witnesses stated under oath in their statements that they personally witnessed assaults and/or torture perpetrated against Nokuthula or they saw clear evidence of assault marks on her face and body. These witnesses were all members of the SAP's Security Branch at the time and worked under the direct command of W H Coetzee and A Pretorius. At the time, Coetzee was a warrant officer and Pretorius was a sergeant;

34.13.2. While she was kept at the farm in Northam, Nokuthula was interrogated, assaulted and tortured. Nokuthula's hands and feet were cuffed. Her sleep was kept to a minimum.

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She was kicked and slapped. A bag was pulled over her head. She was given electric shocks. She was thrown into a zinc farm dam, allegedly by Radebe. At times she could no longer stand.

34.13.3. A statement made by Veyi and contained in the docket indicates that the last time he saw Nokuthula was near the 4 way stop junction of the Fochville/Carltonville and Johannesburg/Potchefstroom roads. She was in the boot of Coetzee's vehicle and was alive with her hands cuffed behind her back. Her feet were also cuffed. A few days later, when he asked Pretorius where Nokuthula was, he received the response: "*Moenie* [so] *baie vrae vrag nie*" (don't ask so many questions). Veyi was told by one of his colleagues, Sergeant Mathibe, that Coetzee and Pretorius had shot, killed and buried Simelane near Rustenburg. Mathibe has since died.

34.13.4. It also appears from the docket that Lengene originally made a statement to the investigators while he was still under the direct command of Coetzee. In a subsequent interview with the investigating officer (Captain Leask), Lengene admitted that his "*original statement was not the whole truth.*" Before making his statement he had met with Coetzee and Pretorius who told him that "*it was up to him*

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and [Mkhonza] *to save their skins*". Pretorius warned Lengene that they would be provided with a copy of his statement by Dir. Neville Thoms (then Head of Priority Crimes, Gauteng). He also said that the investigating officer would not be able to prove any charges as "*he had no proof of a body*". Lengene stated that after the first interview he had been taken to Coetzee who wanted to know what was said in the interview. He was told to rewrite a statement, which Pretorius vetted and which he was instructed to keep it in a safe place so that it could later be handed to an attorney who was being arranged through the police.

34.13.5. Lengene stated that he feared Coetzee and Pretorius very much and "*at no cost must they become aware of my statement ....*" He has since died.

34.13.6. It also appears from the docket that on 10 February 1996 Pretorius and Coetzee secretly met with Mkhonza and coached him regarding his version should Captain Leask approach him. This discussion was secretly taped by the investigation team and I am advised that the tape and/or a transcript thereof are in the possession of the investigators.

34.13.7. The docket also contains a statement from one Mokone

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Sefuthi, a former policeman who indicates that he was posted to guard Nokuthula while she was being held. According to Sefuthi, Coetzee, Pretorius and Mong continuously threatened Nokuthula with death during the interrogations. After Nokuthula had been removed from the farm, Sefuthi asked Pretorius what had happened to her. Pretorius replied that that Sefuthi "*would never see her again*".

34.14. I respectfully submit that these facts are all contained in the police docket that was provided to the TRC, or were contained in the findings of the TRC Amnesty Committee in relation to the amnesty application of the perpetrators (with the exception of Radebe, who did not apply for amnesty), which are dated 23 May 2001 and annexed hereto marked "**TN10**". I have not annexed all the supporting documentation as it is readily available to the respondents. The purpose of the reference to the various statements is to give an overview of the available evidence (which would have to be tested in a court of law) in order to indicate the circumstances surrounding Nokuthula's disappearance and likely murder and to indicate that known suspects have not been prosecuted or have not appeared before an inquest.

34.15. Nokuthula's disappearance and the events that have transpired

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since the TRC hearings have left me and my family with a deep sense of loss and anguish.

34.16. Since her disappearance, we have spared no effort in our search for her or her remains. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her.

34.17. When it was suggested that she may have been working for the anti-apartheid movement, the family made inquiries with the ANC in Swaziland, and in the neighbouring countries such as Botswana. All these efforts proved fruitless.

34.18. Her disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.

34.19. All these efforts proved fruitless until the Sowetan newspaper published two stories about Nokuthula's disappearance on 27 January 1995 and 6 February 1995. Copies of the newspaper reports are annexed hereto marked **"TN11"** and **"TN12"**

34.20. The newspaper articles appear to have prompted the police to open an investigation docket. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the

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Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. The crimes being investigated were murder and kidnapping.

34.21. On 19 February 1996 Director Neville Thoms, the Head of Priority Crimes, Gauteng addressed a letter to the Secretariat of Safety and Security and the National Head of Priority Crimes summing up the investigations to date. A copy of the letter is annexed hereto marked "**TN13**". A further letter, expanding on the contents of this letter was sent to the Divisional Chief of the National Crime Investigation Services in Pretoria on 26 February 1996, and a copy thereof is annexed marked "**TN14**". As these letters refer to details of the investigation they are not attached to the founding affidavit but are instead attached to my *in camera* affidavit. I refer to my *in camera* affidavit at paragraph 43 below.

34.22. According to the investigation diary in the docket, the case was discussed with Deputy Attorney General Kevin Attwell and Advocate De Vries on 23 February 1996. They recommended that the matter be discussed with Dr D'Oliviera of the Third Force Investigations team. A discussion was then held with Dr D'Oliviera. At this meeting it was decided that all possible evidence must be gathered and the investigation must proceed.

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34.23. An entry made in the investigation diary on 22 October 1996 by Thoms indicates that the matter was to be held back pending the instructions of the Attorney General. Advocate Ebrahim was reading the statements and exhibits. Captain Leask then filed the investigation notes in the "*respective files*". No instructions from Advocate Ebrahim were recorded in the investigation diary.

34.24. The final entry in the investigation diary prior to the amnesty hearings before the TRC on 10 February 1998 reads "*amnesty hearings o/s*". I presume that "o/s" means "outstanding".

34.25. On 6 July 1998, Coetzee was warned of his rights in terms of section 35 of the Constitution in respect of Nokuthula's murder. He declined to make a statement. A copy of the warning is annexed hereto marked "**TN15**".

34.26. Our family was involved in the TRC process. On 3 June 1997, Matthew Simelane (Nokuthula's and my late father) testified in a "victims' hearing" before the Human Rights Violations Committee. He explained the family's plight and the efforts they had undertaken to try and find the truth, but at the end of the hearing, the chairperson of the Committee said that it was "*in the position very much that you are at the moment and that is to watch and wait for the outcome of the amnesty applications which have been made*". A copy of the transcript of the hearing is annexed

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hereto marked "**TN16**".

34.27. After the amnesty applications were filed, it quickly became clear that some of the perpetrators were willing to comply with the procedure, tell the truth and acknowledge their role in Nokuthula's torture and disappearance. On the other hand, Pretorius, Coetzee and Mong took a confrontational and uncooperative attitude, complying only to the extent that they felt was necessary to obtain amnesty. They refused to apologise to the family or to demonstrate any sense of remorse for the pain caused to the Simelane family.

34.28. It appears from the findings of the TRC Amnesty Committee (annexure **TN10** above) that all of those who applied for amnesty in respect of Nokuthula's abduction were granted amnesty. In addition, Selomolela and Veyi were granted amnesty in respect of her torture.

34.29. The TRC Amnesty Committee however, declined to grant amnesty to Coetzee, Pretorius and Mong in respect of the torture of Nokuthula on the basis that they had failed to make "*a full disclosure of all relevant facts*" as required by section 20(1)(c) of the Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act). In particular, the majority of the Amnesty Committee found that:

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> **"[they[orchestrated their testimony in an attempt to minimize their roles in the torture of Ms Simelane. They were evasive and resorted to prevarication and long-winded technical explanations whenever they sensed difficulties or shortcomings in their versions. They studiously failed to furnish direct answers to questions which they regarded as potentially damaging to their case."**

and

> **"we conclude that the evidence of Coetzee, Pretorius and Mong is untruthful insofar as it concerns the duration and extent of Ms Simelane's torture whilst she was in the custody of the Security Police, especially on the farm. Coetzee, Pretorius and Mong have accordingly failed to make a full disclosure of all relevant facts in regard to this aspect of the matter as required by the provisions of Section 20 of the Act. Their applications are accordingly REFUSED on this aspect."**

34.30. It therefore logically follows that the refusal of Coetzee, Pretorius, Mong's amnesty applications (and the fact that Radebe and Schoon did not apply for amnesty) meant that they should have faced prosecution for their respective roles in the kidnapping and/ or torture and/ or the likely murder of Nokuthula.

<u>Attempts to seek justice</u>

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35. Since the refusal of Coetzee, Pretorius and Mong's application for amnesty on 23 May 2001, my family and I have made a number of attempts to persuade the NPA to investigate and launch criminal proceedings against them (and Radebe) in respect of Nokuthula's torture, disappearance and possible murder, including meetings with the PCLU.

36. During 2005 the Foundation for Human Rights ("FHR") took up Nokuthula's case and met with members of the PCLU and urged them to take various steps in the short term, including:

36.1. Prosecuting suspects who did not apply for amnesty for kidnapping since kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. In particular it was pointed out that Radebe placed himself at the scene of Nokuthula's abduction and that other police witnesses implicated him in various acts related to her kidnapping;

36.2. Preferring charges of defeating the ends of justice against two of the senior officers (Coetzee and Pretorius) for intimidating a junior officer (Sergeant Lengene) into making a false statement and for attempting to coach a witness (Norman Mkhonza) into making a false statement.

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37. The FHR also presented the PCLU with a memorandum dated 18 August 2005 setting out the basis for the said recommendations, a copy of which is annexed hereto marked **"TN17"**. The PCLU declined to take these proposed charges forward. At the time it was claimed that a suspect like Radebe was a "*small fish*". The suggestion that the pursuing of the 'small fish' could lead to the 'big fish' fell on deaf ears.

38. The PCLU has put up various excuses to me and my representatives over the years as to why they have not been able to take Nokuthula's case forward. These include the following excuses:

38.1. Insufficient evidence: In my view cases that are not seriously investigated will always suffer from a lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is entirely without merit. It is based on an erroneous reading of the '*use immunity*' provision contained in section 31 of the TRC Act which, in any event, was not invoked in any of the proceedings before the TRC dealing with Nokuthula.

38.2. Statute of limitations: Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised that they

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were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of the 20 year prescription rule contained in section 18 of the Criminal Procedure Act 51 of 1977. In order to address this legal obstacle during 2006 the FHR presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokhuthula constituted the international crime of torture. I am advised that by 1983 torture was a prohibited and unlawful act in terms of customary international law. South Africa was accordingly obliged to investigate and prosecute transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

38.3. Effective moratorium: Up until 2006, the PCLU advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. Although it was not clear who had imposed such a moratorium they were not permitted to proceed with any "*political cases*" until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. As mentioned above, together

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with the wives of the Cradock 4, I applied to court to have this policy set aside as unconstitutional.

38.4. Bureaucracy: It was difficult for the PCLU to work on these types of cases because it was difficult to convene the multi-departmental Departmental Task Team comprising members of, amongst other departments, the Department of Justice and Constitutional Development, the SAPS and the National Intelligence Agency. This group was apparently required to advise the NDPP and the PCLU which cases to take forward or not.

38.5. Litigation: The case I brought against the aforesaid amendments to the prosecution policy, the Nkadimeng case, apparently prevented or stopped investigations into political crimes. No reason has been provided as to why this litigation should have caused the halting of such investigations.

38.6. Lack of investigators: Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations. Apparently officials under the control of the second respondent refused or neglected to assign detectives to the so-called political cases.

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38.7. Inquest more appropriate than prosecution: On several occasions members of the PCLU advised that the family should rather seek an inquest than a prosecution. Until 2013 this proposition was rejected by me and my family as we felt that there was sufficient evidence to warrant prosecutions against some or all of the potential accused.

38.8. Lost docket and various administrative issues: In or about 2010 the docket apparently went missing and was rediscovered at some later stage. This and other issues are set out in correspondence attached to this affidavit.

39. I have even appointed private detectives. I have reported the inaction of the South African authorities to the United Nations Special Rapporteur on Enforced Disappearances who in turn corresponded with the government. A copy of the letter received from the Chairperson of the Working Group on Enforced or Involuntary Disappearances dated 24 July 2013 is annexed hereto marked **"TN18".** Nokuthula's case has been covered in the media (an example is my opinion piece in the City Press dated 26 December 2013, a copy of which is annexed hereto marked **"TN19"**). A documentary about my sister's story was made and screened on TV ("*Betrayal*", SABC, Grey Matter Media, Johannesburg: Film Resource Unit [distributor], ©2006.). A copy can be made available to this

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honourable Court on request. A statue was erected in her memory in Bethal. However the authorities charged with delivering justice appear to be impervious to any and all persuasion and we are still without answers.

The request for a formal judicial inquest

40. During January 2013 I met with the investigating officer, Captain Masegela. He advised me that he had submitted his investigation report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act.

41. By the beginning of 2013 I had lost all faith in the ability of the first and second respondents to deal competently with sister's case. I looked into the possibility of launching a private prosecution but was advised that I would have to raise a considerable sum of money to lodge as security of costs for the legal costs of the accused, which I would have to pay if the accused were acquitted. I could not afford such costs. I accordingly wrote a letter to the Acting NDPP on 29 January 2013 requesting that my sister's case be referred to a formal inquest before the High Court, a copy of which is annexed hereto marked "**TN20**". I wrote:

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> **"If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution."**

42. Between January 2013 and February 2014 my representatives and I entered into a period of intensive communications with the first and second respondents and responsible officials within their departments. Copies of these communications, inclusive of correspondence, emails and notes, are referred to in the timeline set out below.

43. During the aforesaid period we attempted to persuade the first respondent to refer my sister's case to a formal inquest; alternatively to finalize its investigations speedily and make a prosecutorial decision. These attempts proved fruitless. The first and second respondents defended the delays and the ongoing investigation. An account of these exchanges is included the investigative timeline, set out below, and in the affidavit of Frank Dutton, annexed hereto as **"TN4".** Since the annexes referred to in the investigative timeline include correspondence between my attorneys and the NPA and SAPS, as well as extracts from the police docket, certain of these annexes are not attached to this affidavit but are attached to my *in camera* affidavit

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marked **"TN21"** which is contained in the *in camera* record. The documents which are attached to this affidavit are numbered **TN21.1** to **TN21.23**. They appear in the rows in the table below shaded grey.

Investigative Timeline

Date	Action	Reference
11 Sept. 1983	Nokuthula Simelane is kidnapped by member of the Security Branch of the South African Police.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane. (Annex **TN10**)
11 Sept. to about mid-October 1983	Nokuthula Simelane is secretly kept captive in a store room on a farm at Northam where she is persistently tortured by members of the Security Branch.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
About mid-October 1983	Nokuthula Simelane is secretly taken from the farm at Northam by members of the Security Branch and has not been seen again.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
27 January 1996	Sowetan newspaper published a story about Nokuthula's disappearance and made an appeal for information.	Sowetan newspaper date January 1996 (Annex **TN11**)
January/ February 1996	Former Security Branch policeman Sergeant M M Veyi provided evidence to the TRC Amnesty Committee about the abduction, torture and disappearance of Ms. Simelane	1. TRC Amnesty Hearin AC/2001/185 – 2. Evidence of former Sergeant Veyi. (Annex **TN22**) 3. Sowetan news report

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February 1996	In consequence to the disclosures by former Sergeant Veyi CAS1469/02/1996 Murder case docket was opened and investigated by "Priority Crimes Unit" based at John Vorster Square (now Johannesburg Central Police Station). The case was assigned to Captain Leask. Initial investigation made progress but before its conclusion the case was transferred to the D'Oliviera Team towards the end of 1996. Little or no further investigation is undertaken.	1. Extracts of from docket. (Annex **TN21.1**) 2. Letter from PCLU, 5 December 2013 (Para 5.1.6) (Annex **TN21.2**)
1996/97	Police (D'Oliviera Team) investigation put on hold pending the TRC process.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 3. (Annex **TN21.3**)
3 June 1997	Commencement of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane. Following persons make applications for amnesty for abduction, torture and other related crimes. None of the applicants applied for amnesty in respect of the murder of Ms Simelane. W H Coetzee (TRC ref. AM4122/96) A Pretorius (TRC ref. AM4389/96) J F Williams (TRC ref. AM4375/96) J E Ross (TRC ref. AM4377/96) F B Mong (TRC ref. AM4154/96) N L Mkhonza (TRC ref. AM5420/97) M M Veyi (TRC ref. AM5421/97) M L Selamolela (TRC ref. AM5419/97)	TRC Amnesty Hearing AC/2001/185
1998	NDPP Ngcuka establishes TRC component within NPA Head Office to attend to prosecution matters arising from TRC.	Letter from PCLU, 5 December 2013. Para 5.1.6 (Annex **TN21.2**)
February 1999	Meeting between TRC and NPA to discuss a process of establishing mechanisms for identifying potential cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)

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11 March 1999	TRC commences referrals for potential prosecution to NPA – alerting them to sources of evidence to crimes. Correspondence does not specify any particular cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)
30 June 2000	Final session of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane	TRC Amnesty Hearing AC/2001/185
23 May 2001	TRC Decision issued in this Simelane matter. All applicants are granted amnesty for the abduction of Ms Simelane; applicants W.H Coetzee, A Pretorius and F B Mong are refused amnesty for torture; applicants M M Veyi and M L Selamolela are granted amnesty for the torture of Ms Simelane.	TRC Amnesty Hearing Decision AC/2001/185 (Annex **TN10**)
29 August 2001	The TRC Amnesty Committee decision in the Simelane matter is gazetted.	Proc 31. Justice 29/08/2001
12 March 2003	Volumes 6 and 7 of the TRC Report are published.	TRC Report
12 March 2003	Specific mention is made in the TRC Report on Nokuthula Simelane's abduction, torture and disappearance. Volume 2, Chapter 3 para 278 - 280; 287 – 292 Volume 6, Chapter 1 para 194 – 206 Volume 6, Chapter 2 para 50 – 71 Volume 7, Victims list	TRC report . (Extracts annexed as **TN24 - 27**)
23 March 2003	PCLU is created by Presidential Proclamation. Officials assume duty July/ August.	1. Presidential Proclamation (Annex **TN28**) 2. Letter from PCLU, 5 December 2013. (Annex **TN21.2**)

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2003	The South African President directed the NDPP to give attention to the cases of 500 persons who had been reported missing by the TRC. NPA established a Task Team to evaluate the TRC report and to identify cases for investigation. 150 cases were identified for immediate investigation.	About PCLU (Annex **TN29**)
2003	NPA TRC Unit is converted into Priority Crimes Litigation Unit (PCLU)	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
2003	The NDPP give attention to the cases of some 500 persons who had been reported missing by the TRC. A Task Team evaluates the TRC Report to identify cases for investigation. Approximately 150 cases were identified for immediate investigation. The disappearance of Nokuthula Simelane is one of these cases.	About PCLU (Annex **TN29**)
2003	The PCLU requests all outstanding cases to be referred to it.	Letter from PCLU, 5 December 2013 (Annex **TN21.2**)
2003	NPA and PCLU place TRC cases "on hold" awaiting formation of policy on the TRC cases.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 6. ((Annex **TN21.3**)
November 2004	Foundation for Human Rights makes submission on behalf of family re: prosecutions of persons refused amnesty.	Letter from PCLU, 5 December 2013, para 5.1.4. (Annex **TN21.2**)
2004 and 2005	Several discussions between FHR and PCLU (Advocate Anton Ackerman) about charges arising from the alleged torture of Ms. Simelane (in terms of International Law); the prosecution of Sergeant Radebe on kidnapping charges and the possibility of holding an Inquest into this matter.	Letter from PCLU, 5 December 2013, para 5.1.5. (Annex **TN21.2**)
1 December 2005	NPA issues Guidelines for TRC cases in terms of National Prosecution Policy sec.179(5) of the Constitution	Appendix A, National Prosecution Policy dated 1 December 2005. (Annex **TN30**)

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23rd September 2007	Establishment of Ginwala Enquiry into the fitness of Advocate Pikoli to hold the office of NDPP	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2007/8	Decision by the SAPS not to investigate TRC cases pending conclusion of Ginwala Commission.	Letter from Dr. Ramaite, Acting NDPP, 31 January 2013, para 8. (Annex **TN21.3**)
4 November 2008	Ginwala Enquiry into NDPP finalised and issues report.	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2 December 2008	Amendments to Prosecution Policy struck down	Judgment, Nkadimeng & Others v The National Director of Public Prosecutions & Others, T.P.D. Case no. 32709/07 (Available on request)
Early 2010	Advocate Macadam appointed by Acting NDPP to take over TRC matters and to liaise with the General Dramat Commander of DPCI.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 10. (Annex **TN21.3**)
March 2010	Duplicate Docket and TRC material requested from State Archives and made available to PCLU.	Letter from Acting NDPP, Adv Jiba, 13 August 2013 p3 (Annex **TN21.4**)
25 March 2010	1. Duplicate Case Docket forwarded to Superintendent Bester of DPCI by PCLU requesting investigation to determine availability of witnesses; confirmation of statements; and other matters. 2. Police Captain Masegela of DPCI was appointed to investigate matter	1. Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010 (Annex **TN21.5**) 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)

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October 2010	Captain Masegela of DPCI returns duplicate docket and other files and material to Advocate Macadam	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)
27 October 2010	Letter from Advocate Macadam to Captain Masegela (together with duplicate case docket; other files and material) with a directive for extensive further investigations.	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU dated 27 October 2010 (Annex **TN21.6**)

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October 2010 (date not specified)	Missing Persons Task Team (MPTT) requested to explore the farm at Northam for possible exhumation and to check mortuary records for possible leads in respect of remains of Ms. Simelane.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.3 (Annex **TN21.3**)
Late 2010 (date not specified)	Original docket located	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 page 3 sub paragraph vii. (Annex **TN21.4**)
July 2011	The investigating officer, Captain Masehela, submitted his report to Adv Macadam recommending an inquest.	Thembi Nkadimeng discussion with Captain Masegela
October 2012 (date not specified)	Exploration by MPTT of farm at Northam completed and they conclude there is no possibility of an exhumation in the absence of specific evidence of a burial site. MPTT report issued on 25 January 2013.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.5 (Annex **TN21.3**)
22 January 2013	1. Captain Masegela returns docket and provides report in terms of Sec. 4 of the Inquest Act to Adv. Macadam 2. NPA denies that the docket was returned with the required certificate for an Inquest and claims that docket was returned with a substantial amount of the original investigations incomplete, and no evidence establishing that Ms. Simelane had been murdered.	1. Information supplied b Captain Masegela to Thembi at a meeting 2. Letter from Dr. Ramail NDPP dated 31 January 2013, para 16 (Annex **TN21.3**).
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing. MPTT report made available to PCLU on exploration of Northam farm and finding that exhumation is not possible unless there is specific evidence of the precise burial place.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)

TP 9

29 January 2013	The holding of an inquest is requested by family as authorities are not making progress in their investigation into determining circumstances of death.	Inquest Request – letter from T.P. Nkadimeng to NPA dated 29 January 2013 (Annex **TN20**)
31 January 2013	NDPP says that Adv. Macadam is perusing docket and resubmit to investigating officer.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 (Annex **TN21.3**)
11 February 2013	Letter pointing out that this matter has not been diligently attended to and calling for a prosecution or an inquest. To this end a meeting has been arranged between family representatives and Adv. Macadam to discuss and determine how the investigation can be completed and to set a reasonable deadline for this work to be completed.	letter from T.P. Nkadimen NPA dated 11 February 2013 (Annex **TN21.7**)
12 February 2013	NDPP reasserts that a decision can only be taken once investigation has been completed and refers to the upcoming meeting on 18 February 2013 between members of his staff and families representatives to discuss the investigative steps that are being taken.	Letter from Dr. Ramaite Acting NDPP dated 12 February 2013 (Annex **TN21.8**)
13 February 2013	Adv Macadam of PCLU instructs Col Xaba of DPCI to undertake various investigations:	Letter from Adv. Macadan Colonel Xaba of DPCI dated 13 February 2013 (Annex **TN21.9**)
18 February 2013	Meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC) (the last two mentioned representing family). Agreement that investigative tasks as set out in PCLU letter to DPCI dated 27 October 2010 is incomplete but there will be an endeavour to conclude investigation by end of May 2013.	1. Letter from NPA, 13 August 2013 (Annex **TN21.4**) 2. Minutes of Meeting (Annex **TN21.10**)

TP 07

6 March 2013	Again pointing out the considerable delays that have occurred in this matter by providing a timeline; raising concerns about some of the investigative tasks mentioned at the meeting of 18 February 2013 and in the letter to Colonel Xaba – also that not all tasks agreed to at the meeting have been included in the letter. Emphasizing those outstanding investigations are concluded as agreed by 30 May 2013.	Letter from Thembi Nkadimeng to NPA dated 6 March 2013 (Annex **TN21.11**)
13 March 2013	Adv. Macadam notes concerns about serious inaccuracies and unreasonable demands made in the letter of 6 March 2013 from Thembi Nkadimeng. He undertakes to do his best to finalise investigation by 30 May 2013.	Email from Adv. Macadam to Adv. Robin Palmer dated 13 March 2013. (Annex **TN21.12**)
27 March 2013	Captain Masegela informs Thembi Nkadimeng telephonically that the skeletal remain of a young woman has recently been found by construction workers at the site of a new mall in Brits.	
6 April 2013	Response by Adv. Palmer to Adv. Macadam concerning the issues he raised in his email of 13 March 2013.	Email from Adv. Robin Pa to Adv. Macadam dated 6 April 2013. (Annex **TN21.13**)
15 April 2013	Raising concern that the contents of some communications between the family's legal representatives and NPA have been disclosed to the Sunday Times. Investigation into Sergeant Radebe's alibi is continuing. Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.	Email from Adv. Macadam to Adv. Robin Palmer dated 15 April 2013. (Annex **TN21.14**)
2 May 2013	Adv. Palmer asked for an update on the current status of the investigation to which Adv. Macadam replied that there were no new developments.	Email between Adv. Macadam and Adv. Palme dated 2 May 2013. (Annex **TN21.15**)
17 May 2013	Adv. Macadam informs Adv. Palmer that investigation will not be concluded by end of May 2013 and reports on various aspects.	Emails between Adv. Macadam and Adv. Palmer 17 May 2013 (Annex **TN21.16**)

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26 June 2013	Canvasses the following issues: • Whereas it was indicated that a decision would be made by the end of May 2013 on this matter -this date has now passed and there is still no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute, or to refer the matter for a formal inquest. • The emotional toll the delays are having on the family and friends of Nokuthula Simelane • Request specific indications of remaining investigative steps together with target dates.	Letter attached to email from Adv. Robin Palmer to Adv. Macadam dated 26 June 2013. (Annex **TN21.17**)
31 July 2013	This letter expresses frustration at the lengthy delay in completing the investigation and demands that this matter be urgently resolved by means of a prosecution or an inquest.	Letter from Legal Resourc Centre (LRC) (representin family) to NPA dated 31 J 2013 (Annex **TN31**)
5 August 2013	Letter from LRC to Acting NDPP disputing further reasons for delay	Letter dated 5 August 201 responding to Adv Macadam email dated 31 July (Annex **TN32**)
13 August 2013	Skeletal remains have been found and DNA testing is being conducted.	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 pag 3 sub paragraph vii. (Annex **TN21.4**)

TP

5 December 2013	• DNA sample from Brits skeletal remains did not contain sufficient material for DNA extraction. A second sample to be obtained and sent to a specialist DNA Laboratory in Bosnia. • Facial reconstruction is being done in an effort to identify the remains. • The plot at Westonaria to be inspected by an anthropologist to determine feasibility of exhumations. • Four mortuary entries fit the criteria set these entries are however illegible. SAP Recovery Unit has been directed to find these graves and obtain a DNA sample from each for comparison purposes. • Plan and map to be submitted. • Additional TRC statements found and these need to be investigated.	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
16 January 2014	The family feels no closer to resolution despite the elapse of yet another year. The protracted delays with no action prior to 2010 are again pointed out. Family not satisfied with investigation progress since 2010 either. DNA and Exhumations – queries link between skeletal and other remains with Ms. Simelane and requests specifically what the links are to exclude "shots in the dark" as delaying tactics. Westonaria Plot- a possible exhumation of this plot should not cause delays in finalisation - unless there is specific evidence of a burial site. Requests a meeting with the acting NDPP to discuss these issues	Letter from Legal Resourc Centre (representing famil to NPA dated 16 January 2014 (Annex **TN21.18**)
16 January 2014	Acknowledges letter dated 25 September 2013 and will provide a comprehensive report on investigations into DNA of skeletal remains found at Brits by end of January 2014.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)

TP 17

10 February 2014	In respect of DNA comparisons of skeletal remain found at Brits the testing has to be done at a specialist laboratory abroad which is expensive – procurement policies have to be followed for the authorisation of the expense. Such authorisation is awaited before proceeding with further sampling and testing. An expert in craniofacial superimposition was unable to make an identification. The Forensic Science Laboratory will follow up on the four remains identified in mortuary records and with a determination of possible exhumations at the Westonaria plot. Pending forensic results the investigator will continue the investigations identified by Adv. Macadam.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)
26 February 2014	Family is concerned to note that the SAPS does not accept responsibility of investigation delays over the past four years. It is also noted that investigation has not been prioritised by DPCI and the end of investigation is not yet in sight. The nexus between the skeletal remains and mortuary remains are queried and do not provide a reason to delay finalisation of case. Two questions are posed: 1. Have investigation been conducted diligently? 2. Did the discovery of the skeletal remains halt or delay investigations?	Letter from Legal Resourc Centre (representing famil to General Dramat of DPC dated 26 February 2014 (Annex **TN21.20**)
February to July 2014	No responses received to LRC letters to NPA dated 16 January 2014 and to the DPCI dated 26 February 2014. No other reports received.	

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10 July 2014	Letter from LRC to the NDPP (copied to Adv. Abrahams and Macadam) noting that: • No response had been received to LRC's letter of 14 January 2014 and assuming that the NDPP did not wish to meet with the applicant and her legal representatives; • No monthly progress reports had been supplied by the PCLU as previously promised; • Applicant had not been advised of the DNA test results. The letter assumed that there was no real intention to make a decision to prosecute or not; and moreover that there is no intention to refer this case to an inquest. It accordingly reserved the rights of the applicant. No response was received from the NDPP.	Letter from LRC to the NDPP dated 10 July 2014 (Annex **TN33**)
10 July 2014	Letter from LRC to Lt-Gen. A Dramat, National Head: Directorate for Priority Crimes Investigation (DPCI), SAPS noting that: • No response had been received to LRC's letter of 24 February 2014 and assuming that the DPCI has no response and that no progress has been made in this investigation; • Applicant had been promised notification of the DNA test results but heard nothing; • There was no intention to finalize this matter expeditiously, or at all and reserving rights of the applicant.	Letter from LRC to Nation Head: DPCI dated 10 July 2014 (Annex **TN34**)

TP 17

17 July 2014	Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 and: • alleging contact between applicant and investigating officer (IO); • notifying that the laboratory in Bosnia had completed the DNA tests and that the IO had been advised on 14 July 2014 that the results were negative; • alleging that extensive investigations had been conducted and the docket had been submitted to the NDPP for consideration and further instructions, if necessary; • Suggesting a meeting with the investigating officer's commanding officer Col Xaba to resolve any outstanding issues.	Letter of 17 July 2014 fror Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 (Annex **TN21.21**)
31 July 2014	Meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre). The meeting followed mostly a question and answer format with Frank Dutton asking for details about the investigation. The docket was handed to the PCLU of the NPA on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.	Minutes of meeting dated July 2014 (Annex **TN21.2**
11 August 2014	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC seeking an affidavit from the family's private investigator affidavit setting out what investigation he had conducted.	Letter from Colonel Xaba Commander, Crimes Against the State, DPCI tc LRC dated 11 August 201 (Annex **TN35**)
9 September 2014	In a letter dated 9 September 2014 the LRC advised Col Xaba that Frank Dutton took no statements.	Letter from the LRC to Co Xaba dated 9 September 2014 (Annex **TN36**)

TP 17

10 September 2014	Col Xaba indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit from Frank Dutton.	Letter from Col Xaba to the LRC dated 10 September 2014 (Annex **TN37**)
16 September 2014	Frank Dutton supplied the requested affidavit to Col Xaba	Email with attachment from LRC (on behalf of Frank Dutton) to Col Xaba (Annex **TN21.23**)
25 September 2014	Col Xaba requests information on Thembi's family members who were studying in Swaziland	Letter from Col Xaba to the LRC dated 25 September 2014 (Annex **TN38**)
22 October 2014	Col Xaba requested further information and an affidavit from the applicant	Letter from Col Xaba to the LRC (Annex **TN39**)
20 January 2015	The applicant hands her affidavit to Captain Masegela	Email from the applicant
26 February 2015	Col Xaba indicated that investigations are ongoing.	Email sent from Col Xaba to the LRC and SALC (Annex **TN40**)
9 April 2015	Lt Col M S Mahlangu, Commander, Crimes Against the State, Directorate for Priority Crime Investigation advises that the case docket has been forwarded to the NPA for decision	Letter from the DPCI to th LRC (Annex **TN41**)

44. It is evident from the correspondence entered into with the first respondent that no decision has been taken to prosecute or not to prosecute the known suspects. It is also evident that no decision has

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been taken to refer my sister's case to a formal inquest. Although the police have advised that the docket has been referred to the NPA I have no faith in the NPA taking a decision timeously or at all.

Political constraints

45. I submit that the first and second respondents and their respective officials dealing with my sister's case, as well as other so-called political crimes, have been subject to certain political constraints or pressures. Such constraints and pressures have served to shape the approach or policy of the first and second respondent and their responsible officials in relation to the so-called political cases. Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to my sister's case and other so-called political cases, questionable, if not unlawful. It also serves to explain the inordinate delay in finalizing the investigation of my sister's case.

46. This policy or approach is evidenced by the following steps aimed at ensuring a measure of political control over prosecutorial decisions dealing with so-called political cases arising from the past:

46.1. The undated 2004 secret report, titled "Report: Amnesty Task Team", which was disclosed during the proceedings in the matter

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of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07), annexed hereto marked **"TN42"**, revealed that:

46.1.1. The government Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed an "Amnesty Task Team" ("ATT") to consider and report on, amongst other things, a future process for the "*consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past*".

46.1.2. The ATT was concerned about "*the absence of any guarantees that alleged offenders will not be prosecuted*" (Report of the task team, 3.2.4(c));

46.1.3. The Amnesty Task Team recommended the creation of a Departmental Task Team comprising members of the Department of Justice and Constitutional Development, the Intelligence Agencies, the South African National Defence Force, the South African Police Service, Correctional Services, the National Prosecuting Authority and the Office of the President. The functions of the proposed Task Team would be to:

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46.1.3.1. consider the advisability of the institution of criminal proceedings for an offence committed during the conflicts of the past and make recommendations to the National Director of Public Prosecutions;

46.1.3.2. consider applications received from convicted persons alleging that they had been convicted of political offences with a view to making recommendations for parole and pardon;

46.1.3.3. evaluate prosecution decisions in relation to crimes arising from conflicts of the past and make recommendations to the president in terms of a proposed "Indemnity Act" (Report of the task team, 3.2.2, R441 – R445, read with "annexure B" thereto).

46.2. Some of the ATT's report was accepted by government and implemented, as is evidenced by the 2005 amendments to the Prosecution Policy made under section 179 of the Constitution and the introduction by President Mbeki of a Special Dispensation for Political Pardons in 2007. The amendments to the Prosecution Policy incorporated certain of the recommendations of the ATT. The amendments specifically allowed for the involvement of the executive in the decision-

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making of the prosecution authorities. Paragraph 6 of Part B stated that "*the PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA: (a) the NIA; (b) the Detective Division of the SAPS; (c) The Department of Justice; and (d) the DSO*". In addition, the NDPP was required to inform the Minister of Justice of any decision taken (Amended policy, Part B, para 10).

47. While the amendments to the Prosecution Policy were found by the courts to be manifestly unconstitutional and unlawful, they nonetheless firmly signalled to the first and second respondents, and their officials, the approach or policy of government. This approach indicated in no uncertain terms that the so-called political crimes, regardless of how serious, were not to be treated in the same way as other serious crimes. It is submitted that few with an eye on the future would have defied the government in this regard.

48. The apparent rationale behind the government's approach was disclosed during the proceedings of the Ginwala Commission of Inquiry into the fitness of the then NDPP, Advocate. Vusumzi Patrick Pikoli ("Pikoli"), to continue in office. During May 2008 Adv. Pikoli filed an affidavit with the Ginwala Commission which in part dealt with the cases referred by the TRC to the NPA. Pikoli relayed how cabinet ministers and the then National Commissioner of Police were

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concerned that the then head of the PCLU, Adv Anton Ackermann would launch cases against ANC members. The relevant extracts of Adv. Pikoli's affidavit filed before the Ginwala Commission is annexed hereto marked "**TN43**". A full copy of his affidavit before the Ginwala Commission can be supplied on request. This is an unsigned copy of the final version but Adv. Pikoli confirms that this version served before the Ginwala Commission. In particular Adv. Pikoli gave an account of a meeting that took place in 2006 attended by himself and various cabinet ministers at paragraph 247 of his affidavit:

> **"Some time later a meeting was convened at the home of Minister Skweyiya, the Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr Jafta. The meeting was called by Acting Minister Didiza and I was told that it related to the prosecution in the Chikane matter. It was originally suggested that Advocate Ackermann accompany me to the meeting but I elected to go on my own in order to establish what the concerns were.**
>
> **It transpired at the meeting that:**
>
> > **The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of**

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whether it was Advocate Ackermann or me who was behind the decision to prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

49. In his supporting affidavit (annexed hereto as **TN7**) and in his *in camera* affidavit (contained in the *in camera* record), the former NDPP, Advocate Pikoli, confirms that there was political interference that effectively barred the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including my sister's case. The former head of the PCLU, Advocate Anton Ackermann SC, confirms in his supporting affidavit (annexed hereto as **TN8**), that he was effectively stopped from pursuing the TRC cases, inclusive of Nokuthula's case. Both Advocates Pikoli and Ackermann state that it was no coincidence that there has not been a single prosecution of any TRC matter since Adv. Pikoli's suspension from office and the

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removal of the TRC cases from Adv. Ackermann SC in September 2007.

50. The underlying rationale of the Government's opposition to the pursuit of the so-called political cases is disturbing. I submit that such manipulation of the criminal justice system for the purpose of protecting "cadres" from prosecution, serves an ulterior purpose, constitutes bad faith, is irrational and amounts to a subversion of the rule of law.

Public release of the Pikoli Memorandum

51. Advocate Pikoli has filed both an open court affidavit and an *in camera* affidavit. Attached to the latter affidavit is a memorandum in question is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 ("the memorandum"). It was annexed to Adv. Pikoli's affidavit before the Ginwala Commission.

52. In this memorandum, which was addressed to the then Minister of Justice, Adv. Pikoli concluded that there had been improper interference in relation to the TRC cases and that he had been

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obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. He indicated that he was no longer able to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.

53. As Adv. Pikoli had marked this memorandum as an "*internal secret memorandum*" it is currently not attached to his open court affidavit. It is attached it to an *in camera* affidavit that is annexed to the supporting affidavit of Adv. Pikoli, which will be filed separately and served only on the first and third respondents as they are already in possession of the memorandum. The Registrar of this Honourable Court will requested not to make the *in camera* affidavit available to the public, unless this honourable Court authorizes its release.

54. I submit that it ought to be made available to the other respondents, as well as the public, for the following reasons:

54.1. The issues and complaints raised in the memorandum have already been discussed in the body of Adv. Pikoli's affidavit filed before the Ginwala Commission, which has been part of the public record since 7 May 2008, and which was also part of the court record in the matter of *Nkadimeng & Others v The National*

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Director of Public Prosecutions & Others (TPD case no 32709/07).

54.2. There is nothing in the memorandum that implicates or impairs national security.

54.3. Since the memorandum demonstrates unlawful conduct it cannot be prejudicial to the security or other interests of the Republic.

54.4. The disclosure of the memorandum is warranted since it reveals evidence of a substantial failure to comply with the law and the Constitution. The public interest in the disclosure of the memorandum far outweighs any contemplated harm, inconvenience or embarrassment.

54.5. The interests of justice demands the disclosure of the memorandum, not only to the other respondents, but also to the public at large.

LEGAL FRAMEWORK GOVERNING PROSECUTIONS AND INQUESTS

55. This section briefly sets out the relevant legal framework governing prosecutions and inquests in South Africa and seeks to determine whether a duty rested upon the NPA to take a decision in my sister's case and when such a decision should be taken.

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56. Section 179(1) of the Constitution establishes a single national prosecuting authority in the Republic. Subsection (2) provides that "*The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.*" The relevant statute is the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), which must be read together with Chapter 1 of the Criminal Procedure Act ("the CP Act").

57. The prosecution policy issued in terms of section 179(5)(a) and (b) of the Constitution read with section 21(1) of the NPA Act must be observed in the prosecution process. The preface to the Prosecution Policy asserts, *inter* alia:

> **Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.**
>
> **Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.**

58. While emphasising the need for prosecutorial discretion in every case, the Prosecution Policy sets out the relevant considerations which should inform any decision to institute or review a prosecution or to discontinue proceeding. The Policy Directives issued in terms of s

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179(5)(b) of the Constitution and s 21(1)(b) of the NPA Act do not specifically set out any timelines or guidelines as to when decisions to prosecute or not should be taken. Part 17 does, however, note a prosecutor's obligation to ensure the accused is tried without unreasonable delay.

59. Paragraph 4(c) of the Prosecution Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction a prosecution should normally follow, unless the "public interest demands otherwise". The policy further provides that when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.

60. In my sister's case, the NPA has failed to take a decision whether to prosecute or not. Moreover it has failed to take a decision on whether to institute an inquest. The taking of such decisions would have addressed the rights of me and my family and commenced the process of closure. The failure to take such decisions over such prolonged period of time has destroyed whatever confidence we once had in the NPA in particular and the criminal justice system in particular.

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Inquests

61. Inquests in South Africa are governed by the Inquests Act 58 of 1959 ("the Act" or "the Inquests Act") which also governs the procedure when a death or alleged death occurs. In terms of section 4, a policeman investigating the circumstances of death or alleged death must submit a report to the public prosecutor who may call for additional information if necessary.

62. The Act provides at section 5 that "*If criminal proceedings are not instituted in connection with the death, or alleged death, the public prosecutor referred to in section 4 shall submit those statements, documents, and information submitted to him to the magistrate of the district concerned.*"

63. The prosecutor who received the report from the investigating officer has essentially two options: either to institute criminal proceedings or to submit the information to the magistrate of the district. There is no time period specified for these decisions.

64. If it appears to the magistrate that the death occurred due to unnatural causes the magistrate must ensure that an inquest is held by a judicial officer in terms of section 6. According to section 16(2), the judge or magistrate must make a finding as to the identity of the deceased person, the cause or likely cause of death, the date of death and

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whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person.

65. If the judicial officer finds that the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of the any person, the judicial official has a duty to "*cause the record of proceedings to be submitted to the attorney general.*"

66. In terms of section 17(2) of the Act the NDPP has a discretion to order the judicial officer to re-open the inquest to take further evidence or to open criminal proceedings against any person suspected of being criminally responsible for the death. The Minister may, in terms of section 17A, and also on the recommendation of the NDPP request a judge president to designate a judge of the SCA to re-open the inquest.

67. Under section 21(1) of the Act an inquest cannot take place, if a criminal prosecution has been instituted or the judicial officer has knowledge that a prosecution is to be instituted. However, as spelt out in s 21(2), an inquest does not preclude a prosecution from taking place at a later stage and the outcome of an inquest may provide information necessary to initiate a prosecution. Section 21(2) of the Inquests Act allows inquest proceedings to be stopped if criminal proceedings have been, or will be instituted.

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68. I am advised that, contrary to the repeated assertions of the first respondent, section 5 of the Act does not require that a final decision not to prosecute be made before a matter is referred to an inquest. This follows as a matter of logic and law as per the scheme of the Act.

69. Ultimately the purpose of an inquest is to promote public confidence in the administration of justice and to reassure the public that all deaths from unnatural causes will be properly investigated. Inquests are also aimed at ensuring that appropriate measures can be taken to prevent similar deaths from taking place in the future. Finally, inquests are conducted so that the perpetrators of such deaths may, as far as possible, be brought to justice.

THE DELAY IS UNREASONABLE

70. My sister disappeared more than 30 years ago and the investigation docket has been in existence for some 18 years. The docket has been with the NPA for nearly 14 years and with the PCLU for some 11 years. It was referred to Advocate Chris Macadam in the PCLU in 2010 and has been under his control for some 4 years. It appears from correspondence received from the SAPS and the NPA during 2013 that here has been little or no investigation for the bulk of all these time periods. There can be no doubt that the delays have seriously undermined the prospects not only of a successful prosecution, but also the prospects of getting to the truth and recovering of Nokuthula's

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remains.

71. While I accept that my sister's case presented some challenges for investigators I am advised that such challenges were not unduly complex; and certainly did not justify the prolonged delay in taking a prosecutorial decision or referring to an inquest. In this regard I refer this honourable court to the affidavit of Frank Dutton annexed hereto as **"TN 4"**.

72. In this matter the first respondent points to another body, namely the SAPS, for failing to timeously perform its investigative functions. However Nokuthula's case, as with the other TRC cases, was referred to the NPA and it is the NPA that has the ultimate responsibility to take a decision and it should have taken the necessary steps in order to place itself in a position to do so within a reasonable time. After such long periods of delay neither the NPA nor the SAPS may put up systemic causes to explain their dereliction of duty.

73. It has been 18 years since the docket was opened in this matter. It may have been justifiable to have held back the investigation or decision while the TRC amnesty process was ongoing and before an amnesty finding had been made. However, more than 13 years have elapsed since the amnesty decision was handed down on 23 May 2001. The fact that this matter has been outstanding for more than three decades speaks to the gross neglect of the relevant authorities

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and the unreasonableness of the delay.

68. I submit that in the circumstances of my sister's case the matter ought to have been investigated years, if not decades ago. Similarly a prosecutorial decision or a referral to an inquest should have taken place many years ago. A prolonged and ongoing failure to take a decision, as in my sister's case, results in the *de facto* situation that criminal proceedings are not instituted, which satisfies the threshold set out in the Inquest Act.

69. A prolonged and ongoing failure to either prosecute or refer to an inquest serves to defeat the objects and underlying rationale of the power to prosecute under the Constitution, the Prosecution Policy, the Policy Directives and the power to refer to an inquest in terms of the Inquest Act.

70. Such delays reinforce the view held by me, my family and in many communities that serious crimes of the past do not receive any diligent attention from the authorities and indeed have been singled out for neglect. It also reinforces the likely views of the perpetrators that they need not fear any repercussions for crimes such as murder, so long as they have a political flavour.

GROUNDS FOR RELIEF

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71. I submit that my family and I have a right to have my sister's case referred to an inquest, alternatively to a prosecutorial decision. I submit that I furthermore have a right to one or other of such decisions within a reasonable time period. My rights are premised upon the following grounds:

71.1. The interests of justice and the need to prevent a grave injustice;

71.2. The constitutional obligation to act without delay;

71.3. My entitlement under the Constitution to have various rights respected, including our rights to human dignity and equality;

71.4. The rule of law, incorporating the principle of legality;

71.5. Various provisions of PAJA;

71.6. The special responsibility to pursue cases arising from the TRC process;

71.7. South Africa's international law obligations

<u>The interests of justice</u>

72. I am advised that the superior courts of South Africa have certain inherent powers to be exercised in the interest of the proper administration of justice. This includes when it may be necessary to act in order to prevent a grave injustice.

73. I submit that the exceptional circumstances of this case warrant the

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exercising of the Court's inherent powers to order the holding of a formal inquest before the High Court. This is because there was a clear duty of the NPA to refer this matter to an inquest in the context of an inordinate delay. This delay was the product of the wilful or negligent inaction or obstruction by the State's prosecutorial and policing authorities. The delay was compounded by the failure of the said respondents to conclude its criminal investigation despite clear evidence that the investigation was not capable of further progress.

Constitutional obligation to act without delay

74. I am advised that there is a constitutional obligation on the NPA and the SAPS to perform their duties without delay. Section 237 of the Constitution provides "*All constitutional obligations must be performed diligently and without delay.*" Both the decision to institute a prosecution and the decision to not prosecute involve the exercise of constitutional powers and therefore constitute constitutional obligations.

75. I submit that accountable governance and social trust are built upon decision making by public officials which are reasonable and responsive. The failure to afford me and my family a basic investigative process followed by a reasonable prosecutorial decision

TP M

making process has denied us our substantive rights. These rights are set out below.

Human Dignity

76. The unreasonable delay in investigating this case and the prolonged delay in taking a prosecutorial decision; or referring the case to an inquest has violated my right to dignity. Such lapses have denied me and my family, as well as that of our wider community, the acknowledgement of our intrinsic worth as human beings.

77. The conduct of the responsible officials in the departments controlled by the first and second respondents have denied me a prosecutorial decision or an inquest within a reasonable time period. In so doing they have denied me and my family the possibility of closure of a most painful past. This conduct has breached our rights to human dignity.

78. The inordinate delay in taking steps to investigate the known suspects responsible for my sister's torture and disappearance has disrespected my family's rights as victims. The conduct of the NPA and SAPS and at times, the express statements of the NPA, indicate that the matter in this case has not been attended to with any urgency. No adequate explanation has been provided for these lapses.

79. Moreover the allegations made by the perpetrators who abducted my

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sister that she was turned and became an informant remain unsettled. Such scurrilous claims ought to be the subject of an official investigation and an official finding. The delay in making such a finding has seriously offended my human dignity and that of my family.

80. Ultimately, the prolonged delay infringes upon my right to dignity and that of my family in that it:

80.1. protects the perpetrators responsible for the kidnapping, torture and enforced disappearance of my sister at the expense of me and my family;

80.2. causes suffering to me and my family by denying us justice without undue delay;

80.3. prevents me and my family from reaching closure;

80.4. dishonours the respect, dignity and value of my family in the wider community

80.5. demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") and by undermining the purpose and spirit behind the TRC amnesty process.

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Right to life

81. The right to life as protected in section 11 of the Constitution is infringed as the prolonged delay has severely undermined the prospects of a successful investigation and prosecution of the perpetrators who infringed this right by committing acts of murder and enforced disappearance. The delay has also devalued the life of the disappeared person.

Right to freedom and security of the person

82. The prolonged delay violates the right to freedom and security of the person enshrined in Section 12 by undermining and retarding the investigation of perpetrators who violated the freedom and security of Nokuthula; by committing acts of torture, assault and other cruel and inhuman treatment.

Right to equality

83. The prolonged delay, and failure to take forward the so-called political cases of the past, including Nokuthula's case, violates the right to equal protection and benefit of the law enshrined in Section 9 by

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unjustifiably discriminating against the victims of this class of crimes.

Rule of law

84. The fact that serious crimes from the past, such as the kidnapping, torture and likely murder of my sister, have not been treated with any seriousness, implicates the rule of law, upheld in section 1 of the Constitution.

85. Crime, particularly serious crime, undermines the fabric of our society and violates, amongst other rights, the right to life, the right to freedom and security and the right to dignity. The State has a constitutional duty to address crime which arises from its duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'

86. Serious crime committed by agents of the State should be viewed in a particularly serious light. The perpetrators of such crime are often shielded from justice. During apartheid the perpetrators of state sponsored crime enjoyed almost total impunity. The failure of the new South African State to timeously investigate such cases, particularly those cases in which amnesty was denied or not applied for, gives rise to an appearance of political deal making or tolerance of such crimes.

87. The rule of law requires that the laws creating crimes must be obeyed; and that there cannot be favouritism exercised for the prosecution or

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non-prosecution for any breach of the law.

88. I submit that in the light of the fact that so few victims of serious crimes arising from past conflicts have seen justice done through the courts, it is essential that on those occasions when such crimes can be prosecuted, that they be pursued effectively and expeditiously.

Principle of Legality

89. I am advised that the failure by the NPA to take a decision is subject to the principle of legality. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith. Such decisions may not be arbitrary and must be rationally related to the purpose for which the power was given.

90. I submit that the conduct of the first respondent and its officials in respect of my sister's case is not only irrational but may have been mala fides or deployed for ulterior purposes.

91. The NPA is granted the power to make decisions whether to prosecute in order to ensure that justice is done for victims, victim's families and the wider community. My sister's case was not pursued by the first respondent and his officials, notwithstanding repeated demands, requests and pleas over many years. Such conduct is not rationally

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connected to the purpose for which the prosecutorial power was granted.

92. Since 2013 further delays have been caused by the NPA's insistence that it wait for the apparent completion of all aspects of the investigation. This insistence, together with its failure to demand results from the SAPS is at odds with the aforesaid purpose. The latest delay jeopardises the possibility of a successful conviction. There can be little doubt that in these circumstances the delay is both excessive and irrational.

93. There are extremely important policy reasons for taking a decision to prosecute or not within a reasonable time. This obligation is not only inferred as part of rational decision-making but is required in terms of the NPA's own Prosecution Policy which states that the maintenance of law and order within a human rights culture requires "*effective and swift prosecution*".

94. In the circumstances the gross delay in making a prosecutorial decision constitutes an improper exercise of the NPA's discretion.

95. Aside from the irrationality of the delay it appears that such delay may be the result of conduct or decision making exercised in bad faith or for an ulterior purpose. As mentioned above under the heading "Political constraints" the State put in place measures in order to manipulate,

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control or obstruct prosecutorial decisions dealing with the political cases of the past. Aside from such measures constituting a gross encroachment on the independence of the NPA they serve to explain why the TRC cases or the political cases from the past have been treated so differently from non-political cases; and have suffered such terrible neglect.

The delay is in conflict with PAJA

96. The delay and failure to take a decision are inconsistent with the following provisions of Promotion of Administrative Justice Act 3 of 2000 (PAJA):

96.1. section 6 (2) (f) (ii) of PAJA in that they are not rationally related to the purpose of the first respondent's, namely the effective prosecution of crime without fear, favour or prejudice.

96.2. section 6 (2) (h) in that they are unreasonable, alternatively, irrational. This is so because the effect of such conduct is to assist the perpetrators to escape justice.

96.3. section 6 (2) (c) in that such conduct was procedurally unfair. This is so because the first and second respondents strung me and my family along over many years giving us the impression that they were doing their legally mandated jobs when they were

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not.

96.4. section 6 (2) (d) in that such conduct was materially influenced by an error of law insofar as agents of the first respondent claimed that they were obliged to suspend action on all of the so-called political cases while a standardized policy on such cases were being developed (the amendments to the Prosecution Policy issued in December 2005). In fact there was no legal authority for the suspension of such cases.

96.5. section 6 (2) (e)(ii) and (iii) in that such conduct was carried out for an ulterior purpose or motive; or because irrelevant considerations were taken into account or relevant considerations were not considered. This is so because it appears from the section titled "Political constraints' that political or irrelevant considerations interfered with the approach of the first respondent to the TRC cases resulting in their neglect or abandonment.

96.6. section 6 (2) (e)(iv) in that such conduct was carried out as a result of the unauthorised or unwarranted dictates of another person or body, in that it appears from the section titled 'Political constraints', that persons outside the NPA brought considerable pressure to bear on the first respondent and/ or officials within the NPA to treat the so-called political cases differently from other

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cases, resulting in their neglect.

96.7. section 6 (2) (e)(v) and (vi) in that such conduct was carried out in in bad faith; or arbitrarily or capriciously. This is so because it appears from the section titled 'Political constraints' that political interference in relation to the so-called political cases resulted in both the first and second respondents not treating such cases with any urgency or diligence. In so doing they acted in bad faith or capriciously.

96.8. section 6 (2)(h) in that the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. This is so because my sister's case involves very serious crimes of kidnapping and murder; is more than 30 years old; and the first and second respondents, and/ or their responsible officials, have known since the mid-1990s who the perpetrators are. Nonetheless they saw fit to evade their legal responsibilities and only commenced with serious investigations in early 2013 when I sought the immediate holding of an inquest.

97. I am advised that section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 provides that the "*failure to take a decision*" as a

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specific ground of judicial review. As I have demonstrated above the first respondent has a duty to take a decision whether to prosecute or not; or refer to an inquest. Indeed whenever the NPA is in possession of a docket, particularly a docket involving a serious crimes such as kidnapping and murder, it has a duty to take a decision, as described above.

98. Although no law prescribes a period within which the first respondent is required to take such decisions I have also demonstrated that the delay has been grossly unreasonable in the circumstances, which is a further ground of review provided for in section 6(3) of PAJA.

99. I am advised that in terms of section 7 (1) of PAJA, judicial review proceedings brought in terms of section 6 (1) must be instituted within 180 days after the date upon which the person concerned "was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and reasons. I submit that the impugned action is ongoing in that the delays complained of and the failure to make decisions persist to this day. Accordingly this application complies with section 7(1).

Obligations arising from the TRC process

100. Initially, my family and I were very positive about the TRC process and

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its implications for reconciliation in South Africa. At the time, we felt that it did not matter if the perpetrators were not prosecuted, as long as they told the truth and showed remorse for what they did and helped my family to find Nokuthula's remains so that we could bury her properly.

101. As mentioned above we were disappointed with the amnesty process of the TRC. Nonetheless we assumed that the refusal of Coetzee, Pretorius, Mong's amnesty applications meant that they would be investigated for their role in Nokuthula's torture and likely murder.

102. The historic compromises that gave birth to our democracy with its enshrined freedoms required certain sacrifices, particularly on the part of victims. These sacrifices were demanded in order to advance national unity and reconciliation. Perpetrators were given an opportunity to escape justice, both criminal justice and civil liability, as long as they came clean. Victims would have to accept these outcomes. This compact was reflected in the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("the Interim Constitution") as well as the TRC Act. However where perpetrators offered only lies, deceit, half-truths and a wall of silence they were meant to face consequences. Accordingly, both a moral and legal obligation arose to follow up such cases. In this regard I refer to the affidavits of Alexander Lionel Boraine and Dumisa Ntesebeza filed evenly herewith.

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103. My family and I accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. We did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept in Nokuthula's case and indeed in most of the arising from the conflicts of the past. This failure has served to defeat the purpose behind South Africa's historic compromises and has rendered largely meaningless the entire truth for amnesty program. It has become an effective or *de facto* blanket amnesty. It stands as a betrayal of all of us who participated in good faith in the TRC process.

Violation of South Africa's international law obligations

104. The delays and failure to take a decision are substantively unconstitutional and invalid in that they constitute an infringement of the international law obligations of the Republic of South Africa, as set out in sections 231 to 233 read with section 39(b) of the Constitution, to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

105. The delays and failure to take a decision violate the following international law instruments:

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105.1. Article 2(3), read with article 2(1), of the International Covenant for Civil and Political Rights ("ICCPR") by denying victims and their families an effective criminal justice remedy;

105.2. Article 6(1), of the ICCPR by permitting those who have violated the right to life to escape justice and punishment;

105.3. Article 7 of the ICCPR by contravening the duty to hold the perpetrators of torture or cruel, inhuman or degrading treatment or punishment responsible for their actions;

105.4. Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties;

105.5. Article 7 of CAT by failing to give effect to the requirement that all acts of torture must be submitted to the competent authorities for the purposes of prosecution;

105.6. Article 12 of CAT by failing to ensure that competent authorities promptly investigate, wherever there are reasonable grounds to believe that an act of torture has been committed;

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105.7. Article 13 of CAT by failing to uphold the right of those who allege torture to have their cases promptly and impartially examined by competent authorities;

105.8. Article 14 of the Declaration on the Protection of all Persons from Enforced Disappearance (Adopted by General Assembly resolution 47/133 of 18 December 1992) by failing to bring the perpetrators behind my sister's disappearance before the competent authorities for the purpose of prosecution and trial.

105.9. Article 3(g) of the Constitutive Act of the African Union by failing to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights; and articles 4(m) and (o) of the said Constitutive Act by failing to reject impunity and uphold the rule of law.

105.10. Article 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Dec. 16, 2005) by not affording me and my family "equal and effective access to justice"; as well as article 4 by not investigating my sister's case and prosecuting those responsible.

COMPELLING THE FIRST RESPONDENT

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106. I submit that I have demonstrated the unlawfulness of the delays and the ongoing failure to make a prosecutorial decision or to refer Nokuthula's case to an inquest. I have also demonstrated the serious undermining of the prospects of justice and the reaching of the truth with every day that goes by. In the circumstances I have established a clear right to the making of a prosecutorial decision in Nokuthula's case, alternatively a clear right to have her case referred to a formal inquest.

107. I submit that I have demonstrated that the delays and the failure to take the said decisions have infringed my constitutional rights and that further delay will seriously prejudice my rights and that of my family. I have accordingly established a reasonable apprehension of injury.

108. The stress and trauma that we have endured for decades will be considerably magnified by any further delays. My mother is elderly and is troubled by ill-health. Witnesses and potential accused are getting elderly and some may not live for much longer. In the circumstances, I submit that I have amply demonstrated that the balance of convenience favours me and my family and that we will suffer irreversible harm by any further delays.

109. I submit that that I have no other viable or alternative remedy. I have exhausted all avenues of persuasion. Many years of knocking on

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doors and pleading for action has fallen on deaf ears. No civil remedies can deliver the justice and the truth that my family and I seek.

SHORTENED TIME PERIODS

110. My family and I have exercised considerable patience and restraint over the last three decades. Once the docket had been opened by the SAPS, and particularly when the amnesty applications of the perpetrators had been finalized, and the matter handed over to the NPA, we expected action to be taken. We lived in hope that the next week or the next month, or failing that the next year, would yield some resolute action on the part of the authorities.

111. We did not wish to go the huge effort of launching an application to court needlessly. This is why we have waited so long. However, we cannot wait any longer. If the responsible agencies cannot or will not make a prosecutorial decision after such a long effluxion of time then we should be allowed to reach closure by being granted a formal inquest before the High Court.

112. With every day that goes by the prospects of justice or reaching the full truth and finding the remains of Nokuthula are seriously undermined. My mother is now elderly and not well. Witnesses and possible accused are also elderly and some may be approaching their last

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years. This ground alone justifies urgency or at least shortened time periods for the purposes of filing of papers and the hearing of this matter.

Wherefore I pray that the Honourable Court grants the relief as set out in the Notice of Motion.

THEMBISILE PHUMELELE NKADIMENG

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at JOHANNESBURG on this the 18 day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

TREVOR BAILEY ATTORNEY
82 KILKENNY ROAD
PARKVIEW 2193
JOHANNESBURG
RSA.

ANNEXURES to NKADIMENG FOUNDING AFFIDAVIT

TN #	Description of Annexure	Paragraph(s) Cited
1	Confirmatory affidavit of Sizakele Simelane (mother)	1
2.	Confirmatory affidavit of Antonio Lungelo Simelane and	1
3	Confirmatory affidavit of Junior Mzwandile Nkosinathi Simelane	1
4	Supporting affidavit of Frank Dutton, former Chief Investigator of the Directorate of Special Operations	5,
5	Supporting affidavit of Dumisa Ntsebeza, Advocate SC, former TRC Commissioner and Investigation Unit Head	5
6	Supporting affidavit of Alexander Boraine, former Deputy Chairperson of the TRC	5
7	Supporting affidavit of Vusi Pikoli, former NDPP	5
8	Supporting affidavit of Anton Ackermann, former NDPP	5
9	TRC news release dated 24 June 1999 re: Brigadier Schoon's application for amnesty in respect of crimes committed against Simelane	34.7.1
10	Findings of the TRC Amnesty Committee (AC/2001/185) in relation to the amnesty application of the perpetrators, dated 23 May 2001 [**NOTE**: This document is also referred to as "TRC Amnesty Committee Finding AC/2001/185" in the Investigative Timeline.]	34.14, 34.28, Investigative Timeline
11	Sowetan newspaper report #1 re: Simelane's disappearance, dated 27 January 1995	34.19, Investigative Timeline
12	Sowetan newspaper report #2 re: Simelane's disappearance, dated 6 February 1995	34.19
13	Annexed to *in camera* founding affidavit	34.21
14	Annexed to *in camera* founding affidavit	34.21
15	Warning issued to Respondent Coetzee regarding his rights in terms of section 35 of the Constitution in respect of Simelane's murder	34.25
16	Transcript of "victims' hearing" before the Human Rights Violations Committee, dated 3 June 1997	34.26
17	Memorandum from the FHR setting out the basis for the FHR's recommendations, dated 18 August 2005	37
18	Letter received from the Chairperson of the UN Working Group on Enforced or Involuntary Disappearances, dated 24 July 2014	39
19	Applicant's opinion piece in the City Press, dated 26 December 2013	39
20	Letter from Applicant to the Acting NDPP requesting that the Simelane case be referred to a formal inquest before the High Court, dated 29 January 2013	41
21	Annexed to *in camera* founding affidavit	
22	Evidence of former Sergeant Veyi	Investigative Timeline
23	"Report for the Office of the National Director of Public Prosecutions" dated 7 March 1999.	Investigative Timeline

TP M

TN #	Description of Annexure	Paragraph(s) Cited
24	Mention of Simelane in TRC report Volume 2, Chapter 3 para 278 - 280; 287 – 292	Investigative Timeline
25	Mention of Simelane in TRC report Volume 6, Chapter 1 para 197 – 206	Investigative Timeline
26	Mention of Simelane in TRC report, Volume 6, Chapter 2 para 50 – 71	Investigative Timeline
27	Simelane listed as disappeared in Volume 7 (extracts)	Investigative Timeline
28	Presidential Proclamation creating the PCLU	Investigative Timeline
29	About PCLU document	Investigative Timeline
30	Appendix A, National Prosecution Policy, dated 1 December 2005	Investigative Timeline
31	Letter from Legal Resource Centre (LRC) to NPA dated 31 July 2013	Investigative Timeline
32	Letter dated 5 August 2013 from LRC to Acting NDPP responding to Adv Macadam email dated 31 July	Investigative Timeline
33	Letter from LRC to the NDPP, dated 10 July 2014	Investigative Timeline
34	Letter from LRC to National Head: DPCI, dated 10 July 2014	Investigative Timeline
35	Letter from Colonel Xaba, Commander, Crimes Against the State, DPCI to LRC, dated 11 August 2014	Investigative Timeline
36	Letter from the LRC to Col Xaba dated 9 September 2014	Investigative Timeline
37	Letter from Col Xaba to the LRC dated 10 September 2014	Investigative Timeline
38	Letter from Col Xaba to the LRC dated 25 September 2014	Investigative Timeline
39	Email from Col Xaba to the LRC dated 22 October 2014	Investigative Timeline
40	Email sent from Col Xaba to the LRC and SALC dated 26 February 2015	Investigative Timeline
41	Letter from DCPI to LRC dated 9 April 2015	Investigative timeline
42	Undated 2004 secret report, titled "Report: Amnesty Task Team"	46.1
43	Relevant extracts from the affidavit of Vusumuzi Patrick Pikoli, former NDPP, before the Ginwala Commission	47

TP 1

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103

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent

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L.M

FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

SIZAKELE ERNESTINA SIMELANE

state under oath as follows:

1. I am Sizakele Ernestina Simelane. My identity number is 401209 0309 080. I am the mother of the late Nokuthula Aurelia Simelane ("Nokuthula"). I am also the mother of the applicant in this matter, Thembisile Phumelele Nkadimeng ("Thembi").

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I endorse the application launched by Thembi to bring closure and finality to the case of Nokuthula. I confirm the contents of Thembi's affidavit insofar as they pertain to me and my family.

TP 07 SES L.M

4. Nokuthula was my first child. I gave birth to her when I was 20 years old. I am now 75 years old. Nokuthula's father and my husband, Matthew, died in 2001. He never found out what happened to our daughter. We still don't know what happened to her. We have endured daily agony since her disappearance in 1983.

5. We have not been able to bury Nokuthula's remains with the dignity and respect that she deserves. I desperately want to do this before I die. Until we can do this my family and I will have no closure.

6. We know that she was abducted and brutally tortured by the Security Branch of the former South African Police. We know that she refused to collaborate with the apartheid security forces. It is likely that she was murdered by these members. We know that it was routine practice for the Security Branch to murder their captives if they refused to collaborate and to conceal their remains in a manner that made discovery unlikely, if not impossible.

7. We have tried to find out what happened but we do not have answers. I do not know why the responsible Security Branch officers have cruelly refused to disclose the whereabouts of her last resting place. Their obstinate refusal has caused my family and I to suffer indescribable pain for more than 30 years. They should be required to face the consequences, not only for their crimes, but also for their wilful and malicious withholding of the truth.

8. We expected that with liberation a new post-apartheid government would stand with us to search for the truth and to hold the perpetrators accountable. We were wrong. Rather than standing with the victims, successive post-apartheid governments have gone out of their way to accommodate the perpetrators and shield them from justice.

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9. Our pleas since the mid- 1990s for a proper investigation have fallen on deaf ears. Our queries over the years have simply been deflected with promises of action which have never materialized.

10. When we realized by the beginning of 2013 that the authorities had no intention to seriously pursuing justice in the case of Nokuthula we sought a formal inquest. The prosecutors had the temerity to decline this request on the claim that they were still investigating. In mid-2015 they are apparently still investigating. We have no faith in the SAPS and the NPA. We do not believe that they are acting in the interests of justice in Nokuthula's case.

11. We feel betrayed. Nokuthula was betrayed by one of her own cadres. The TRC's Amnesty Committee granted the white security officers amnesty for kidnapping even though they had found that these same individuals had been untruthful about what they did to her during her captivity, and that they had made the false claim that Nokuthula was cooperating with them. The Amnesty Committee nonetheless granted amnesty to the white officers for kidnapping and in so doing violated the full disclosure principle. We regarded this as an inexplicable betrayal. We then expected the various post-apartheid governments to pursue justice in Nokuthula's case. They turned their backs on us. Prosecutors even refused to investigate those police officers who did not apply for amnesty for the kidnapping of Nokuthula. This included the Commander of Security Branch C1 Section, former Brigadier Willem Schoon, who authorised the crimes committed against Nokuthula.

12. I have suffered emotionally, psychologically and physically as a result of my daughter's disappearance. This suffering has been heightened by the duplicitous conduct of the police and prosecutors who ought to have upheld the rule of law, but, acting at the behest of politicians, deliberately blocked Nokhuthula's case from going forward, as well as other cases from the past. I suffer from a chronic back ache,

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which is caused by nervous tension. The quality of my health has deteriorated immensely. I have suffered pain that is impossible to quantify.

Simelane

SIZAKELE ERNESTINAH SIMELANE

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Bethal on this the 9th day of May 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Mkhwa

COMMISSIONER OF OATHS

LOYISO MCHWA - MAHLANGU
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SES

"TN2"

108

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent

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FREDERICK BARNARD MONG Seventh Respondent

MSEBENZI TIMOTHY RADEBE Eighth Respondent

WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT OF ANTONIO LUNGELO SIMELANE

I, the undersigned

ANTONIO LUNGELO SIMELANE

state under oath as follows:

1. I am Antonio Lungelo Simelane. My identity number is 610915 5760 088. I am the brother of the late Nokuthula Aurelia Simelane ("Nokuthula"). I am also the brother of the applicant in this matter, Thembisile Phumelele Nkadimeng ("Thembi").

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I endorse the application launched by Thembi to bring closure and finality to the case of Nokuthula. I confirm the contents of Thembi's affidavit and the supporting affidavit of my mother, Sizakele Ernestina Simelane, insofar as they pertain to me and my family.

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4. I suffered mentally and emotionally as well as physically as a result of the ongoing disappearance of my sister, Nokuthula. My doctor has diagnosed me with anxiety and depression. I am now on medication for chronic depression. My doctor has also diagnosed me with high blood pressure and diabetes.

5. I am the eldest son in my family. Since my father's death in 2001, I have felt more pressure to be a leader for my family which is difficult in these circumstances. I was admitted to hospital from 30 January to 03 February 2011 for stress related reasons, which resulted largely from the vandalizing of my sister's statue in Bethal. I was admitted to the hospital again from 07 March to 11 March 2011. I am still on medication.

6. Much of my stress derives from the pain of my family.

ANTONIO LUNGELO SIMELANE

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Ermelo on this the 18th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

DANIEL OLIVIER
COMMISSIONER OF OATHS
DEPUTY SHERIFF FOR THE
HIGH COURT ERMELO
c/o Church and Joubert Str
P.O. Box 41, Ermelo, 2350
Tel: 017 819 7542

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"TN3" 111

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent

TP

JMN L.M

FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

SUPPORTING AFFIDAVIT OF JUNIOR MZWANDILE NKOSINATHI SIMELANE

I, the undersigned

JUNIOR MZWANDILE NKOSINATHI SIMELANE

state under oath as follows:

1. I am Junior Mswandile Nkosinathi Simelane. My identity number is 700531 5323 081. I am the brother of the late Nokuthula Aurelia Simelane ("Nokuthula"). I am also the brother of the applicant in this matter, Thembisile Phumelele Nkadimeng ("Thembi").

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

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JMN LM

3. I endorse the application launched by Thembi to bring closure and finality to the case of Nokuthula. I confirm the contents of Thembi's affidavit and the supporting affidavit of my mother, Sizakele Ernestina Simelane, insofar as they pertain to me and my family.

4. I was thirteen years old when I lost my sister. I suffered a lot of pressure emotionally when we lost Nokuthula. I loved her so much. I could not accept that I was not going to see her any more. I still need answers. Life was never the same without her. It will never be the same again.

JUNIOR MSWANDILE NKOSINATHI SIMELANE

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Bethal on this the 9th day of May 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

LOYISO MCITWA - MAHLANGU
Kommissaris van Ede / Commissioner of Oaths
Praktiserende Prokureur / Practising Attorney
R.S.A.
36 Louis Trichardtstraat / Street
Unit 4 Ground Floor Belmont Villas Building
NELSPRUIT 1200

TP 9

"TN 4"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

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AFFIDAVIT

I, the undersigned

FRANK KENNAN DUTTON

do hereby make oath and state:

1. I am a South African citizen with ID Number 4905204085086. I reside at 18 Lawrence Place, Waterfall, 3650, KwaZulu Natal.

2. I am an International policing and investigation expert and provide expertise on a consultancy basis internationally as well as locally. I have played leading roles in complex investigations in South Africa and many other countries. Including Bosnia, Croatia, Kosovo, Sudan (Darfur), Afghanistan, DRC, Cameroon, Uganda, Nigeria, Rwanda, Kyrgyzstan, Liberia, Mozambique, Zimbabwe, Brazil and East Timor. I have 38 years of policing experience in South Africa and I was the first head of the Directorate of Special Operations (also known as the Scorpions).

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3. In 2012 I was awarded the Order of Baobab in Gold by the President of South Africa for my South African and International police work. The citation to this award is as follows:

> *Frank Kennan Dutton: THE ORDER OF BAOBAB IN GOLD. Awarded for his exceptional contribution to and achievement in his investigative work as a dedicated and loyal policeman, for exposing the apartheid government's "Third Force"; for his role in working for peace in KwaZulu-Natal; his international work in investigating and exposing war crimes and crimes against humanity in Bosnia, Kosovo and Darfur; and assisting in establishing the causes of violence in East Timor and Sudan.*

4. The purpose of this affidavit is to assess the investigation into the kidnapping and murder of Nokuthula Aurelia Simelane, ("Nokuthula"). Nokuthula was abducted, tortured and enforceable disappeared by the South African Security Branch ("SB") of the former South African Police ("SAP") in 1983.

5. I conclude that there is no justification for the long delay in finalizing this investigation. I also conclude that there is no acceptable reason why a prosecutorial decision should not have been made in relation to the known suspects. Failing such a decision the matter ought to have been referred to a judicial inquest.

6. In my view, if the investigative and prosecutorial authorities had acted with reasonable diligence, such decisions could have been made more than 10 years ago, if not earlier.

TP 9

7. My outline of my own investigation and my assessment of the police investigation is not exhaustive. Moreover, I have excluded several details that would not be in the interests of justice to include at this stage.

8. In this affidavit I set out:

8.1. My experience and expertise;

8.2. An outline of my private investigation;

8.3. My insight into the police investigation;

8.4. My conclusions on the criminal investigation conducted by the police;

8.5. The versions of the white and black Security Branch officers;

8.6. Various investigative issues; and

8.7. My conclusions on the delay.

EXPERIENCE AND EXPERTISE

9. My experience and expertise is as follows:

9.1. I joined the South African Police on 1 August 1966. After undergoing a year's police training in Pretoria, I was posted to KwaZulu-Natal where I performed general policing duties at Greenwood Park, Glendale and Tongaat police stations.

9.2. Whilst serving at Tongaat in 1971 I was appointed as a detective. Since then I have worked as a detective/investigator for the rest of my career.

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9.3. I was transferred to Pinetown Detective Branch in 1979 and held the rank of Detective Warrant Officer.

9.4. In 1983 I was promoted to a Commissioned Officer. I was appointed as the Head of the Durban West Field Unit. This Unit was responsible for investigating serious violence related cases.

9.5. Political violence escalated in KZN from the mid-1980s and in consequence the unit which I headed investigated many cases of political violence. Hundreds of political violence cases were investigated under my command. Some of these cases exposed the hidden hand of the then South African government and its security forces in instigating and fuelling political violence.

9.6. The most prominent of these investigations was the murder investigation and conviction of Samuel Jamile (the former Deputy Minister of Interior for the KwaZulu Government); and the Trust Feed case in which South African Police Captain Brian Mitchell and several KwaZulu police officers were convicted on thirteen counts of murder. The attempts by generals and other senior officers within the South African Police to cover up this crime were exposed in this case.

9.7. In an address to the OAU Ad Hoc Committee for Southern Africa on 28 April 1992 in Arusha, Tanzania, President Nelson Mandela highlighted [illegible]

TP (17)

Feed case and the contribution that this case had made towards the successful negotiations for a democratic South Africa.

9.8. In 1992 I was appointed to head the KwaZulu-Natal investigation team of the Goldstone Commission. This led to, among other things, the exposure of the workings of the SAP Security Branch's activities under the command of former Colonel Eugene de Kock at Vlakplaas and the role and association of the South African Police top command structure in intimidation, bombings and the murder of political opponents.

9.9. In March 1994, after the Goldstone Commission had published its report on "State Sponsored Violence" implicating senior government Cabinet Ministers and the Command structure of the South African Security Forces I was appointed to serve on a Special Investigation Team headed by the then Attorney General of the Transvaal, Dr D'Oliviera. This Team was charged with conducting criminal investigations into the issues raised by the Goldstone Commission's report. I assisted in debriefing witnesses in Denmark and obtaining comprehensive affidavits from them. This resulted in the arrest of Eugene de Kock and others.

9.10. In August 1994, I was appointed by the Minister of Safety and Security, Sydney Mufamadi, to establish and command the Investigation Task Unit (ITU) to investigate hit squads within the KwaZulu Police. This investigation led to the exposure of a secret Military Intelligence Operation (Code named Operation Marion) in which 200 young Zulu men were trained to act as "Hit

TP 9

Squads". This in turn led to the prosecution (and acquittal) of the former Minister of Defence, General Magnus Malan, and former senior military officials for the murder of 13 people in the 1987 Kwa Makhutha massacre. During this period I was promoted to the rank of Colonel.

9.11. In 1996 President Nelson Mandela seconded me to the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), where I assisted in the ICTY's investigations into genocide, war crimes and crimes against humanity in Bosnia and Croatia. At the end of 1997 I was appointed to head the ICTY Office in Sarajevo where I facilitated all ICTY investigations (including the exhumations of mass graves) in Bosnia.

9.12. In 1998 I was promoted to the rank of Commander (a P5 position) and commanded all field investigations in Albania, Bosnia, Croatia, Kosovo, Macedonia, and Serbia.

9.13. Early in 1999 I facilitated the initial field investigations into the forced evictions of Albanians from Kosovo by the Serb Security Forces. To achieve this I established Investigation Units in Tirana, Albania and Skopje, Macedonia. I headed these initial investigations. These investigations resulted in indictments being issued against President Milosevic and other senior officials for crimes against humanity.

9.14. I returned to South Africa in December 1999 after being recalled by the South African Government and was appointed as a Director General within the Department of Justice and tasked to establish and head the new

TP

Directorate of Special Operations (also known as the "Scorpions") a specialised investigative unit. I remained in this position until my retirement from the South African Government Service in April 2004 after 38 years of service.

9.15. Since my retirement I have worked both internationally and locally as a policing expert and private investigator.

9.16. The work that I have done for the past ten years is summarised below:

9.16.1. I was selected by a United Nations Security Council appointed Commission of Inquiry to investigate and assist the Commission in determining the causes of violence in Darfur during 2004/2005.

9.16.2. I was appointed in 2005 by UN Mission in the DRC (MONUC) to investigate incidents of sexual abuse against women.

9.16.3. I investigated incidents of violence for a Security Council appointed Panel of Experts for Sudan in 2005/2006.

9.16.4. On behalf of the UN Development Program (UNDP) I investigated the cause of an explosion in the living quarters of UN staff members in Afghanistan during 2006.

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9.16.5. I headed an Investigation Team for a Commission of Inquiry appointed by the United Nations General Assembly to determine the causes of violence in East Timor during 2006.

9.16.6. I investigated and recovered missing SAM 6 missiles in Afghanistan during 2007 on behalf of UNDP.

9.16.7. I was selected to serve on a South African panel to review the evidence against South African Police National Commissioner, Jackie Selebi during 2007 and to make a recommendation to the Director of National Prosecutions in respect of prosecution.

9.16.8. I conducted an investigation on behalf of the World Bank into procurement irregularities in the awarding of a multi-billion US$ hydro-electric power contract in the DRC. The contract was shown to be corrupt and was subsequently withdrawn.

9.16.9. I conducted investigations on behalf of UNDP into incidents of serious staff corruption in South Africa, Mozambique, Brazil, Liberia, Cameroon, Ghana, Ethiopia and Zimbabwe at various times between 2006 and 2011.

9.16.10. Working from Geneva I conducted an investigation into embezzlement of funds from the malaria programme of "The

Global Funds" in Kyrgyzstan, India and various African countries in 2009 and 2010.

9.16.11. In September 2011 I was appointed by United Nations Office on Drugs and Crime (UNODC) to conduct an assessment on the Seychelles Police Service.

9.16.12. In January 2012 I was appointed by the Seychelles Government and tasked to re-structure the Seychelles Police Service to bring about a reduction in spiralling national crime. Over a two year period these efforts resulted in a 30% decrease of serious crime in the country; and a significant increase in police productivity.

PRIVATE INVESTIGATION

10. During June 2011 I was retained as a consultant by the family of Nokuthula Aurelia Simelane to inquire into the whereabouts of Nokuthula Simelane who had been kidnapped from the Carlton Centre, Johannesburg in September 1983 by members of the former Security Branch of the South African Police. My investigation was sponsored by the Foundation for Human Rights (FHR).

11. I researched documents provided to me by the family's legal representatives as well as the contents of public records pertaining to Ms Simelane's disappearance. I studied the testimonies before the Amnesty Committee of the TRC in respect of the abduction and assault of Ms Simelane. I also acquainted

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myself with the Truth & Reconciliation Commission (TRC) Report and the TRC findings concerning the Security Branch of the South African Police.

12. I noted the contents of the Amnesty Committee's decision regarding the amnesty applications in respect of Ms Simelane.

13. From the aforementioned information I was able to establish the following:

13.1. For 13 years following her kidnapping in 1983 Ms Simelane was just another "missing person". Her family was left bewildered and traumatised by her sudden and unexplained disappearance. This is despite the fact that the circumstances of her disappearance were officially known to South African Police and Security Branch senior HQ management as well as to police officers within these organisations. No effort was made to communicate this knowledge to the family of Ms Simelane nor was an investigation launched into her kidnapping and disappearance.

13.2. The crimes against Ms Simelane were eventually exposed in 1996 after an appeal for information was published in the City Press. This appeal prompted one of the complicit black SB members, Nimrod Veyi, to come forward and disclose the truth about her disappearance, torture and suspicion of her murder.

13.3. Those who perpetrated crimes against Ms Simelane were given an opportunity of seeking amnesty from the Truth and Reconciliation

Commission in terms of the Promotion of National Unity and Reconciliation Act.

13.4. No one applied for amnesty in respect of her murder.

13.5. The Security Branch members that sought amnesty for her abduction (kidnapping) were granted amnesty for this crime. They are:

13.5.1. W H Coetzee 1st Applicant (TRC Applicant Reference AM4122/96),

13.5.2. A Pretorius 2nd Applicant (TRC Applicant Reference AM4389/96),

13.5.3. J F Williams 3rd Applicant (TRC Applicant Reference AM4375/96),

13.5.4. J E Ross 4th Applicant (TRC Applicant Reference AM4377/96),

13.5.5. F B Mong 5th Applicant (TRC Applicant Reference AM4154/96),

13.5.6. N L Mkhonza 6th Applicant (TRC Applicant Reference AM5420/97),

13.5.7. M M Veyi 7th Applicant(TRC Applicant Reference AM5421/97),

13.5.8. M L Selamolela 8th Applicant (TRC Applicant Reference AM5419/97).

13.6. In respect of the assault (torture) of Ms. Simelane two black Security Branch members were granted amnesty for her assault after satisfying the amnesty committee that they had made full and truthful disclosures. They are:

13.6.1. M M Veyi,

13.6.2. M L Selamolela.

TP 7

13.7. The three white Security Branch members who applied for amnesty in respect of the assault (torture) of Ms Simelane were refused amnesty as it was found that they had not made full and truthful submissions. They are:

13.7.1. W H Coetzee,

13.7.2. A Pretorius,

13.7.3. F B Mong.

13.8. An aggravating factor to these serious crimes is that the perpetrators were serving South African Police members. Moreover senior South African Police commanders at HQ level authorised and were complicit in the crimes. All the complicit police members had a legal and moral obligation to uphold the law and to protect and serve all the people of South Africa.

13.9. By 1983 South Africa had enacted particularly harsh security legislation which allowed for detention without trial and the holding of political activists in solitary confinement. Notwithstanding the draconian powers at their disposal, the perpetrators of the crimes against this young woman choose to hold her captive on an isolated farm under primitive conditions depriving her even of the meagre protection that would have been afforded to her had she been detained under existing Security Legislation.

13.10. Following Ms Simelane's captivity and torture she disappeared. Now, more than 30 years later, and in the absence of any other explanation it can only be concluded that she is deceased.

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13.11. Some 18 years after these dramatic disclosures in 1996, and after the matter going through an initial South African Police investigation; the TRC process and numerous appeals to the authorities for this case to be concluded, the authorities have refused to act against the perpetrators or to bring the death of Nokuthula Simelane to legal finality through an inquest.

13.12. There is still a small window of opportunity to remedy matters and bring about some legal finality to the death of Ms Simelane. There is however no time for further delays as evidence is constantly being eroded or destroyed by the passage of time.

Insight into Police Investigation

14. After completing my investigation into the whereabouts of Ms Simelane early in 2012, I was retained by the legal representatives of the Simelane family to provide advice and assistance relevant to my experience and my investigation.

15. In order to perform this function I was provided with *inter alia* correspondence between the family's legal representatives, the NPA and SAPS as well as other relevant documents.

16. My insight into the police investigation is based on this correspondence as well as meetings with:

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16.1. Advocate Macadam the head of Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority on 22 July 2011.

16.2. Colonel Xaba (Director) and Captain Masegela (Investigating Officer) both of the South African Police Service, Directorate for Priority Crime Investigation (Hawks) on 3 July 2014.

During both these meetings the status of the investigation was discussed. I do not know what additional investigation has been done since 31 July 2014 - except that I was required to provide an affidavit to the Investigating Officer in which I outlined the inquiries that I had previously done in this case. I should mention that at the meeting with Colonel Xaba and Captain Masegela on 31 July 2014 both officers said that they were satisfied that their police investigation had been completed and that the case file had been forwarded to the NPA for attention. They pointed out that further investigative instructions may be issued by NPA in respect of this investigation.

CONCLUSIONS ON THE CRIMINAL INVESTIGATION

17. In my opinion the authorities have consistently failed to act. Eighteen years since the revelations by Nimrod Veyi and the opening of an investigation docket, the authorities have still not completed some of the most basic investigations. The prolonged lapse of time has severely undermined the prospects of justice, and indeed meaningful closure for the family.

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18. In my opinion the kidnapping, torture and disappearance is not an complex criminal investigation. The issues are relatively straight forward. A complicating factor is the protracted time delay in undertaking and completing these investigations. This is compounded by every passing day. This difficulty is however the product of the authority's' own neglect in failing to attend to this matter expeditiously.

19. In my entire career spanning 48 years (during which time I have dealt with hundreds of unnatural deaths - resulting in either prosecutions or inquests) I have never experienced a case that has been subjected to the delays that this matter has.

20. It is my experience that if investigations cannot for some reason be concluded within a reasonable period an inquest is held on the available evidence. This is particularly so when the police or other authorities contributed to the death. The inquest finding can be very specific in some cases. Alternatively, if there is little or no supporting evidence it is not unusual for an inquest court to conclude that on available evidence a finding cannot be made in respect of the cause of an unnatural death. The holding of an inquest and the inquest finding has never, in my experience, prevented investigations from continuing, and if warranted prosecutions may follow an inquest.

TP 9

FACTS WHICH ARE COMMON CAUSE

21. In 1983 Ms Simelane was a young, woman who had just completed a degree at the University of Swaziland. She was acting as a courier for Umkhonto we Sizwe (MK). She was betrayed by infiltrated agents in the MK structures in Swaziland. At a rendezvous in September 1983 she met with a Security Branch agent at the Carlton Centre Johannesburg. She mistakenly believed him to be an operational MK cadre. She was lured to the basement of the Centre where she was overpowered by several Security Branch members and kidnapped. Ms Simelane was manhandled, placed in the boot of a police vehicle and transported to Norwood Security Branch Flats where the Security Branch had an operational office in the cleaner's quarters on the roof of the building. She was held, interrogated and tortured in this office for several days.

22. Coetzee and Williams testified before the Amnesty Committee of the TRC stating that after their kidnapping of Ms Simelane they met with Brigadier Muller (deceased), who headed the Soweto Security Branch, and reported their action to him. They also sought permission to continue their illegal detention of Ms Simelane in order to turn her into an operative for the police (referred to in police circles as a "kopdraai"). Following Security Branch protocols, Brigadier Muller refered this request to Security Branch HQ for approval.

23. Accordingly, Brigadier Muller, accompanied by Coetzee and Williams, met with Brigadier Schoon in Pretoria on the same day. Brigadier Schoon was the Head of the Security Branch Counter Terrorist Section (C1). The proposal of holding Ms Simelane illegally to forcibly turn her into a police operative was discussed.

Brigadier Schoon then approved the kidnapping and gave authority for the illegal action to proceed further.

24. Williams apparently played no further role in this matter. He applied for and was granted amnesty for his role in the abduction (kidnapping) of Ms Simelane.

25. Ms Simelane was subsequently transferred to a remote bushveld farm in the district of Northam in the present North West Province. Here she was kept captive under primitive and extremely adverse conditions for a period of approximately 4 to 5 weeks in a store room without privacy, ablution, medical or kitchen facilities. The interrogation and torture resumed on the farm.

26. She was completely outnumbered by the members of the Security Branch and was forced at all times to share the store room in which she was confined with her captors (who accommodated themselves in the same room) they were all male and physically superior to her. She was dressed in the same brown police overall which she was given to wear and was manacled for the four or five weeks that she was held at this farm. Her legs were permanently cuffed with leg-irons while her hand-cuffs were removed on occasion during the day for short periods.

27. Both the interrogation and the assaults were led by the white officers, particularly Willem Coetzee who was in overall command of the group.

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28. Her graduation ceremony was on 30 October 1983 which she did not attend because of her unlawful captivity and likely murder.

VERSION OF BLACK SECURITY BRANCH MEMBERS

29. According to the black Security Branch officers, Veyi, and Selamolela, Ms Simelane was interrogated and severely assaulted throughout the period of her detention. Towards the end of her stay on the farm, her physical condition had deteriorated to such an extent that she could hardly be recognised. Her wrists and ankles had sustained severe abrasions from the cuffs. She had great difficulty in walking and her physical condition had deteriorated badly. She was, according to Selamolela also subjected to torture by electric shocks. She was, moreover, repeatedly dunked into the farm dam. No first aid, medication, toiletries or similar personal items were furnished to Ms Simelane during her detention on the farm.

30. Ms Simelane never co-operated with her captors neither did she furnish any material information concerning MK as alleged by Coetzee and the other white officers. She persisted with this stance throughout. There was never any question of her being recruited as an agent of the Security Branch. It was because of her refusal to cooperate with the police that she was severely assaulted throughout her unlawful detention.

31. The black officers disputed the version of Coetzee and the other white officers that the information furnished by Ms Simelane led to 'false flag' attacks on

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Government installations or was instrumental in the arrest of 18 persons linked to MK.

32. According to Veyi he last saw Ms Simelane lying in the boot of Coetzee's vehicle near Westonaria severely injured and cuffed.

33. Veyi testified that there was a discussion between himself and Sergeant Mothiba (deceased) in which Mothiba allegedly reported that their Commanders, Coetzee and Pretorius, were involved in the subsequent killing of Ms Simelane and the burial of her body.

34. Veyi alleged that he subsequently inquired from Pretorius as to what had happened to Ms Simelane. He was told *"don't ask a lot of questions"*. Mkhonza said he asked Coetzee what had happened to Ms Simelane and he too was told not to ask questions. According to Veyi, Selamolela and Mkhonza, Ms Simelane was never again a topic of discussion within their Unit.

35. Veyi, Selamolela and Mkhonza say they were never informed at any subsequent time that Ms Simelane was at large or that she was a wanted person. Nor were they required to be on lookout for her. They were never tasked to gather information or intelligence about her despite the fact that their function was gathering intelligence from sources.

TP 07

VERSION OF WHITE SECURITY BRANCH MEMBERS (COETZEE, PRETORIUS AND MONG)

36. According to the white Security Branch members, Coetzee, Pretorius and Mong, the assaults and torture occurred only during the course of the first week of Ms Simelane's detention. Thereafter it was effectively terminated apart from the odd occasion when she would be given a slap or a punch in order to secure her continued co-operation. During the period of her stay on the farm, Ms Simelane's personal needs such as toiletries, food, clothing and the like were attended to.

37. It is claimed that after the first week of detention, Ms Simelane agreed to work as an agent of the Security Branch. She allegedly gave her full co-operation to Coetzee, the leader of the group of police officers. Because she was concerned about her safety, Ms Simelane apparently requested Coetzee not to let the black officers in the group know that she was in fact working with them.

38. They claimed that Ms Simelane furnished information concerning the structures and operations of MK in Swaziland. They further claimed that in order to ensure Ms Simelane's continued credibility with the ANC and MK, certain government installations were attacked by the Security Branch under false flag operations. These attacks formed part of the orders which Ms Simelane had to convey to MK units inside South Africa. MK would apparently have become suspicious of Ms Simelane if these attacks had not been launched; which in turn would have compromised the continued operations of the Security Branch agents who had infiltrated MK. They alleged that Ms Simelane's recruitment

occurred over a period of time and was finalised approximately two weeks prior to her departure from the farm. She was allegedly registered as an occasional source of the Soweto Security Branch to be handled by Coetzee and Pretorius.

39. After the necessary arrangements were made, steps were allegedly taken to return Ms Simelane to Swaziland. Only Coetzee, Pretorius, the late Sergeant Mothiba and a black Security Branch member Frank Langa (also deceased) were apparently involved in the arrangements concerning the handling of Ms Simelane as a Security Branch source. It is claimed that the deceased members, Mothiba and Langa, eventually transported Ms Simelane to Swaziland and released her there. The white officers alleged that she subsequently failed to keep the pre-arranged appointments with her Security Branch handlers and was never heard from again. They claimed that she must have been exposed as a Security Branch agent and was probably executed by MK.

40. The white Security Branch members denied that Ms Simelane's torture continued beyond her first week of detention or that she was so badly assaulted over the prolonged period of her detention or that she was hardly recognisable towards the end of her stay on the farm – they claimed that all injuries were completely healed by the time she was released. They likewise denied that electric shocks were administered to Ms Simelane during her detention on the farm or that her torture included her being thrown into the dam on the farm. They furthermore strenuously denied that Ms Simelane was killed by the Security Branch and her body disposed of after she was taken from the farm.

INVESTIGATIVE ISSUES

41. I set out hereunder a non-exhaustive list of investigative tasks that ought to have been completed within several months following the opening of the docket in 1996 or after the TRC process had been completed in 2001.

42. The credibility of each version ought to have been properly and promptly tested through investigation. The result of this work would have allowed the Director of National Prosecutions to make a decision on whether to prosecute or alternatively to hold an inquest into the death of Ms Simelane.

43. There are three central questions which ought to have been thoroughly investigated many years ago. These are:

    43.1. Did Ms Simelane cooperate with the Security Branch?

    43.2. What was the nature of her injuries, if any, at the time of alleged release?

    43.3. Did she return to Swaziland?

Did Ms Simelane cooperate with the Security Branch?

44. The truth of what became of Ms Simelane hinges on the issue of her alleged cooperation.

45. If Ms Simelane cooperated with the white Security Branch members then their version could reasonably be true. On the other hand, if the 'cooperation' was a fabrication, then their version of her release into Swaziland is also false. If that

is the case, such falsification constitutes a cover-up for what actually happened to Ms Simelane, namely that the Security Branch caused the death of Ms Simelane.

False Flag Operations

46. The white Security Branch members claim that they conducted false flag operations by causing explosions at certain key points in the Johannesburg area to demonstrate that the instructions that Ms Simelane carried as a courier were being carried out, thereby maintaining her credibility with the ANC.

47. The black Security Branch members disputed that the false flag operations in question were associated with Ms Simelane, but rather designed to give credibility to an unconnected Security Branch undercover agent.

48. During the amnesty hearing it became apparent that the false flag attacks referred to limpet mine attacks on electrical sub-stations in Randburg and Sandton on 8 September 1983; and at sub-stations at Bryanston-North and Fairland on 11 September 1983. It therefore seems that the false flag attacks claimed by the white Security Branch occurred before or coincided with Ms Simelane's kidnapping which the Amnesty Committee found occurred on 11 September 1983. These attacks could therefore not have been as a result of cooperation by Ms Simelane – especially as the white members also claimed that Ms Simelane only started cooperating with them a week or two after her capture.

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49. It was of critical importance to establish the exact dates of these false flag attacks through official records to confirm whether these attacks could possibly be attributed to information provided by Ms Simelane. However this was only identified as an investigative task in a letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of Priority Crimes Litigation Unit (PCLU) to Captain Masegela, Directorate for Priority Crimes Investigation (DPCI) dated 27 October 2010.

Other leads arising from the Amnesty Hearing

50. Coetzee and Pretorius testified that during Ms Simelane's detention she provided information which enabled the Security Branch to:

50.1. arrest an ANC cadre whilst she was still in confinement at the farm at Northam and;

50.2. following her captivity to take action against 17 other MK operatives as well as the Sasol MK sabotage group

51. It does not seem that these lines of investigation to determine the veracity of these claims have been followed up. My own investigations have revealed that the action taken against the Sasol group could not have been linked in any way to the alleged cooperation of Ms. Simelane.

TP

139

Information which could have been revealed by Ms Simelane

52. If Ms Simelane cooperated with the Security Branch as alleged, she ought to have disclosed secret information about MK of which she was aware. My investigations have revealed that no specific operatives or safe houses of which she had actual knowledge were compromised.

What was the nature of her injuries?

53. The white police members, Coetzee, Pretorius and Mong, claimed that at the time of Ms Simelane's release she was injury free. Earlier injuries had healed and were no longer visible. This was disputed by the black police members, Veyi and Selamolela, who claimed that she had endured prolonged and sustained assaults and that Ms Simelane's physical condition deteriorated to the extent that she was hardly recognisable and could barely walk.

54. The Truth and Reconciliation Commission's Amnesty Committee that heard the amnesty applications in respect of Ms Simelane made the following finding:

> *Due to the prolonged and sustained assaults, Ms Simelane's physical condition deteriorated to the extent that she was hardly recognisable and could barely walk.*

55. The black police members said that this state of affairs precluded any possibility of releasing Ms Simelane to infiltrate MK in Swaziland.

56. It is common cause between the white and black Security Branch members that Ms Simelane had been restrained with leg and hand cuffs for the entire period

of about four to five weeks of her captivity. The leg cuffs restrained her continually and were never removed; whilst the hand cuffs were removed for short periods during the day. She was fully shackled at all other times including when she slept. According to Coetzee and other white members the shackles were finally removed at the moment of her actual release from the farm.

57. The black Security Branch members asserted that, amongst other serious injuries caused by the ongoing assaults, Ms Simelane had sustained severe and painful abrasion injuries to her wrists and ankles from the continual wearing of cuffs.

58. Medical forensic evidence should have been sought to give an expert opinion on the injuries that leg and hand cuffs are likely to have caused to a person restrained in this way for a period of about four to five weeks. Such expert evidence should also have set out the healing periods for the different injuries alleged by both the white and black police members.

59. As far as I am aware this line of investigation has not been pursued by the DPCI nor has it been identified as an Investigation task by PCLU.

Was Ms Simelane returned to Swaziland as a Security Branch agent?

60. The white Security Branch members claim that Ms Simelane cooperated with them and agreed to work as a Security Branch agent within MK structures in Swaziland. They claimed that as a result of this alleged agreement they returned her to Swaziland.

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141

61. The two black Security Branch members who apparently returned Ms Simelane to Swaziland are both deceased. They died before the Amnesty Committee Hearing took place. This version can therefore not be verified.

62. However, central to the version of the white officers, Coetzee, Pretorius and Mong, is the physical state of Ms Simelane at the time of her alleged release. As Mr Mong explained during his amnesty hearing, should she have borne injuries this would obviously have made her re-infiltration into the ANC in Swaziland as a Security Branch agent unworkable as it would have been obvious that she had fallen into police hands. Injuries to Ms Simelane would have rendered her re-infiltration futile.

Relatives, Friends and Acquaintances

63. Extensive investigations should have been conducted to determine whether relatives, friends, fellow students and comrades had seen or had contact with Ms Simelane post September 1983 (or post Swaziland University Graduation ceremony of October 1983).

64. My investigations revealed that none of her family members, closest friends and colleagues, including cadres in the underground, had seen or had any contact with her following her kidnapping. They all maintained that Ms Simelane had not returned to Swaziland or been seen again after her disappearance early in September 1983.

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Was Ms Simelane listed as Wanted?

65. Coetzee's and Pretorius's version is that after Ms Simelane's release back into Swaziland, she failed to keep pre-arranged appointments with her Security Branch handlers, and was not seen or heard from again.

66. All the Security Branch members, both black and white, regarded Ms Simelane as a potentially dangerous person. The white members explained to the Amnesty Committee that this was the reason why Ms Simelane was at all times restrained during her captivity. They maintained that if she should have escaped they and others would have been in imminent danger. They also felt that as a trained terrorist she posed a serious threat to the State.

67. When Ms Simelane failed to keep her appointments with her Security Branch handlers the most logical assumption by the Security Branch ought to have been that she had reneged on her agreement and returned to the ranks of MK. In order for the white police version to be regarded as credible they ought to have circulated her details as "wanted". Furthermore they ought to have taken measures to gather intelligence to determine her whereabouts and to secure her re-arrest.

68. The black Security Branch members, Mkhonza and Veyi, asserted that when they asked their Commanders Coetzee and Pretorius respectively what had happened to Ms Simelane they were told not to ask too many questions. Both Coetzee and Pretorius claimed during their testimony before the Amnesty Committee of the TRC that they had said this because of the "*need to know*"

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security rule. Furthermore the Security Branch members Coetzee, Pretorius, Veyi, Selamolela and Mkhonza all agreed that Ms Simelane was never again a topic of discussion at their Unit.

69. To the best of my knowledge the determining whether or not Ms Simelane had ever been posted as "wanted" has not been investigated by the DPCI, nor was this identified as an investigation task by PCLU.

Exhumations and Human Remains

70. Finding the mortal remains of Ms Simelane would be a defining moment of the investigation. It would enable not only closure for the family but would also facilitate the search for the truth. It is obviously important that the search for her remains continue.

71. One must however be realistic about this possibility. After some 30 years it is highly unlikely that her remains will be found, unless the perpetrators point them out. Moreover, it is known through admissions made to the TRC that the Security Branch disposed of their victims' bodies in ways that left little or no traces.

72. The authorities have claimed this line of investigation as one of the reasons for the ongoing delay. This has been done on the basis of the flimsiest leads.

73. In my experience, a requirement for a successful exhumation long after death, is knowledge of the <u>precise</u> location of the site of the grave. Searching areas of

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144

open land or plots of land for unmarked graves is extremely unlikely to lead to a successful exhumation.

74. The examination of human remains and possible exhumations should continue. However this search should be realistic and not delay the taking of the relevant decisions.

75. The finalization of this investigation has been delayed for protracted periods whilst the police pursued pointless leads. For instance, they investigated the skeletal remains of a woman that had no reasonable nexus to Ms Simelane. Further delays have been occasioned by the feasibility of conducting exhumations at different locations in the absence of any reliable information or evidence of the presence of a grave at these sites.

CONCLUSIONS

76. In the light of the aforementioned I draw the following conclusions.

Kidnapping Prosecutions

77. At the time of Ms Simelane's disappearance Brigadier Willem Frederick Schoon was the HQ Commander of Section C (the section charged with combatting terrorism) of the Security Branch.

78. The Special Intelligence Unit, Soweto under Willem Coetzee's command had sought and received authority from Brigadier Schoon for the kidnapping and

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torture of Ms Simelane for the purpose of "*turning her*". This is apparent from the evidence of the white Security Branch members before the Amnesty Committee.

79. It is noted that Brigadier Schoon applied for amnesty in respect of the Ms Simelane matter, but never proceeded with his application.

80. According to the evidence of the Security Branch members who kidnapped and tortured Ms Simelane - one of their accomplices was Constable Msebenzi Timothy Radebe. He did not apply for amnesty.

81. Both Brigadier Schoon and Constable Radebe are liable for prosecution in respect of the crimes committed against Ms Simelane. Since this information was available from the time of the hearing of the Amnesty Committee there can be no good reason why Schoon and Radebe should not have been charged with kidnapping shortly after the final amnesty hearing in June 2000.

Possible Murder Prosecution

82. Willem Schoon, Willem Coetzee, Anton Pretorius and Frederick Mong are suspects in the torture and murder of Ms Simelane. They should either have been charged with murder, amongst other crimes, or they should have been required to appear before a judicial inquest in order to explain their conduct and have their versions properly tested.

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83. The failure to take such action more than 30 years after the disappearance of Ms Simelane is inexcusable.

Conclusions on the delay

84. There were several potential starting points for the investigation into the kidnapping, assault and murder of Ms. Simelane. These include:

84.1. When the authorities kidnapped Ms Simelane and concealed the truth of what had transpired in September 1983, some 32 years ago.

84.2. From 1996 when Nimrod Veyi made his disclosures about Ms Simelane's kidnapping and disappearance, and an investigation docket was opened in February 1996, some 19 years ago.

84.3. From February 2001 when the Amnesty Committee handed down its decision and it was clear that:

84.3.1. The White Security Branch officers were refused amnesty for the serious assault (torture) of Ms Simelane;

84.3.2. Brigadier Schoon and Constable Radebe had not applied for amnesty and could be prosecuted on *inter alia* charges of kidnapping.

84.3.3. It is reasonable to suspect that Ms Simelane was murdered by Coetzee, Pretorius and other Security Branch members who were complicit in the murder and/ or cover up, including Brigadier Willem Schoon.

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147

84.4. From 2003 when the PCLU was formed and was given the Simelane matter together with several other cases for immediate investigation, some 14 years ago.

84.5. From 25 March 2010 when the matter was taken up for investigation as per the letter of Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of Priority Crimes Litigation Unit (PCLU) to Senior Superintendent Bester, Directorate for Priority Crimes Investigation (DPCI), four years and eight months ago.

84.6. From 27 October 2010 when specific investigation tasks were directed to be done in a letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of Priority Crimes Litigation Unit (PCLU) to Captain Masegela, Directorate for Priority Crimes Investigation (DPCI), four years and three months ago.

85. Irrespective of when one considers the commencement of the investigation to have started, the delay has been protracted.

86. The authorities (as at 31 July 2014) had still not completed some of the most basic aspects of the investigation. No acceptable explanation has been provided for the inactivity of the relevant authorities.

87. In my view the prolonged delay is not a product of mere neglect. The family had raised its plight in the media over many years and had made numerous representations to the authorities. In the circumstances I believe that the delay

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can only have been the result of a wilful decision not to see justice done in this matter.

F K DUTTON

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Kloof SAP on this the 08th day of April 2015 ~~September 2014~~ the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE CENTRE
2015 -04- 08
PINETOWN
KWAZULU-NATAL

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COMMISSIONER OF OATHS

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent

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ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

DUMISA BUHLE NTSEBEZA

state under oath as follows:

1 I am an adult male senior counsel at the Johannesburg Bar. I was formerly a Commissioner and Head of the Investigation Unit of the Truth and Reconciliation Commission ("TRC" or "the Commission") constituted in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act").

2 I have practiced law for more than 30 years. I was admitted as an attorney in 1984, practicing in the Eastern Cape, mainly in the area of human rights. I

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represented a number of political prisoners throughout the 1980s and early 1990s. Between 1993 and 1996 I taught law at the University of the Transkei (now the Walter Sisulu University). I was called to the Bar in 2000 and took Silk in 2005. I have been an acting judge in three divisions of the High Court of South Africa, as well as the Labour Court.

3 In 2004 I was appointed by the Secretary-General of the United Nations as a member of the International Commission of Inquiry on Darfur, which was established pursuant to a UN Security Council Resolution passed under Chapter VII of the United Nations Charter to investigate violations of international humanitarian law and human rights law in Darfur.

4 I am a founder of South African National Association of Democratic Lawyers and served as its President. I also served as president of South Africa's Black Lawyers Association. I am a member of the Judicial Service Commission (JSC) and a visiting professor of Political Science and Law at the University of Connecticut in the United States. I am the Chairman of the Desmond Tutu Peace Trust, which is in the process of being wound up. I am also a former trustee of the Nelson Mandela Foundation.

5 The facts contained in this affidavit are within my own personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief, both true and correct.

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INTRODUCTION

6 This application seeks to, among other things, compel the National Prosecuting Authority ("the NPA") to establish an inquest in the case of Nokuthula Simelane, who was abducted, tortured and forcibly disappeared by members of the Security Branch of the former South African Police ("SAP") in 1983.

7 I have read the founding affidavit of Thembisile Phumelele Nkadimeng deposed to in this matter. I confirm that I agree with the submissions and views contained therein as they relate to the TRC and South Africa's transition.

INVESTIGATION BY THE TRC

8 I confirm that the case of Nokuthula Simelane was investigated by the TRC as part of the amnesty matter with case number: AC/2001/185.

9 This case was also considered as part of the TRC's inquiries into abductions, interrogations and killings (TRC Final Report: Volume 2, Chapter 3, Subsection 31). It was also considered in relation to the TRC's investigations into the Soweto Intelligence Unit, which was a key component of the Soweto

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Security Branch of the former SAPS (TRC Final Report: Volume 6, Section 3, Chapter 1, Subsection 19).

10 The TRC found Nokuthula to be a victim. Her name appears on the TRC's list of disappeared and missing persons with the registration: "JB00280/01MPWES" (TRC Final Report: Volume 6, Section 4, Chapter 1, Subsection 21). I confirm further that Nokuthula's case was one of the cases that the TRC recommended that the NPA investigate further with a view to prosecution.

CONCLUSION

11 I have frequently gone on record stating that there has been a shameful lack of political will to deal with the issues of reparations and accountability for the apartheid-era victims of gross human rights violations. I fully endorse Archbishop Desmond Tutu's statement made in 2013 that the failure to prosecute those who failed to apply for amnesty undermined those who did. I also endorse his statement that the tardy and limited payments of reparations to victims of human rights violations eroded the very dignity that the commission sought to build.

12 Nokuthula's story is rooted in South Africa's bitter and divided past. She paid the ultimate price for her uncompromising resistance to apartheid. Nokuthula

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was not however cut down on the battlefield while in the line of fire. She was abducted by all-powerful State forces meant to uphold law and order, and then brutally tortured and forcibly disappeared. Her sacrifice helped to lay the basis for South Africa's democracy with its enshrined freedoms.

13 Nokuthula's family, notwithstanding their own pain and suffering, embraced the Constitutional compact which ushered in South Africa's new democratic order. They did so on the basis that:

13.1 Where the perpetrators were not truthful about their roles, and where feasible, there would be justice in the cases of their loved ones. This has not occurred in Nokuthula's case and indeed not in most of the TRC cases.

13.2 Where the full truth was provided, they would accept that the perpetrators were entitled to amnesty. However, instead of the full truth, the white security branch perpetrators chose to give the survivors of their victims little more than half truths. The senior officers who masterminded the operation and gave the order for her elimination have remained silent.

14 Nokuthula Simelane's family still do not know where her remains are. The lies and deceit of Simelane's killers have denied the family the basic human right of laying her remains to rest with the respect and dignity that she deserves.

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15 More than 30 years after the atrocities that forever changed the lives of Nokuthula's family, they continue to be denied truth, justice and closure. Even if a prosecution or inquest does eventually take place, the many years of delay have severely compromised the interests of justice. This is, in my view, unforgiveable. The shameful political machinations that effectively stopped this investigation and others, are contemptuous of the sacrifices made for the liberation of South Africa.

16 I accordingly endorse this application, and respectfully urge this honourable court to grant the order in the terms set out in the notice of motion.

DEPONENT

Thus signed and affirmed at Sandton on this 13 day of May 2015, the deponent having acknowledged that s/he knows and understands the contents of this affidavit, having affirmed that the contents hereof are true and correct and that s/he considers the affirmation binding on his / her conscience.

COMMISSIONER OF OATHS

SIMPIWE CLIFFORD NJOKWENI
Commissioner of Oaths
Practising Attorney
Republic of South Africa
4th Floor, The Forum
2 Maude Street, Sandown

"TN6"
156

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent

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ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

SUPPORTING AFFIDAVIT OF ALEXANDER LIONEL BORAINE

I, the undersigned,

ALEXANDER LIONEL BORAINE

state under oath as follows:

1 I am an adult male. I am currently retired. I was formerly the Deputy-Chairperson of the Truth and Reconciliation Commission ("TRC" or "the Commission") constituted in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act").

2 I founded the International Center for Transitional Justice (ICTJ) and served as its first president. The ICTJ assists governments and civil society in the

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construction and implementation of transitional justice programs in many countries around the world. A significant part of its work is based on South Africa's experience of the TRC, which is of great interest to governments and people around the world.

3 From 1998 to 2001, I served as professor of law at New York University and as director of the New York University Law School's Justice in Transition Program. From 1986 to 1995 I headed two South African non-profit organizations concerned with ending apartheid and addressing its legacy. I was a member of the South African Parliament from 1974 to 1986, and served as president of the Methodist Church of Southern Africa from 1970 to 1972, having been ordained as a Methodist Minister in 1956.

4 I hold degrees from Rhodes University in South Africa, Oxford University in England, and Drew University in the United States, as well as seven honorary doctorates from universities around the world. I was a Global Visiting Professor of Law at the New York University School of Law's Hauser Global Law School Program.

5 The facts contained in this affidavit are within my own personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief, both true and correct.

TP

INTRODUCTION

6 This application seeks to, among other things, compel the National Prosecuting Authority ("the NPA") to establish an inquest in the case of Nokuthula Simelane, who was abducted, tortured and forcibly disappeared by members of the Security Branch of the former South African Police ("SAP") in 1983.

7 I have read the founding affidavit of Thembisile Phumelele Nkadimeng deposed to in this matter. I confirm that I agree with the submissions and views contained therein as they relate to the TRC and South Africa's transition.

8 The scheme of this affidavit necessitates me dealing with –

8.1 aspects of the TRC report;

8.2 the constitutional compact with victims;

8.3 concluding remarks.

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THE TRC REPORT

9 The TRC was obliged in terms of section 4(e) of the Act to prepare a comprehensive report setting out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal. On 29 October 1998, and in compliance with section 4(e) of the TRC Act, a report styled as the Truth and Reconciliation Commission of South African Report ("the TRC Report") was handed to President Nelson Mandela. The TRC Report was subsequently tabled in Parliament in accordance with section 44 of the TRC Act. The TRC Report comprises five volumes of approximately 2250 pages. A substantial portion of Volume 5 deals with victims of gross violations of human rights.

10 In its Final Report released on 21 March 2003 the Commission stressed that the amnesty provision should not be seen as promoting impunity; and highlighted the imperative of "a bold prosecution policy" in those cases where amnesty has not been applied for in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. In Volume 6, Section 5, Chapter 1 at paragraph 24 we stated that:

> **"it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of**

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impunity or of contravening its obligations in terms of international law."

11 In Volume 5 of the Report at paragraph 14 we specifically called for the investigation and prosecution of those perpetrators who had refused to apply for amnesty.

12 At Volume 6, Section 5, Chapter 4 at paragraph 94 the Commission called upon the State and in particular the National Prosecuting Authority to investigate unsolved disappearance cases.

13 I have noted with despair that the South African Police Service (SAPS) and the NPA have done very little to pursue those cases in which amnesty was denied or not applied for. In fact their performance must be described as abysmal. In my considered view, this can only have been the result of a concerted decision or policy to abandon these cases. The evidence put up in this application supports this view.

A CONSTITUTIONAL COMPACT WITH VICTIMS

14 There is nothing in the constitutional and statutory design of the TRC process which contemplated the extension of the rights of perpetrators to amnesty or indemnity from prosecution. Indeed it was specifically envisaged that criminal

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investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims.

15 An examination of the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("the Interim Constitution") reveals no direct or inferred suggestion that the TRC process would open the door to further opportunities for perpetrators to escape justice outside of the TRC's amnesty's provisions. The postscript reflected the outcome of a negotiated settlement between the former conflicting parties. In order to achieve the objectives of national unity and reconciliation there would be no pursuit of victor's justice, but neither would there be a blanket amnesty for perpetrators. The postscript accordingly contemplated the establishment of mechanisms, criteria and procedures, all regulated by law, through which amnesty would be dealt with:

"NATIONAL UNITY AND RECONCILIATION

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African

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citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi Sikelel' i Afrika. God seën Suid-Afrika.

Morena boloka sechaba sa heso. May God bless our country.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika."

16 Such a far reaching programme required a severe limitation of the fundamental rights of the victims of human rights violations. This was justified in the postscript by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy and peaceful co-existence. The conditional amnesty was authorised for the specific objective of facilitating a peaceful transition towards a democratic order.

17 The principles set out in the postscript were reflected in the design of the legislation. Perpetrators who were granted amnesty received amnesty or immunity from criminal prosecution and immunity from civil law actions. Victims in these matters were unable to proceed with claims for compensation against amnestied individuals or against organisations that may have been vicariously liable for the actions of such perpetrators. Victims who were registered as victims in terms of the Act were however entitled to reparations as approved by Parliament. Conversely, those perpetrators who were refused amnesty or who chose not to approach the TRC faced both criminal prosecutions by the State and civil law claims brought by victims.

18 South Africa's truth and reconciliation design as encapsulated in the postscript to the Interim Constitution and the Act required the sacrifice of the fundamental rights of victims in order to advance national unity and reconciliation. In so doing the State entered into a compact with victims. This compact required the State to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied. It is with great sadness that I must note that the State has done little to meet its obligations to victims in terms of this compact.

19 Most victims accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept.

20 The Interim Constitution specifically authorised the suspension of justice and the rule of law in order to build a constitutional democracy. These measures were specifically intended to apply in the transitional period. They were never intended to roll over indefinitely. The TRC was intended to have a limited life in order to complete its constitutional mandate. The limitation of fundamental rights as permitted by the TRC Act was to be confined to the transitional period from the violent past to the democratic future. That democratic future is the current South Africa. The "historic bridge" has been crossed. Today,

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South Africa enjoys one of the most respected and stable democracies in the world. It cannot be said that prosecuting those who declined to participate in the TRC process will threaten our democracy.

21 Measures taken to limit justice in present times are not taken to ensure the survival of our constitutional democracy but rather for the sake of expedience. The barter of the rule of law for expedience is not acceptable. Indeed, such a barter is manifestly offensive to the values upon which the new South African democratic state is founded, namely human dignity, equality, the advancement of human rights, the supremacy of the constitution and the rule of law.

THE FAILURE TO INVESTIGATE AND FINALIZE THE TRC CASES

22 The failure and/ or extended delay in investigating and resolving the enforced disappearance of Nokuthula has caused unimaginable pain to her family. In addition, the interference with the work of the NPA and the abandonment of the TRC cases has:

22.1 Seriously eroded the human rights culture established by the Constitution;

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22.2 Undermined the recommendation by the TRC that the NPA should prosecute those who failed to apply for amnesty or who were refused amnesty;

22.3 Interfered with the ability of the NDA to uphold and protect the Constitution and the fundamental rights entrenched therein;

22.4 Violated the fundamental rights of victims of apartheid-era crime;

22.5 Allowed perpetrators to escape justice and accountability without any obligation to publicly acknowledge their wrongdoing and perform community service or reparation.

23 It seems to me that the government has gone out of its way to afford perpetrators every last avenue to escape justice and accountability. Given that Apartheid era offenders were afforded a special and generous dispensation during the life of the TRC to apply for amnesty and escape criminal sanction, it is not acceptable that those from this group who chose to spurn the TRC process; and those who were denied amnesty, are now afforded further avenues to escape justice.

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CONCLUSION

24 The failure or refusal of the authorities to attend to Nokuthula's case timeously represents a terrible betrayal of Nokuthula herself. It is a betrayal of what she struggled and died for.

25 The abandonment of the TRC cases also represents a betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of the South African TRC amnesty process which required that those who spurned the process and those denied amnesty would face the consequences.

26 The gross neglect of the TRC cases is a betrayal of victims who have been waiting for the prosecutions of those who failed to apply for amnesty or who were denied amnesty. The failure of the State to act against perpetrators of the past has added considerably to the trauma of victims. Allowing perpetrators to escape all justice and accountability adds insult to their injuries.

27 The abandonment of the TRC cases is a betrayal of those perpetrators who came forward in good faith to apply for amnesty during the operation of the TRC. Above all, it stands as a betrayal of all South Africans who embraced

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the spirit of truth and reconciliation in order to move beyond the bitterness of the past.

28 The interference with the work of the NPA on the TRC cases is deeply offensive to the rule of law and is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

29 I accordingly endorse this application, and respectfully urge this honourable court to grant the order in the terms set out in the notice of motion.

DEPONENT

Thus signed and affirmed at Constantia Place on this 27. day of March 2015, the deponent having acknowledged that s/he knows and understands the contents of this affidavit, having affirmed that the contents hereof are true and correct and that s/he considers the affirmation binding on his / her conscience.

COMMISSIONER OF OATHS

MICHAEL ALTMANN
COMMISSIONER OF OATHS
MANAGER: OLD AGE HOME/VILLAGE
CAPE PENINSULA ORGANISATION FOR THE AGE

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

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WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

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PROFESSIONAL EXPERIENCE

4. Prior to 1990 I was a member of Umkhonto weSizwe and I worked for the ANC's legal and constitutional affairs department in exile.

5. Between 1991 and 1994 I worked as a legal adviser with the Munich Reinsurance Company of Africa Limited Group. From 1994 until 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar. My specific mandate was to help restructure the Department of Justice. At the time, there were eleven departments countrywide and I was tasked with amalgamating those departments into one central department.

6. From 1997 to 1999, I served as Deputy-Director General of the Department of Justice. In 1999, I was appointed Director General of the Department of Justice and Constitutional Development and worked in that role until 2005.

7. On 1 February 2005, I was appointed the National Director of Public Prosecutions ("NDPP") by the President in terms of Section 10 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") as read with Section 179 of the Constitution. My appointment was for a 10 year term as contemplated in Section 12(1) of the NPA Act.

8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty

V.F.

TP 17

by the then President, Mr. T. Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ("TRC") contributed to the decision of President Mbeki to suspend me. The President suspended me from office in terms of section 12(6) of the NPA Act and ordered an Enquiry into my fitness to hold office as the NDPP.

9. During 2008, a commission of enquiry into my fitness to hold office, led Dr. F. Ginwala, found that the Government had failed to substantiate the reasons for my suspension and that I was a fit and proper person to hold the position of National Director of Public Prosecutions. She further recommended that I be restored to the office of the NDPP. Notwithstanding this finding and recommendation, acting President Mr. K Motlhlanthe dismissed me from my post. In 2009 I obtained an order from the High Court restraining President Zuma from appointing a successor to my position. Later that year I accepted a monetary out-of-court settlement from the government.

10. Between 2010 and 2012 I was a partner at SizweNtsalubaGobodo and the director of its Forensic Investigations department.

11. Between 2012 and 2014 I served as a commissioner of the Khayelitsha

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Commission, which investigated allegations of police inefficiency in Khayelitsha as well as allegations of a breakdown in relations between the community of Khayelitsha and the Police. In December 2014 I was appointed as the Western Cape's first police ombudsman.

12. I am a former trustee of the Constitutional Court Trust, a former member of the Magistrate's Commission and a founding member of the International Association of Anti-Corruption Authorities. I am currently an independent director on the board of Cricket South Africa, where I chair the social and ethics committee. Amongst my awards, I was conferred the International Association of Prosecutors Award in 2008.

CONFIRMATION

13. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Anton Ackermann SC ("Ackermann"), insofar as they relate to me.

14. In particular, I confirm the contents of the applicant's affidavit under the heading "Political constraints". I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996

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("the TRC cases").

15. In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority (NPA).

THE INDEPENDENCE OF THE NPA

16. The Office of the NDPP was created on 1 August 1998 in terms of section 179 (1) of the Constitution. The NDPP is the head of the NPA, and manages the directors of public prosecutions, investigating directors, special directors, and other members of the prosecuting authority either appointed or assigned. During my tenure I was duty bound to carry out the responsibilities set out in the NPA Act as well as the Constitution of the Republic of South Africa.

17. As NDPP I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act) which both impose a duty on prosecutors to act "*without fear, favour or prejudice*". These provisions provide both a constitutional and statutory guarantee of independence to the NPA.

TP 07

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THE TRC CASES

18. In April 2003 President Mbeki received the final TRC report. The President announced in Parliament that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA as part of the "*normal legal processes*". He also said that those perpetrators who were prepared to unearth the truth would be welcome to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in existing legislation. Former President Mbeki's statement to the national houses of Parliament dated 15 April 2003 is annexed hereto marked **"VPP1"**. Regrettably what was to follow in relation to the TRC cases was anything but the "*normal legal processes.*"

19. In my former capacity as Director General ("DG") of the Department of Justice and Constitutional Development ("DoJ") I had previously been involved in the formulation of a policy to deal with the TRC cases, which were regarded as politically sensitive. On 23 February 2004, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives.

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20. It is important to note that the recommendation of the Task Team of a two stage process which would have required a recommendation from an inter-departmental task team before the NDPP could institute any criminal proceedings in the political cases was rejected. This was because such a process would have been a violation of prosecutorial independence enshrined in Section 179 of the Constitution.

21. Some of these developments have been highlighted in the extracts from my affidavit filed before the Ginwala Commission in May 2008, which have been annexed to the founding affidavit. For the sake of completeness I highlight some of these facts in this affidavit.

22. In relation to the steps taken by the NPA with regard to the TRC cases prior to my appointment as NDPP on 1 February 2005 I refer to the affidavit of Anton Ackermann SC filed evenly herewith. On my appointment as NDPP, the Priority Crimes Litigation Unit (PCLU), a sub-unit within the NPA, had already been tasked with handling the TRC cases. The PCLU was headed by Special Director Advocate Anton Ackermann.

23. The decision to prosecute those implicated in the attempted murder, through poisoning, of former church leader and head of the South African Council of Churches, the Reverend Frank Chikane, on 23 April 1989 at the then Jan Smuts Airport, Kempton Park ("the Chikane matter), saw the

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unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

24. The initial decision to prosecute three Security Branch members, former Colonel C L Smith, and former Captains G J L H Otto and H J Van Staden, was taken prior to my appointment as NDPP. This decision was taken in November 2004 by Dr. Silas Ramaite SC in his capacity as Acting National Director of Public Prosecutions. However, he instructed that this matter, and all other TRC cases, be held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.

Developments since 2005

25. Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by the NPA Act, the amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments to the Prosecution Policy were titled: "*PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994*" ("the Prosecution Policy Guidelines" or "the Guidelines"). A copy of the said amendments is annexed to the founding affidavit marked **"TN30"**.

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26. In terms of paragraph B6 of the amended Prosecution Policy it was stipulated that that the PCLU should be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

26.1. The National Intelligence Agency ("NIA");

26.2. The Detective Division of the South African Police Service ("SAPS");

26.3. The Department of Justice and Constitutional Development; and

26.4. The Directorate of Special Operations ("DSO").

27. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects in the Chikane matter, which, in my opinion, was clearly sufficient to justify a prosecution. None had applied for amnesty for this offence. I therefore gave the initial instruction to proceed with the prosecution in February 2006.

28. In response to the said notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. These representations were reviewed by a team within the NPA under the

V.P.

TP 9

leadership of Advocate T. Pretorius who reported to me that the representations did not comply with the requirements set out in the Guidelines, insofar as the suspects declined to disclose the full truth. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

29. Meanwhile in early 2006 I had approached the then Commissioner of Police, the DG of Justice, and the heads of the NIA and the DSO (also known as 'the Scorpions') requesting them to nominate senior officials to assist the PCLU in accordance with the Prosecution Policy guidelines. Unfortunately the SAPS and the NIA never provided the PCLU with the necessary support to conduct its investigations adequately.

30. In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackermann's participation claiming that Ackermann intended to prosecute the leadership of the ANC. This is notwithstanding the formal denial by the NPA that no such plans were in place. I advised Mr. Selebi that Ackermann was appointed as the head of the PCLU under Presidential proclamation and it was not for the SAPS to determine who should discharge the mandate given to the PCLU.

31. I then approached the Presidency in order to secure the necessary

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collaboration of the parties to apply the Prosecution Policy Guidelines. A meeting was arranged in mid-2006 by Reverend Frank Chikane, the then Director General in the Presidency. The meeting was attended by himself, the DGs of Justice and the NIA, Mr. Selebi, the Secretary of the Defence Secretariat, Mr. Jafta from the Presidency and I. Mr. Selebi again complained about Advocate Ackermann's involvement in the process.

32. Later in 2006 I was summoned to a meeting which was convened at the home of Minister Skweyiya, the then Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza and I was advised that it related to the prosecution in the Chikane matter.

33. At this meeting it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members. I quote hereunder from my affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> *"The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to*

V.P.

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prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.

...The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

34. Also in 2006 a further meeting took place at the office of the Presidency. My recollection of this meeting is that it was decided that the working committee or Task Team would not make recommendations on a decision

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as to whether to prosecute or not, but would be responsible for ensuring that I received all the necessary inputs and information from the various departments so as to assist me to make a well-considered decision.

35. At this meeting I proposed that Dr Silas Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team. I suggested this in order to counter the complaints in regard to Advocate Ackermann and to get the Task Team working. The proposal was accepted.

36. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Mr. Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and accepted.

37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph B6 of the Guidelines.

38. The Task Team met for the first time on 12 October 2006. I attended the opening session of the first meeting together with Ms. Kalyani Pillay (my

V.P.

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adviser), the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Aside from this meeting, I did not participate further in the activities of the Task Team. I received reports from time to time on their activities. These reports led me to believe that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing.

39. Meanwhile I had received further representations from the suspects in the Chikane matter contending that they had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I sought an independent opinion from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006 and concluded that the claimed indemnities were no bar to prosecution and that the said law had been repealed in 1995.

40. Dr Silas Ramaite reported to me that at the Task Team meeting on 25 October 2006 had received an audit report from Advocate Ackermann on all cases in the possession of the PCLU. Dr. Ramaite reported to me further that the Chikane matter was discussed by Task Team for the first time at its meeting on 6 November 2006. Mr. J Lekalakala of the SAPS stated that the National Commissioner believed that Rev. Chikane was not interested in a prosecution. Advocate Ackermann however indicated that Rev. Chikane had left the matter in the hands of the NPA.

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V.P.

41. In early December 2006 I was informed by Dr Ramaite of the renewed contention by Mr. Selebi that Reverend Chikane had not been consulted. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held discussions with him during the course of interactions during 2006 and 2007. I also met with him separately. Reverend Chikane's advised me that while he may have forgiven his perpetrators, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

42. Although I knew that Ackermann had discussed the matter with Rev. Chikane as far back as 2004, in December 2006 I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position.

43. However, towards the end of 2006 it became clear to me that powerful elements within government structures were determined to impose their will on my prosecutorial decisions. In this regard I quote from my affidavit filed before the Ginwala Commission:

> *"In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors*

TPM V.P.

General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

Developments from 2007

44. In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DoJ I informed Mr. Selebi and the Directors General that there was a serious misunderstanding. I resolved to approach the Minister of Justice and request her guidance. Pending such response the functioning of the Task Team was compromised by the uncertainty and it held no further meetings until 8 August 2007.

45. Towards the end of January 2007 Advocate Ackermann and Advocate Mthunizi Mhaga (also of the PCLU) reported to me that they had met with

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Reverend Chikane on 22 January 2007 and that he had reaffirmed his attitude, namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this confirmation I wrote to the legal representatives of Messrs. Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

46. Around this time, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General Johann van der Merwe, had both made representations to me as contemplated in the Guidelines. They both admitted to authorising the murder of Reverend Chikane and requested me not to prosecute them in the light of this disclosure. However, they declined to make full disclosure in response to requests for information. I accordingly declined to accede to their request that they be given immunity from prosecution in terms of the Guidelines.

47. On 6 February 2007 I had a meeting with the Minister of Justice and Constitutional Development, Mrs. B S Mabandla. During this meeting it appears that she had gained the impression that I had agreed not to pursue the TRC cases. On 8 February 2007, she addressed a letter to me titled "TRC MATTERS", a copy of which is annexed hereto marked **"VPP2"** in which she stated the following:

"I must advise you at the outset that the media articles alleging that

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V.P.

the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

48. An example of one of the articles in the press is from the Beeld newspaper titled "*Cops up for apartheid crimes*" which was published on 7 February 2007. A copy of this article is annexed hereto marked **"VPP3"**.

49. I am at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters will not be prosecuted. I found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice.

50. It is most likely that I would have clarified my position with the Minister, either through a meeting or a telephone discussion. I would have confirmed to the Minister that it was not my intention to drop the TRC cases.

51. I decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the

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problems experienced in implementing this policy. This memorandum is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

52. In this memorandum I concluded that there had been improper interference in relation to the TRC cases and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.

53. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to this affidavit. I have attached it to an *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release. In this regard I make the following submissions:

53.1. The issues and complaints raised in the memorandum have already been discussed in the body of my affidavit filed before the Ginwala Commission, which has been part of the public record

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V.P.

since 7 May 2008. and which was also part of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).

53.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

53.3. Since the memorandum points to unlawful and unconstitutional conduct it would in the public interest for this memorandum to be released

53.4. The public interest in the disclosure of the memorandum far outweighs any possible contemplated harm, inconvenience or embarrassment.

54. I never received any response from the Minister to this memorandum. Given the serious issues I was raising in the memorandum, and given that the NPA Act criminalizes obstruction of the work of the prosecuting authority, I would have expected an immediate response from the Minister. The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.

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55. During the course of the next few months the legal representative of Messrs. Otto, Smith and van Staden, Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea and sentencing agreement.

56. The negotiation of the plea and sentencing agreements with the five accused was an extended process and was only concluded in early July 2007. On 10 July 2007 I sent a memorandum to the Minister informing her of the fact that the prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to murder Reverend Chikane by means of poisoning. The memorandum informed her of the fact that plea and sentencing agreements had been entered into. To the best of my recollection the Minister did not respond to this memorandum.

57. On or about 10 July 2007 I went off on compassionate leave because of the illness and subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

58. In August 2007, those implicated in the Chikane case pleaded guilty to the charges in exchange for suspended sentences as per Section 105A of the Criminal Procedure Act, 1977. Vlok and Van der Merwe were sentenced to

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ten years in prison suspended for five years, while the other three received five year prison sentences, suspended for five years.

59. I would have preferred a full prosecution in this case because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They largely confined their disclosure to facts that were already in the public domain. They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

60. A full prosecution in the Chikane case would have produced greater truth and accountability. However there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances.

61. Shortly after the plea and sentence agreement had been confirmed in court

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a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The claim was made on the basis of a fabricated document. A copy of this newspaper article is annexed hereto marked **"VPP4"**. The NPA responded to this article by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport article were denied. A copy of this press statement is annexed hereto marked **"VPP5"**.

62. After the newspaper article was published, I was summoned to a meeting of the of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Mr. Selebi. Cabinet Ministers included the Minister for National Intelligence Services, Mr. Ronnie Kasrils, Minister Mabandla, Minister Skweyiya amongst others.

63. During the meeting, Mr. Selebi said to me that the '*gloves are now off*' and that he was '*declaring war*' on me. In response I told him: "*for once in your life can you tell the truth and shame the devil*".

64. Those at the meeting demanded answers from me about TRC prosecutions. They were also particularly concerned that I was instituting an investigation into certain members of the South African Police Service.

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This was in relation to my investigation into who was behind the fabrication of the letter purportedly written by Ackermann SC. Minister Mabandla told me to stop this investigation as we could not be seen to be taking each other to court. I advised the Minister that I would not stop the investigation.

65. I explained that:

65.1. the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

65.2. the NPA was actively preparing for those prosecutions and that we should not be stopped from doing our job.

65.3. it was my role as the NDPP to decide who would be charged.

66. On 28 August 2007 I received a faxed letter from the Minister of Justice, Ms. B S Mabandla. A copy of this letter is annexed hereto marked **"VPP6"**. She referred to the meeting held on 23 August 2007. She noted that the National Commissioner of Police and I had different views on the Rapport article regarding the alleged forgery of certain NPA documents. She noted that I had initiated an investigation into the alleged forgery but she complained that she had not been advised of this decision or the basis thereof. Paragraphs 4 and 5 of the Minister's letter are particularly

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revealing:

> *4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that* ***indeed there is an investigation by the NPA on certain political office bearers.***
>
> *5. It was suggested at the meeting then that it would be useful if you could* ***respond to the allegation that there is an investigation*** *as mentioned above.* (Emphasis added).

67. The Minister's letter was further indication of the view held at ministerial level that I should not enjoy actual discretion to make prosecutorial decisions in relation to the so-called political cases arising from the conflicts of the past.

68. I responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked **"VPP7"**. My copy of this letter is not on an NPA letterhead, but I confirm that the contents thereof were transmitted to the Minister.

69. In this letter I referred to the 23 August 2007 meeting:

> *"....which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."*

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70. I confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*".

71. In relation to paragraph 4 of the Minister's letter I noted that it is:

> "*....clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.*"

72. I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had then briefed the then Minister of Justice, as well as the President. I also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the Director of Public Prosecutions (DPP) in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as then DG of Justice I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.

73. I concluded my letter by requesting an urgent meeting with the Minister and myself and my Deputies. I also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

74. The Minister did not respond to my requests and these meetings never

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took place. On 23 September 2007 I was suspended from office by President Mbeki. Shortly after my suspension I learned that Advocate Ackermann had been relieved of his duties in relation to the TRC cases.

CONCLUSION

75. I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.

76. The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued. It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored.

VUSUMZI PATRICK PIKOLI

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I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohohlo
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House, 40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

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STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality. Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring.

V.P.

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It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated.

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls.

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

V.P. 2

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Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures...The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors, who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law.

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy. In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

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"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

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The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Mpumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once-off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty. A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past,

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but also in the creation of a new ethos within our society.

Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases; and this was not to be.

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

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In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to

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make a contribution to this Fund. Most of the resources that have been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

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V.P.

To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow,

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

VPP 2

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
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Adv Vusi Pikoli
National Director of Public Prosecutions
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PRETORIA
0001

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
9/2/07
NATIONAL PROSECUTING AUTHORITY

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VPP 3

News24 archives
Breaking News First

Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan

Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoli, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

V.P.

Johan Wagener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

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VPP 4

Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuienis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweier is nie.
Rapport het die afgelope week uit onberispelike bronne verneem die polisiedossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiewe poste wat hulle beklee.
Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie.
Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingspan wat die vermeende Boeremaglede aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.
Die nasionale vervolgingsgesag (NV) het die ondersoeke jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.
Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat weinig aan die ondersoeke gedoen het.
Hierna is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.
Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuienis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontploffing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.
In Junie 2004 het mnr. Sipho Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrektiewe dienste, en min. Essop Pahad kan vervolg word nie omdat "daar eenvoudig nie genoeg getuienis is om 'n klagstaat op te stel nie".
Ngwema het destyds gesê die NV weet nie wié het wát gedoen of wie die opdragte gegee het nie.
"Indien die NV dit met die getuienis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.
Mnr. Dirk van Eck het reeds aangedui hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.
Die politieke omstredenheid oor vervolgings vir misdade uit die verlede sal uitbrei as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidstak.
Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.
Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuienis in die ondersoeke na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweier om te sê of die opdrag nagekom is en wat die vordering daarmee is.
Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phuti Setati, woordvoerder van nasionale speurdiens, verwys.
"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

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scarstenss@rapport.co.za
) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear '
Sonja CarstensPretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.
Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services.
The sources' names are withheld at the request because of the sensitive positions that they hold.
According to the sources, no further investigation into the information taken in the case files.
The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.
The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.
Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.
After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state. Ackermann was the prosecutor in the Vlok Van der Merwe trial.
Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.
In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linda Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".
Ngwema said then that the NPA do not know who has what or who did not give the orders.
"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility, "was Ngwema's words.
Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.
The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. institute. Basie Smit, a former head of the police detective and security branch. One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.
Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.
Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.
"The police want his comments on the case reserved," the RAF said.
scarstenss@rapport.co.za
) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

* In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
* Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
* Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
Cell: 082 333 3880

v.f

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MINISTRY
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA
Private Bag X 276, Pretoria, 0001, Tel (012) 315 1535, Fax (012) 315 1748
Private Bag X 256, Cape Town, 8000, Tel (021) 467 1700, Fax (021) 467 1750

Our ref: 2/3/6
Enq: Adv. M Sibiselane

Adv V P Pikoli
National Director of Public Prosecutions
Office of the National Director of Public Prosecutions
Private Bag X 752
PRETORIA
0001

Dear Adv Pikoli

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

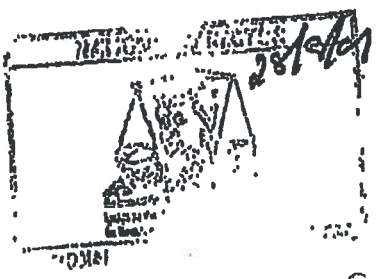
1. I refer to the discussions in the above meeting of 23 August 2007.
2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.
3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.
4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.
5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find the above in order.

Yours sincerely

MS B S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07



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V.P.

VPP7

Ref: NDPP/kp

Minister B. Mabandla
Minister of Justice and Constitutional Development
Momentum Building
cnr Prinsloo and Pretorius Streets
PRETORIA

29 August 2007

Dear Minister

MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to your fax of 28 August 2007.

2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.

3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).

4. I confirm and repeat the following:

4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.

4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police. I give the

Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.

6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing.

7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

V.P.

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"TN8"
217

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

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WILLEM SCHOON Ninth Respondent

AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

INTRODUCTION

1. I am a senior counsel, a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (the first respondent in this matter, hereinafter referred to as the "first respondent" or the "NDPP"). I am currently retired.

2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 ("the Act") I was appointed by President T M Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit ("PCLU"). A copy of this proclamation is annexed to the founding affidavit marked **"TN28".** I served as head of the PCLU between 2003 and 31 March 2013. I retired from the National Prosecuting Authority on 31 March 2013.

TP 9

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. As I have not studied all the relevant official documentation I stand to be corrected on certain details, such as dates.

4. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

EXPERIENCE

5. I have worked as a prosecutor for more than 40 years. I have prosecuted several high profile cases in South Africa. I set out hereunder an outline of my professional career:

5.1. Joined the Department of Justice in 1970.

5.2. Graduated from the University of Potchefstroom with the degrees of B Juris and LLB in 1975.

5.3. Admitted as an advocate in 1976.

5.4. Served with the office of the Attorney-General in Pietermaritzburg between 1977 and 1989.

5.5. Appointed Deputy Attorney General: Transvaal in 1989 and served in this post until 2003.

TP 87

5.6. Senior Counsel status was conferred on me in 1993.

5.7. Appointed head of the Priority Crimes Litigation Unit (PCLU) in March 2003.

5.8. I retired in 2013.

CONFIRMATION

6. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Vusumzi Patrick Pikoli insofar as they relate to me.

7. Although I was not specifically aware of an official policy or decision to stop, obstruct or hold back the investigation and possible prosecution of the cases recommended for prosecution by the Truth and Reconciliation Commission ("TRC"), including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996, I can confirm that I was effectively stopped from pursuing the investigation and prosecution of the so-called political cases arising from South Africa's past ("the TRC cases").

8. In this affidavit I set out my experiences in trying to pursue the prosecution of the TRC cases and how I was effectively stopped from carrying out this work.

BACKGROUND

9. If my memory serves me correctly, in 1998 the investigation dockets held by the Unit headed up by Transvaal Attorney General Dr. Jan D'Oliveira Unit were transferred to the National Prosecuting Authority ("NPA"). In terms of a directive issued in 1999 by the then National Director of Public Prosecutions ("NDPP"), the TRC related cases were transferred from the then Directorate of Special Operations ("DSO"), and from the various offices of the Directors of Public Prosecutions ("DPP") and the South African Police Service ("SAPS") to the office of the NDPP.

10. In 1999, a working group called the Human Rights Investigative Unit ("HRIU") was established within the NPA by the then National Director of Public Prosecutions ("NDPP"), Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The head of the Unit was Vincent Saldanha. It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, however it instituted no prosecutions.

11. In 2000, the dockets held by the HRIU were transferred to the Directorate of

Special Operations ("DSO"), more widely known as the Scorpions. An entity was established within the DSO to handle the TRC cases known as the Special National Projects Unit ("SNPU"), which was headed by Advocate Chris Macadam. The SNPU operated until 2003, but it too instituted no prosecutions.

12. On 24 March 2003 I was appointed to head up the newly established PCLU. The mandate of the PCLU is to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national and international crimes, such as terrorism, sabotage, high treason, sedition, foreign military crimes and other priority crimes as determined by the NDPP.

13. On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.

14. In May 2003 the then NDPP, Advocate Bulelani Ngcuka, made a determination that all TRC-related cases, in which amnesty had been denied or not applied for, were '*priority crimes*' in terms of the proclamation. This resulted in more than 400 investigation dockets being transferred to my office. Advocate Chris Macadam, attached to my office, and I conducted the initial audit and identified 21 cases as worthy of further investigation.

15. During 2004 and 2005 the PCLU identified 16 cases for further investigation and

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possible prosecution. The Simelane case was one of the cases earmarked for further investigation.

16. In relation to post-TRC prosecutions conducted by the PCLU, only the following cases have been instituted: S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others.

16.1. In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism during the 1990s, entered into a 'plea agreement' with the PCLU in terms of 105A of the Criminal Procedure Act. Terre' Blanche pleaded guilty to five counts of terrorism in contravention of the Internal Security Act and was sentenced to six years of imprisonment, which was wholly suspended. He had not applied for amnesty. This was the first TRC related case taken up by the PCLU.

16.2. During 2004 I came across the docket of Buyile Roni Blani, an ANC member, who was implicated in the mob killing of two people in 1985. Blani was charged with the killings in 1985 but managed to flee to Angola where he remained in exile until his return in 1992. He did not apply for amnesty. Since the evidence was clear and compelling and the case was already fully investigated I instructed that it should proceed. Blani was arrested and granted bail. On 25 April 2005, following a plea and sentence agreement, he was convicted on all charges and sentenced to five years imprisonment,

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four of which were suspended for five years.

16.3. In 2004, Gideon Nieuwoudt (who died in 2005), Johannes Martin van Zyl, and Johannes Koole were each charged with abduction, assault and murder of the 3 anti-apartheid activists, known as the PEBCO 3.

16.3.1. This was the first case that the PCLU brought in respect of perpetrators who had been denied amnesty. Their applications for amnesty had been denied in 1999.

16.3.2. Shortly after their bail hearings in 2004, Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some 5 years because of the failure of the Department of Justice to file its answering papers. Eventually in 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of van Zyl.

16.3.3. The case against the three former security policemen was provisionally withdrawn in 2009. The NPA submitted to the High Court that the prosecution could not proceed while there was an amnesty proceeding pending. The Department of Justice filed an affidavit recommending the provisional withdrawal of the criminal charges against the surviving Johannes Koole, and Martin Van Zyl,

who was seriously ill. The Amnesty Committee was never reconvened and the case against Van Zyl and Koole was never reinstated.

17. On the morning of 11 November 2004 the police was on the verge of effecting the arrests of three former officers of the Security Police on charges which related to the attempted murder of the Rev. Frank Chikane, the former head of the South African Council of Churches in 1989 by poisoning. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

17.1. On the same morning I received a phone call from Jan Wagenaar, the attorney for the abovenamed suspects. He told me that I would receive a phone call from the Ministry of Justice and I would be advised that the case against his clients must be placed on hold.

17.2. Shortly thereafter I received a phone call from an official in the then Ministry of Justice. I was informed by the said official that a decision had been taken that the Chikane matter should be put on hold pending the development of guidelines to deal with the TRC cases. I told him that that only the NDPP could give me such an instruction.

17.3. A few minutes later the NDPP contacted me and instructed me not to

proceed with the arrests. I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases.

18. All TRC related investigations and prosecutions were accordingly placed on hold pending the formulation of guidelines in relation to the so-called political cases of the past. These were to be incorporated as amendments to the Prosecution Policy (hereinafter referred to as "the amendments" or "the guidelines"). I was instructed by the NDPP to stop working on all the TRC cases.

19. At least two legal opinions were prepared by my office regarding the constitutionality of the proposed amendments to the Prosecution Policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerard Nel, the legal adviser to the NDPP, who was playing a leading role in formulating the proposed amendments.

20. This suspension of prosecutions amounted to an effective moratorium on the pursuit of TRC related cases.

21. During 2005 I met with representatives of the Simelane family. They raised a number of requests, including that the PCLU should:

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21.1. Investigate with a view to prosecuting Detective Inspector Msebenzi Timothy Radebe, who played a role in the abduction and the torture of Simelane both at Norwood and Northham and who did not apply for amnesty.

21.2. Investigate with a view to bringing defeating the ends of justice charges against Coetzee and Pretorius for intimidating the late Sergeant Lengene into making a false statement and for attempting to coach Norman Mkhonza into making a false statement.

21.3. Follow up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and follow up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.

21.4. Investigate the circumstances of the deaths of two key witnesses, Sergeant Mathibe and Sergeant Lengene.

22. I was not able to assist with these requests as at that stage my hands were tied with the effective moratorium in place pending the issuing of the new Prosecution Policy.

23. In December 2005 the amendments to the Prosecution Policy were issued. These

amendments permitted the granting of effective indemnities to perpetrators in TRC related cases who did not make use of the erstwhile amnesty process.

23.1. The NDPP was authorised to apply the same amnesty criteria used by the TRC but could also decline to prosecute on other open-ended criteria such as the perpetrator's demonstration of remorse, level of indoctrination sustained, attitude towards reconciliation and/ or his willingness to abide by the Constitution.

23.2. These criteria would entitle the NDPP to decline to prosecute, even where there was adequate evidence to justify a prosecution in a serious case such as kidnapping or murder.

23.3. The PCLU was expected to act under the advisement of a multi-departmental committee which included the National Intelligence Agency and the South African Police Service. The entire process would be carried out behind closed doors.

24. As mentioned above, I was opposed to the amendments to the Prosecution Policy as I felt they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. I again expressed my dissatisfaction with various officials, including the NDPP. In my view the amendments or guidelines were aimed solely at accommodating

perpetrators and providing them with another avenue to escape justice.

25. Once the guidelines were issued in December 2005 I wanted to proceed with the 5 cases I had identified with good prosecution prospects and the 11 cases which required further investigation. These were identified as "*major priorities*" for the PCLU for the 2006 – 07 period. Moreover a press statement issued by the NDPP during 2006 led to additional requests from victims for further investigations in their cases. However, with the exception of the Chikane matter, during the course of 2006 and 2007, the PCLU was unable to pursue any of the TRC cases for various reasons. These included a lack of investigative capacity as well as difficulties encountered in convening the multi-departmental committee that was meant to advise the PCLU on what cases to pursue.

26. In March 2006 I again met with the representatives of the Simelane family. I had to advise them that I was unable to take the investigation forward as there were no investigators attached to the PCLU. Requests I had made to the SAPS and the DSO for competent and experiences investigators, in this matter and the other TRC cases, had fallen on deaf ears. The said representatives also supplied me with a legal opinion which recommended that those involved in the torture of Ms. Simelane be charged with torture, as a crime against humanity or war crime, in terms of customary international law, since such crimes never prescribe.

27. As a result of this meeting the said representatives wrote to the then NDPP, Adv.

Pikoli, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. In subsequent interactions I advised the said representatives to pursue an inquest rather than a prosecution. I did so because I realized that there was no prospect of a serious investigation or prosecution taking place in the political context that prevailed at the time.

28. During 2006 the then NDPP, Adv Pikoli, appointed a team to review the representations made by the suspects in the Chikane matter who were seeking an indemnity under the amendments to the Prosecution Policy. The team was chaired by Dr. T. Pretorius. I refused to participate in this review as I regarded the said amendments as unconstitutional. After several months the review team concluded that no indemnities should be granted as the full truth had not been disclosed.

29. During 2007 the PCLU eventually returned to the Chikane attempted murder case and in June 2007 the three suspects, together with Adriaan Vlok, former Minister of Police, and Johan van der Merwe, former Commissioner of Police were charged with one count of attempted murder, alternatively conspiracy to murder Chikane. A plea and sentence agreement was agreed upon which the Court confirmed during August 2007. In terms of the plea and sentence agreement the accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced to ten years imprisonment, wholly suspended for five

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years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the condition that that they are not convicted of a similar crime.

30. This case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the Security Branch in October 1988, as well as other senior officers of the both the SAPS and the former South African Defence Force (SADF). However no further cases were pursued which can be attributed to political interference in the work of the NPA.

31. In 2008 the High Court in Pretoria (*Nkadimeng & Others v The National Director of Public Prosecutions & Others*, TPD case no 32709/07) struck down the amendments to the Prosecution Policy as unconstitutional. The Court found that the amendments were a "*copy-cat*" of the TRC amnesty process; that many of the criteria were not relevant in deciding whether or not to prosecute; and that they were moreover "*a recipe for conflict and absurdity*".

POLITICAL INTERFERENCE

32. The first act of political interference which effectively stopped the work of the PCLU into the TRC cases was the suspension of such cases during 2004 pending the issuing of the new prosecution guidelines. This introduced the effective moratorium I referred to above.

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33. Once the guidelines had been issued, and the multi-departmental working committee (subsequently referred to as the Task Team) was established in 2006, it became clear that the SAPS and NIA representatives believed they were part of the prosecutorial decision making process.

33.1. On 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General P C Jacobs, representing the view of the National Commissioner, which indicated that before any prosecutorial decision was made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP in respect of who to prosecute or not.

33.2. In respect of the interactions between the NDPP and other government departments and officials, I refer to the affidavit of Adv. Pikoli, which is filed evenly herewith.

34. The NDPP objected to this approach on the basis that it would constitute an unwarranted interference in the work of the NPA. The NDPP would be obliged to wait for the process to be completed and to receive a recommendation before he could make a decision, even where there were reasonable prospects of a successful prosecution.

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35. During 2007 an office note, purportedly written by me in 2006, was circulated in certain government circles in which it was reflected that I was investigating criminal charges against 37 ANC leaders, including the then President, Thabo Mbeki. This office note was a fabrication. I had written this office note in 2003 but the date of the note had been adjusted to give the false impression that it had been compiled in 2006. I believe it was aimed at discrediting me and ultimately stopping the investigations into the TRC cases. I am firmly of the view that the then National Commissioner, the late Mr. J Selebi, played a conspicuous role in claiming that I was pursuing the said leaders.

36. During this time I was informed by Adv. Pikoli that the then Director-General of the Department of Justice, Menze Simelane, had approached him and raised concerns about my handling of the prosecution of the TRC cases. He asked the NDPP to relieve me of my duties in this regard, which the NDPP declined to do. The NDPP advised me that senior people in the government wanted to fire me because I was still pursuing the TRC cases.

37. Adv. Vusi Pikoli was suspended from his duties as NDPP in September 2007. Shortly after his suspension I was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP. Adv. Mpshe advised me that I was relieved of my duties in relation to the TRC cases with immediate effect. I have no doubt that Adv. Mpshe received a political instruction to remove me from these cases. I

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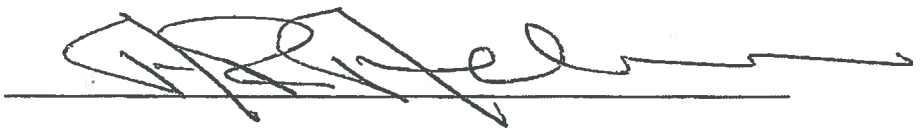
advised Adv. Mpshe that removing me from the TRC cases would not make the cases go away.

38. At the time, I believed that if I was being removed from the TRC cases, then nobody else would be permitted to pursue the cases boldly and fearlessly. It is no coincidence that there has not been a single further prosecution since I was relieved of my duties in this regard.

CONCLUSION

39. There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.

40. In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes.



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A R ACKERMANN

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at PRETORIA on this the 07th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

"I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of his affidavit, that he/she does not have an objection to taking the oath, and that he/she considers it to be binding on his/hers conscience, and which was sworn to and signed before me and that the administering oath complied with the regulations contained in Government Gazette No. R 1258 of 21 July 1972, as amended

SIGNATURE
Commissioner of Oaths

MAHMO FOSCH
FULL NAMES

Designation: Ex officio: Republic of South Africa Date: 07/05/2015

Place: WITBANK Business Adress: WOODMAN POST OFFICE

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236

June 24, 1999

AMNESTY HEARING - WILLEM SCHOON

The Amnesty Committee of the TRC is to hear amnesty applications of Brigadier Willem Schoon - a part heard matter, on the abduction of Nokuthula Simelane, an ANC activist from Swaziland in 1982.

Four applicants, Willem Coetzee, Norman Mkhonza, Frederick Mong, Frederick Williams, Nomrod Veyi, Jacobus Ross with the exception of Lazarus Selamolela have already testified before the committee in May.

Peter Lengene who had applied for amnesty died three months ago. All the seven applicants were members of the Soweto Special Branch Unit under Coetzee.

They are applying for their role in the infiltration and killing of ANC underground activists in Soweto in the early eighties.

The Schoon hearing will take place on June 28, 1999 in Pretoria at the Idasa Center, cnr Visagie and Prinsloo Street.

For more information call Mbulelo Sompeta : 082 452 7870.

TP 9

237

AC/2001/185

TRUTH AND RECONCILIATION COMMISSION

AMNESTY COMMITTEE

APPLICATION IN TERMS OF SECTION 18 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT, NO.34 OF 1995.

W H COETZEE 1ST APPLICANT

(AM4122/96)

A PRETORIUS 2ND APPLICANT

(AM4389/96)

J F WILLIAMS 3RD APPLICANT

(AM4375/96)

J E ROSS 4TH APPLICANT

(AM4377/96)

F B MONG 5TH APPLICANT

(AM4154/96)

N L MKHONZA 6TH APPLICANT

(AM5420/97)

M M VEYI 7TH APPLICANT

(AM5421/97)

M L SELAMOLELA 8TH APPLICANT

(AM5419/97)

DECISION

1. INTRODUCTION

TP 9

This is an application for amnesty in terms of the provisions of Section 18 of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 ("the Act"). The matter relates to the abduction and subsequent treatment of Ms Nokuthula Aurella Simelane during or about the period August - September 1983. The sequence of events constituting the incident will be set out more fully later in this decision. All of the Applicants were to a greater or lesser extent involved in the incident. They were at all material times members of the Security Branch of the then South African Police attached to the Intelligence Unit stationed at Soweto in the present province of Gauteng. The Applicants fall into two categories in accordance with the extent of their respective participation in the incident. The participation of Applicants Williams, Ross and Mkhonza was limited to the abduction of Ms Simelane while the remainder of the Applicants participated throughout the duration of the incident, except for Veyi who joined in after the abduction. The latter group of Applicants engaged in an internecine war during the course of the hearing which was conducted between two camps. The one camp, consisting of Coetzee, Pretorius and Mong, was represented by Mr Visser and the other camp, consisting of Veyi and Selamolela, was represented by Mr Lamey. All of the Applicants testified in support of the applications. Their versions largely coincided in regard to the abduction of Ms Simelane while the respective versions of the two conflicting camps were mutually destructive in relation to the subsequent treatment of Ms Simelane. The interests of the next-of-kin of Ms Simelane were represented at the hearing by Mr van den Berg who indicated in argument that only the applications of Coetzee, Pretorius and Mong are being opposed. Mr van den Berg presented testimony of Gilbert Thwala in support of the case of the next-of-kin.

It is necessary to set out the material evidence in more detail. The summary of the relevant evidence will commence with the facts which are common cause, followed by the respective conflicting versions of the Applicants involved in the dispute of fact in regard to the treatment of Ms Simelane and will conclude with the version of Mr Thwala.

2. FACTS WHICH ARE COMMON CAUSE

Certain sources attached to the Soweto Intelligence Unit of the Security Police including Mkhonza, had infiltrated the ranks of the African National Congress ("ANC") and its military wing Umkhonto weSizwe ("MK") in Swaziland. The Soweto Intelligence Unit under the command of Coetzee, was alerted by these sources that a meeting was arranged between Mkhonza and an MK member at the Carlton Centre in Johannesburg during or about August - September 1983. Coetzee conveyed this information to the overall commander of the Soweto Security Police, the late Brigadier H Muller. After having considered various options, Muller ordered that the MK member should be abducted with a view to turning the member into an agent of the Security Police. Pursuant to this order, Coetzee gathered a group of Security Police officers, including the Applicants, and prepared them for the operation. On the day of the operation, the group monitored the movements of the MK member with a view to executing the planned abduction. It was only at that stage that it transpired that the MK member was a lady, Ms Simelane. She was young, attractive, soft-spoken and had a slender figure. She had also just completed a degree at the University of Swaziland. In accordance with the plan decided upon by the group of police officers, Mkhonza lured Ms Simelane to the basement of the Carlton Centre where she was apprehended and abducted. Ms Simelane was manhandled, placed in the boot of a police vehicle and transported to the Custodum Flats where the Security Police had an operational office in the cleaner's quarters on the roof of the building. Ms Simelane was left in one of the police vehicles out of sight of the general public. She was subsequently removed to the operational office where she was kept for a few days.

Throughout this period Ms Simelane was interrogated and continuously

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assaulted by a group of Security Police officers. The assaults were of a serious nature and Applicants accepted that this can be equated to torture. All of the Applicants save for Williams, Ross and Mkhonza were to a greater or lesser extent involved in her torture. The latter had ceased their participation in the incident after the abduction was executed at the Carlton Centre. Ms Simelane was subsequently transferred to a secluded premises on a farm in the district of Northam in the present North West Province. Here she was detained for a period of approximately 4 to 5 weeks. The interrogation and torture continued on the farm. The pith of the conflict between the versions of the relevant Applicants concerns the events surrounding the interrogation and torture of Ms Simelane on the farm. The respective versions in this regard will now be set out.

3. VERSION OF COETZEE, PRETORIUS AND MONG

According to these Applicants, the assaults occurred only during the course of the first week of Ms Simelane's detention, whereafter it was effectively terminated apart from the odd occasion when she would be given a slap or a punch in order to secure her continued co-operation. After the first week of detention, Ms Simelane agreed to work as an agent of the Security Police. She gave her full co-operation to Coetzee who was leading the group of police officers. As she was concerned about her safety, Ms Simelane requested Coetzee not to let the black officers in the group know that she was in fact working with the police. This fact was accordingly not conveyed to either Veyi or Selamolela. Ms Simelane furnished information concerning the structures and operations of MK in Swaziland. In order to ensure Ms Simelane's continued credibility with the ANC and MK, certain targets were attacked by the Security Police under false flag operations. These attacks formed part of the orders which Ms Simelane had to convey to MK units inside South Africa. MK would have become suspicious of Ms Simelane should these attacks not have been launched which in turn would have compromised the continued operations of the Security Police agents who had infiltrated MK. Ms Simelane's recruitment occurred over a period of time and was finalised approximately two weeks prior to her departure from the farm. She was registered as an occasional source of the Soweto Security Police to be handled by Coetzee and Pretorius.

During the period of her stay on the farm, Ms Simelane's personal needs such as toiletries, food, clothing and the like were attended to. Throughout this period, her hands and legs were cuffed at night in order to stop her from escaping. After the necessary arrangements were made, steps were taken to return Ms Simelane to Swaziland. Only Coetzee, Pretorius, the late Sergeant Mothiba and one of the Security Police sources were involved in the arrangements concerning the handling of Ms Simelane as a Security Police source. Mothiba and the source eventually transported Ms Simelane to Swaziland. She subsequently failed to keep the pre-arranged appointments with her Security Police handlers. The Security Police never heard of Ms Simelane again. The Applicants vehemently denied that Ms Simelane's torture continued beyond her first week of detention or that she was so badly assaulted over the prolonged period of her detention that she was hardly recognisable towards the end of her stay on the farm. They likewise denied that electric shocks were administered to Ms Simelane during her detention on the farm or that her torture included her being thrown into the dam on the farm. They furthermore strenuously denied that Ms Simelane was killed by the Security Police and her body disposed of after she was removed from the farm.

4. VERSION OF VEYI AND SELAMOLELA

Only Selamolela was involved in the abduction, while both of them were involved in the subsequent detention of Ms Simelane at the Custodum Flats and on the farm in the Northam district. She was completely outnumbered by the members of the Security Police who were all male and physically superior to her. Throughout the period of her detention, Ms Simelane was interrogated and severely assaulted.

Both the interrogation and the assaults were led by the white officers, particularly Coetzee who was in overall command of the group of Security Police. Ms Simelane never co-operated Ms Simelane never co-operated with the police neither did she furnish any material information concerning MK as alleged by Coetzee and the other white officers. She persisted with this stance right up to the end of her stay on the farm and there was never any question of her being recruited as an agent of the Security Police. It is due to this attitude, that she was severely assaulted throughout her detention. Towards the end of her stay on the farm, her physical condition had deteriorated to such an extent as a result of the assaults, that she could hardly be recognised. She had great difficulty in walking and her physical condition had generally deteriorated quite badly. According to Selamolela she was also subjected to torture by electric shocks on the farm. She was, moreover, thrown into the dam on the farm. According to Veyi he last saw Ms Simelane lying in the boot of Coetzee's vehicle while she was still cuffed. He was under the impression that Selamolela accompanied him on this occasion. Selamolela on the other hand had no recollection of this incident. To their knowledge, no toiletries, medication or similar personal items were furnished to Ms Simelane during her detention on the farm. She was in fact dressed in a brown police overall throughout this period. They disputed the version of Coetzee and the other white officers that the information furnished by Ms Simelane led to the false flag attacks on the electrical power stations or was instrumental in the arrest of a number of persons linked to MK. Despite the sustained assaults and the other attempts to recruit her, Ms Simelane remained unco-operative to the end. According to Veyi, Mothiba informed him that Coetzee and Pretorius were involved in the subsequent killing of Ms Simelane and the disposal of her body.

5. VERSION OF GILBERT THWALA

At all material times he was the chief of staff of the Transvaal Urban Machinery of MK and was based in Swaziland. During 1982, Ms Simelane joined his unit and she was operating as a courier for one of the MK units within the Transvaal Urban Machinery. During September 1983, he deployed Ms Simelane on a mission to make contact with one of the other MK units within the Transvaal Urban Machinery at the Carlton Centre in Johannesburg. He had previously made the necessary arrangements with a member of that unit for the meeting with Ms Simelane. The arrangement was in fact that Ms Simelane would collect certain written arrangements in regard to lines of communication between the relevant MK unit and the MK command in Swaziland. She was only given the necessary information to enable her to complete the mission. She was specifically never given any information concerning the membership of the unit or in regard to operational issues such as the location of arms caches or targets for attack. After the necessary logistical arrangements had been made, Ms Simelane was briefed on the mission a few days before her actual departure from Swaziland for South Africa. Arrangements were made for her to be accommodated by an MK member, one Duma Nkosi.

She left Swaziland around the 8th September 1983 and the meeting at the Carlton Centre was arranged for Saturday, 11th September 1983. The arrangement was that Ms Simelane would communicate with him after the meeting at the Carlton Centre on the Saturday. By the Saturday evening, when Ms Simelane had not yet made contact with him, he realised that there was a problem. He made telephonic contact with Duma Nkosi and established that Ms Simelane had failed to return home after having left for a meeting in the morning. It transpired that Ms Simelane's clothing and other possessions were still at the home of Mr Nkosi. He also telephoned Ms Simelane's home to enquire whether she was possibly there. Her relatives indicated that to their knowledge, Ms Simelane was still in Swaziland and were surprised to hear that she would be collecting some items from home that she needed for the purposes of her imminent graduation. By the following evening, he realised that Ms Simelane had disappeared and he instituted the necessary precautions to ensure that the MK units or their operations would not be

compromised by the disappearance of Ms Simelane. He ordered the MK unit to which Ms Simelane was attached as well as the unit of Mr Nkosi to immediately cease all operations until further notice. Steps were also taken in Swaziland to secure the MK premises which were known to Ms Simelane. He again communicated with Ms Simelane's family and indicated to them that she seemed to have disappeared in Johannesburg.

He denied that Ms Simelane had anything to do with the arrest of approximately 18 MK members during 1984. He indicated that apart from one member of the group that was arrested, Ms Simelane had never met any of the other arrestees and had no basis of possibly knowing that they were members of MK. He had taken steps to resolve the mystery surrounding the disappearance of Ms Simelane. He indicated that although he accepted, as one of the possibilities, that she was arrested by the South African Security Police he was puzzled by the fact that no action was taken by the latter against any of the units or the MK premises in Swaziland that were known to Ms Simelane. He had never seen Ms Simelane since her departure for South Africa and emphatically denied the suggestion that Ms Simelane was killed by MK after she was placed back in Swaziland by the Security Police. He indicated that if Ms Simelane had in fact returned to the ANC structures or MK in exile he would have been apprised of that fact and would have been central in any possible MK or ANC investigation into the situation of Ms Simelane.

6. EVALUATION OF THE EVIDENCE

It is apparent from a conspectus of the respective versions that the material matters in issue are :

6.1 The duration of Ms Simelane's torture;

6.2 Whether Ms Simelane co-operated with the Security Police and was recruited by them;

6.3 Ms Simelane's physical condition towards the end of her stay on the farm;

6.4 Ms Simelane's fate subsequent to having been removed from the farm.

Having carefully considered the matter, we are satisfied that in spite of some discrepancies in their versions, the evidence of Veyi and Selamolela is basically truthful. They have both made a very favourable impression upon us and their testimony has struck us as honest as well as a genuine attempt to convey all of the facts and circumstances concerning the incident to the best of their ability. We bear in mind that they have been called upon to recount events that occurred a very long time ago and in which they did not play a leading role. In the case of Selamolela he had to contend with the additional disadvantage of suffering from the effects of post-traumatic stress syndrome which, according to the medical evidence placed at our disposal, negatively affected his memory. There is, in our view, no merit in the submission made on behalf of Coetzee and the other white Applicants that Veyi and Selamolela adopted a hostile position towards their white superiors and were actuated by a desire to put the latter in as bad a light as possible while minimizing their own role in the incident. It is common cause that they made a public disclosure of the circumstances surrounding the Simelane incident after her disappearance was highlighted in a prominent article in the Sowetan newspaper. They subsequently made statements to the then Attorney-General of the Transvaal which were basically consistent with their versions at the amnesty hearing. These statements were deposed to prior to the date on which the first amnesty applications were made in respect of the Simelane incident and at a time when they

had no indication whether or not on what basis any of their superiors may apply for amnesty.

There can be no doubt, in our view, that their principal motivation was to make a full disclosure of the entire incident and to lift the burden of guilt that they were carrying concerning their own role in what they experienced as an unwarranted and unjustifiable invasion of the basic human rights of Ms Simelane. It is inexplicable why they should falsely exaggerate the duration of Ms Simelane's torture when they have confessed their own complicity in that torture. We find it highly improbable that they would implicate themselves in an offence, the severity of which they falsely exaggerate.

We have not been similarly favourably impressed by the versions of either Coetzee, Pretorius or Mong. We have no doubt, that they have made common cause and orchestrated their testimony in an attempt to minimize their roles in the torture of Ms Simelane. They were evasive and resorted to prevarication and long-winded technical explanations whenever they sensed difficulties or shortcomings in their versions. They studiously failed to furnish direct answers to questions which they regarded as potentially damaging to their case. The record speaks for itself in this regard. Moreover, various aspects of their versions are inherently improbable. They failed to furnish a reasonable or acceptable explanation for the fact that Ms Simelane was kept in foot cuffs throughout the period of her stay on the farm in spite of having allegedly agreed to become a police informer. Their explanation that this was done as a precaution against Ms Simelane possibly fleeing, contradicts the allegation that she had in fact been recruited and registered as a police informer while staying on the farm. It is, furthermore, inherently improbable that they would have continued detaining Ms Simelane under primitive and extremely adverse conditions on a remote farm in the bushveld at a time when they in fact had her full co-operation as a newly recruited informer. The probabilities in this regard instead favour the version of Veyi and Selamolela that she was held under these circumstances and continuously assaulted precisely because of the fact that she had refused to co-operate with the police. The version that, on Ms Simelane's insistence, the fact of her recruitment was kept secret from the black members is, in our view, a clever but unpersuasive attempt to neutralise the effect of the contrary version of Veyi and Selamolela. It is beyond the realm of belief that Coetzee and the other white officers could keep up this facade for approximately one month on the farm while at the same time somehow managing to involve Mothiba in Ms Simelane's recruitment without raising the suspicion of the remaining black members. On the totality of the evidence before us, we have no doubt that the versions of Coetzee, Pretorius and Mong are untruthful where they conflict with those of Veyi and Selamolela on the issues in dispute. We are not persuaded that the criticisms levelled at the versions of Veyi and Selamolela in the argument submitted on behalf of Coetzee, Pretorius and Mong affect those versions in any material way even less does it warrant the total rejection of those versions.

Insofar as the evidence of Mr Gilbert Thwala is concerned, we are satisfied that his version is honest and truthful. We are not persuaded that the rancour that developed during cross-examination between Mr Thwala and Mr Visser is indicative of or only explicable on the basis of mendacity on the part of Mr Thwala. This factor does not detract from the gravamen of that version which in broad terms corroborate the evidence of Veyi and Selamolela that Ms Simelane never co-operated or furnished any material information to the police. It, moreover, constitutes a compelling basis for the conclusion that Ms Simelane never returned to Swaziland after she was abducted by the Security Police.

7. FINDINGS

In the circumstances, we are satisfied that Ms Simelane was abducted by

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members of the South African Security Police, including some of the Applicants, acting under the command of Coetzee on or about Saturday, 11 September 1983 at the Carlton Centre, Johannesburg. During her subsequent detention for a period of approximately five weeks, she was continuously and very seriously assaulted by the group of Security Police, under the command of Coetzee, who held her captive. All attempts to extract information concerning MK or its operations as well as attempts to recruit her to become a Security Police informer, were fruitless. Due to the prolonged and sustained assaults, Ms Simelane's physical condition deteriorated to the extent that she was hardly recognisable and could barely walk. Ms Simelane was last seen where she was lying with her hands and feet cuffed in the boot of Coetzee's vehicle. She never returned to her familiar environment in Swaziland after having been abducted by the South African Security Police and had disappeared since. It is not necessary for the purpose of this matter to make a definitive finding on the eventual fate of Ms Simelane.

8. CONCLUSION

The abduction and subsequent situation of Ms Simelane will be dealt with separately.

8.1 Abduction

It is not in contention that the abduction of Ms Simelane was duly authorised by the then commander of the Soweto Security Branch. The facts and circumstances relating to this incident have been fully disclosed. The operation was directly linked to the political struggle being waged at the time against the ANC or MK which were regarded as the political enemies of the South African State and its Security Forces. We are accordingly satisfied that this incident constitutes an act associated with a political objective as envisaged by the Act. Amnesty is accordingly GRANTED to all of the Applicants, save for Veyi who was not involved, in respect of all offences or delicts arising from the abduction of Ms Simelane on or about Saturday 11 September 1983 at or near the Carlton Centre, Johannesburg. We have considered the position of Mkhonza and are satisfied that his actions contributed directly to the unlawful abduction. He is accordingly also entitled to amnesty in spite of the fact that he was under the initial impression that Ms Simelane would be lawfully arrested.

8.2 Torture

In the light of what is set out above, we conclude that the evidence of Coetzee, Pretorius and Mong is untruthful insofar as it concerns the duration and extent of Ms Simelane's torture whilst she was in the custody of the Security Police, especially on the farm. Coetzee, Pretorius and Mong have accordingly failed to make a full disclosure of all relevant facts in regard to this aspect of the matter as required by the provisions of Section 20 of the Act. Their applications are accordingly REFUSED on this aspect.

Insofar as the applications of Veyi and Selamolela are concerned, we are satisfied that they have made a full disclosure of all relevant facts. At all material times they were acting on the orders of their commander, Coetzee, who informed them that Ms Simelane was a member of MK. Their actions were accordingly directed against a perceived political enemy and as such constitute acts associated with a political objective as envisaged by the Act. Their applications accordingly comply with all of the requirements of the Act. In the circumstances, amnesty is hereby GRANTED to the Applicants Veyi and Selamolela in respect of all offences and delicts arising from the torture of Ms Simelane subsequent to her abduction as set out above.

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In our opinion Ms Nokuthula Aurella Simelane, alternatively her next-of-kin are victims in respect of the incidents for which amnesty is hereby granted and the matter is accordingly referred for consideration in terms of the provisions of Section 22 of the Act.

DATED AT CAPE TOWN THIS 23RD DAY OF MAY 2001

DENZIL POTGIETER, A-J

A-J CHRIS DE JAGER, A-J

ADV L GCABASHE

AC/2001/185

TRUTH AND RECONCILIATION COMMISSION

AMNESTY COMMITTEE

APPLICATION IN TERMS OF SECTION 18 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT, NO.34 OF 1995.

W H COETZEE 1ST APPLICANT

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(AM4154/96)

N L MKHONZA 6TH APPLICANT

(AM5420/97)

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M M VEYI 7TH APPLICANT

(AM5421/97)

M L SELAMOLELA 8TH APPLICANT

(AM5419/97)

A D D E N D U M

I agree with the result but do not agree with some aspects and conclusions in paragraph 6 above. The Applicants Coetzee, Pretorius and Mong did not satisfy me that they've made a full disclosure of all relevant facts.

CHRIS DE JAGER, A-J

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Mom's question: Where's my child?

by Sharon Chetty

...s elite fighting unit Barney Molokoane had help from a young woman — his ...ée Nokuthula Simelane — and had it been for her many of his missions may have been successful.

While a social science student at the University of Swaziland, Nokuthula Simelane hid their weapons, acted as courier, provided shelter and was the major communication link between their Swaziland base and South Africa.

And then she disappeared.

The last her parents, Matthew and Christina, saw of her was in June 1983 at their home in Mzinoni township, Bethal. She was 24.

"Nokuthula had finished her degree and had just come home because she was looking for a job," recalled her mother.

"The security police was harassing her a lot. She had a narrow escape after they came to our home one morning and we decided she should go back to Swaziland."

The Simelanes were confident that their daughter was all right as she lived with two uncles — Leonard and Richard Vilakazi.

Dual citizenship

Nokuthula had dual Swazi-SA citizenship. Her uncles were prominent educationists and her father a former mayor of Mzinoni township.

They were well known and respected in both Bethal and Swaziland, which helped her evade the police.

"Then one day Leonard phoned to ask if Nokuthula had arrived in Bethal.

"We did not know she was on her way because she did not say anything. Leonard said Nokuthula was going to stop at her friend Wendy Mpama in Mbabane.

"Wendy then pointed us to an MK cadre named Mpho Mpau".

Mpau, then chief of staff in Swaziland, had sent her on two missions to South Africa, the Simelane's found out.

She was apparently sent to Vereeniging and was successful in delivering a message to an operative there.

Her next stop was at a house in Senoane, Soweto, and that is where the trail ended.

MK man

"We found out that an ANC man named Thoma Nkosi lived in that house. Nkosi said on arriving from work, he found Nokuthula at the house and gave her directions to the Carlton Centre.

"No one knows what happened next," said Mrs Simelane.

"The man Nokuthula was to meet was named Scotch.

"When he was called to Swaziland to account for her whereabouts, he disobeyed his MK bosses.

"Later they found out that he was a double agent and had been working for the police.

"For ten years we searched for our daughter but found nothing,' said Mr Simelane.

"Then in August 1993 Mpho Mpau came to us and explained that he had sent her on the two missions on September 9 1983.

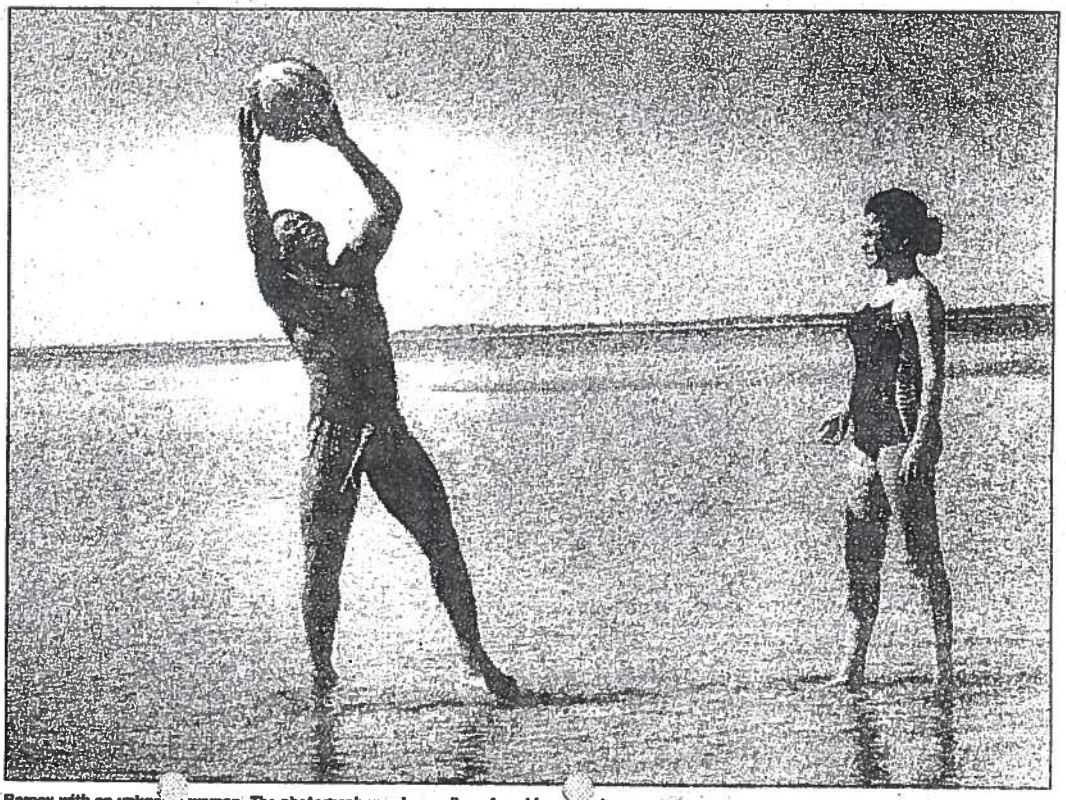
"He confirmed that Scotch was a known police informer but they (MK) could not do anything until the ANC came into power and controlled the police force."

Mpau, now a pilot with the SAA, has not contacted them since.

The Simelanes say even the ANC refuses to accept liability for Nokuthula's disappearance ... they said she was "a mere sympathiser and not a member".

"How can they dismiss her in that way? on every major mission ... Barney came to the country, we would accommodate him," explained Simelane.

"The SAP put pressure on the Swazi police to deport her, but because of her dual citizenship she was left alone. Her uncle's house was attacked many times. A bomb was found there. They know that the last person to have contact with my daughter was an informer ... they control the police now, why can't they go and ask him what happened," a bitter Mr Simelane said.



Barney with an unknown woman. The photograph was in an album found in a safe house.



Missing since 1983 ... Nokuthula Simelane.

Share prices on the Johannesburg Stock Exchange

These were prices at the close of the market.
N.B.: The JSE does not operate on public holidays.
Prices courtesy of Frankel, Pollak, Vinderine Inc

Name	Buyer	Seller	Last	H	L
1. Nail	R1,25	R1,35	R1,35	R2,00	R1,30
2. Kilimanjaro	R3,00	R3,10	R3,00	R3,50	R3,00
3. African Life	R6,20	R6,40	R6,20	R7,35	R4,60
4. Metropolitan	R33,00	R34,50	R36,00	R37,00	25,75
5. Corp Africa	R1,10	R1,30	R1,20	R1,70	R1,00

Glossary:
Buyer: Price at which the share was bought. Seller: Price at which the share was sold. Last: Last traded price on the share. H: Highest level share reached this year. L: Lowest level the share reached this year.

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Sturbie Hall - Shop 21, Wingrin Centre
Industria - 11a Newclare Road (opposite Industria Station)
Siyabuswa - Shop 4, Siyabuswa Shopping Centre
Witbank - C 14(c) OK Centre, Eadie Street

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MK's Mata Hari still not found

Nokuthula Aurelia Simelane was sent on a mission in September 8 1983 but never reached her destination.

See pages 16 and 17.

Missing in action

By Sharon Chetty

A TRACING COMMITTEE set up by the ANC says there are more than 300 Umkhonto we Sizwe cadres who "disappeared" during the struggle for liberation.

Speculation is that many of these soldiers were killed in combat with the old South African security forces and buried in unmarked or falsely marked graves inside or outside the country.

A committee "for the bereaved" was set up in 1991 by Mr Nelson Mandela and then consisted of four returned exiles.

Its task was to inform the families of cadres who had died in exile.In 1992 another committee was set up by the ANC NEC to trace missing persons. A member of this committee, Patience Molekane, said yesterday a number of cadres had been traced, but no figures were available.

"For many of the people we just have names which they used in the camps. Their real names and families are hard to find," Molekane said.

She added that inquiries about missing cadres were still being regularly rec[illegible] at the ANC's Shell House in Johannesburg.

Molekane said her committee had sent a letter to outgoing police commissioner General Johan van der Merwe last April asking him to identify graves of MK soldiers who had died in action aga[illegible] the old South African regime.

V[illegible] der Merwe allegedly did not respond to the first letter according to Molekane and a second request was made in December.

Molekane blamed the slow progress being made by her committee and the committee for the bereaved on "a shortage of information". She said there were only two people left on the tracing committee — committee members had left to find jobs elsewhere.

Sources outside the ANC, like the Durban-based Recoc, have hinted that a number of ANC cadres may well have been "disposed of" by their own people.

Meanwhile, Eastern Transvaal police have confirmed that three MK cadres responsible for the November 1985 attack on the Sasol plant were buried in falsely marked graves in Piet Retief.

Barney Molokoane, Victor Khayiyana and Vincent Sekete were killed in a firefight with security forces when they tried to enter Swaziland at the Houtkop border post.



Inside bumper Sowetan today

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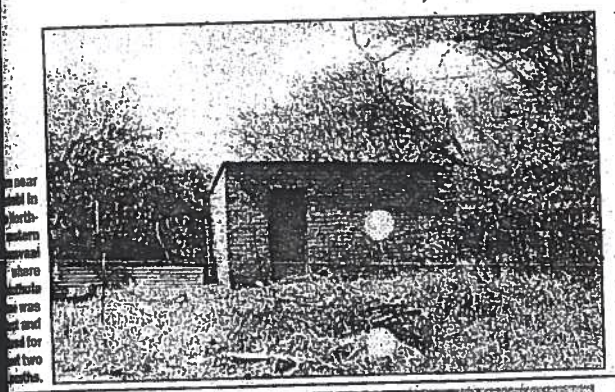
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Page 32

Cops trapped and killed MK cadre



By Sharon Chetty

POLICE ARRESTED AND KILLED an Umkhonto we Sizwe cadre 12 years ago and buried her without trace, a former security branch constable has admitted.

Nokuthula Simelane was on an MK mission in Johannesburg in September 1983 when she went missing.

It was later discovered that the man she was to meet at the Carlton Cen[illegible] Johannesburg was a police informer — but the trail died there and despite 12 years of searching by her parents, Matthew and Ernestina Simelane, everything remains a blank.

This weekend a member of a police security branch unit that operated out of Soweto, said Simelane had been ar[illegible]d when one of their informers set a trap for [illegible].

Simelane was taken to a farm near Thabazimbi in the Northwestern Transvaal and kept there for almost two months, he revealed.

He was part of a unit of nine men who gathered intelligence on activists.

They passed the information on to the C10 unit at the notorious Vlakplaas base which dealt with "terrorists".

'She was very beautiful'

Constable X, who prefers not to be named at this stage, said the black members of the unit guarded Simelane while the white members tortured her.

"She was very beautiful. But by the time they (the white officers) were 'finished' with her, she could not be recognised," he said.

Because Simelane was regarded as a "terrorist" she was kept in leg-irons and handcuffs and interrogated constantly, he said.

He described how one day the leader of the unit drove around with Simelane — in handcuffs and leg-irons — lying in the boot of his car.

"She was still alive, and lying crouched on the floor," he recalled.

Constable X had decided to speak about his unit's nefarious deeds, because, he was "haunted by the evils that were committed".

"My conscience says that this must be made public ... everyone should know about the past," he said. He is prepared to testify before the Truth Commission.

Shot dead and buried

When he saw a picture of Simelane and an article on her disappearance in the *Sowetan* last week, he had no doubt that she was the captive he guarded.

The last time he saw her she was still alive and being held on the farm. After he was sent back to Soweto, he inquired after the woman.

"*Moenie baie vrae vra nie*," was the reply he got from one of his superiors. Later he was told by a sergeant that the two white leaders of the unit had shot dead and buried Simelane in Rustenburg.

A *Sowetan* team accompanied Constable X to the farm in Northam, outside Thabazimbi, where he said Simelane was held.

The owners of the farm for 30 years, PC and Martie Welthagen, confirmed that they were related to the leader of the SB unit, but said they had lost contact with him.

However, they did confirm that the man, whom they knew worked as a *speurder* (detective) with the security branch, used to stay at the farm frequently in the 1980s and that at one stage a young black woman was made to stay there.

Mrs Welthagen said that they were told that the woman was learning to become a policewoman and that she needed to keep away from people.

The couple, who are in their 70s, said their memories were failing and they could not recall exactly who was taken there.

The outbuilding which Constable X said was used as the prison, is a short distance from the main farmhouse.

There is a road leading directly to that cottage and Constable X says a separate access road was used by the policemen.

"We slept in sleeping bags on the floor. We used to wash at the tap outside.

"There's the place where we used to have braais," he said, pointing to a fire-scorched section on one side.

Welthagen said that the stuffy, one-roomed abode was built more than 20 years ago to house farm labourers.

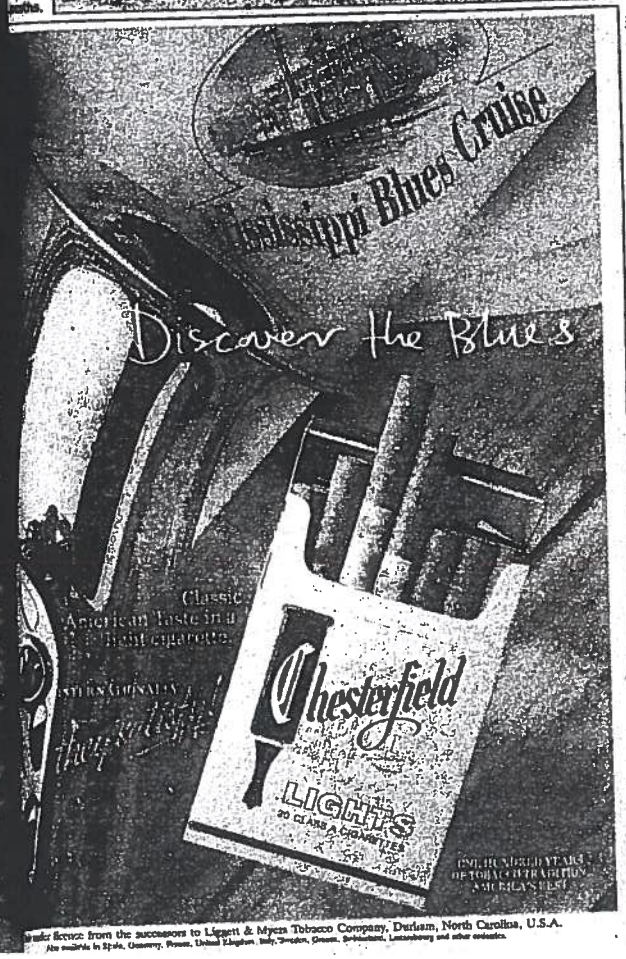
No one was living there because the Welthagen's had stopped farming their land.

The names of the policemen involved in the security branch unit are known to *Sowetan*.

At least two of the white officers appear on a controversial list of 3 500 people who applied for indemnity shortly before last April's elections.



MK cadre Nokuthula Simelane was killed by police 12 years ago and buried without a trace.



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Also available in [illegible]

ANNEXURE "TN13": IN CAMERA AFFIDAVIT

(SEE ATTACHED FILE)

ANNEXURE "TN14": IN CAMERA AFFIDAVIT

(SEE ATTACHED FILE)

WAARSKUWINGSVERKLARING DEUR VERDAGTE

Om 14:30 op hierdie 6de dag van Julie 1998
te Pretoria
kantoornommer Hawkeyenest Area 7, voer ek 'n onderhoud met Willem Hetta Johannes Coetzee, hierna die verdagte genoem. In my kantoor is daar slegs ek, die verdagte en Justo Pretorius, wat as tolk in die _____ taal, wat deur die verdagte verstaan word, optree en niemand anders nie.
Die verdagte word meegedeel dat ek 'n Kaptein (rang) in die Suid-Afrikaanse Polisie (Diens) is en ampshalwe 'n Vrederegter / ~~Vredesbeampte~~ is. Ek toon aan hom / ~~haar~~ my aanstellingssertifikaat.
Sy / ~~Haar reaksie~~ daarop is: Ek verstaan

Ek deel die verdagte nou mee dat ek deel het aan die ondersoek van 'n saak van Menige Roof: Moord. Nokuthula Sigenjane wat gepleeg is op die — dag van Gedurende September 1993 om ongeveer — te (plek) Carltan Centrum Pta. en dat ek oor sekere inligting beskik wat daarop dui dat hy / sy in die pleging van die genoemde misdryf geïmpliseer is.

VRAAG: Verstaan en begryp u die beweringe teen u?

ANTWOORD: Ja.

DIE VERDAGTE WORD ONVERWYLD SOOS VOLG MET BETREKKING TOT DIE BEPALINGS VAN ARTIKEL 35 VAN DIE GRONDWET VAN DIE REPUBLIEK VAN SUID-AFRIKA, 1996 VERWITTIG:

1. *Die rede vir sy/haar arrestasie/aanhouding;*
2. *Dat hy/sy die reg het om te swyg en dat hy/sy gewaarsku word dat enigiets wat hy/sy sê in 'n geregshof teen hom / haar gebruik mag word; en*
3. *Dat hy/sy die reg het om met 'n regsverteenwoordiger van sy/haar keuse te konsulteer en, waar dit andersins tot wesenlike onreg sou lei, om deur die staat van die dienste van 'n regspraktisyn voorsien te word;*
4. *Dat hy/sy nie verplig word om 'n bekentenis of 'n erkenning te doen wat as getuienis teen hom/haar gebruik kan word nie.*

2/.....

TP 9

VRAAG: Verstaan u dit?

ANTWOORD: Ja.

VRAAG: Wil u/u regsverteenwoordiger skakel?

ANTWOORD: nee

VRAAG: Verlang u om deur die Staat van die dienste van 'n regsverteenwoordiger voorsien te word?

ANTWOORD: Ja.

HANDTEKENING/REGTERDUIMAFDRUK VAN VERDAGTE

EK GAAN SEKERE VRAE AAN U STEL EN DEUR DIE BEANTWOORDING DAARVAN, KAN U SEKERE PUNTE VERDUIDELIK WAARDEUR U MOONTLIK U ONSKULD KAN BEWYS:

VRAAG: Wat is u keuse: Wil u 'n verklaring maak, slegs op vrae antwoord of u swygreg uitoefen?

ANTWOORD: Geen verklaring maak nie.

HANDTEKENING/REGTERDUIMAFDRUK VAN VERDAGTE

VUL DIE VOLGENDE IN SLEGS INDIEN DIE VERDAGTE VERKIES OM IETS TE SE:

VERSOEK DIE VERDAGTE OM OP DIE VOLGENDE VRAE TE ANTWOORD:

1. Is u op enige wyse aangerand of gedreig?

   ANTWOORD: _____

2. Indien wel, deur wie, wanneer en waar?

   ANTWOORD: _____

Het die feit dat u aangerand of gedreig is enige invloed op die aflegging van hierdie verklaring/beantwoording van vrae?

ANTWOORD: _____

TP

Het u enige beserings?

ANTWOORD: _____

Is u op enige wyse beïnvloed om 'n verklaring af te lê en/of vrae te beantwoord?

ANTWOORD: _____

Is u tans onder die invloed van enige drank en/of dwelms?

ANTWOORD: _____

NA AFLOOP VAN DIE VERKLARING/BEANTWOORDING VAN DIE VRAE WORD DIE VERDAGTE SE VERKLARING/VRAE EN ANTWOORDE AAN HOM/HAAR VOORGELEES EN WEER GETOLK.

DIE VOLGENDE VRAE WORD NOU AAN HOM / HAAR GESTEL:

1. Is u tevrede dat wat u gesê het, korrek genotuleer is?

ANTWOORD: _____

2. Is u tevrede dat hierdie verklaring/antwoorde u weergawe van die gebeure noukeurig beskryf?

ANTWOORD: _____

3. Het u enige klagtes oor die wyse waarop hierdie verklaring afgeneem/vrae gestel is?

ANTWOORD: _____

4. Is u tevrede met die tolk?

ANTWOORD: _____

_____
HANDTEKENING/REGTERDUIMAFDRUK
VAN VERDAGTE

TP

BOSTAANDE VERKLARING DEUR MY AFGENEEM:

PLEK: Pretoria

DATUM: 98/7/6

TYD: 14:32

HANDTEKENING: BEAMPTE
SUID-AFRIKAANSE POLISIEDIENS

Ek _____ (naam), sertifiseer dat ek getrou en juis na die beste van my vermoë met betrekking tot die inhoud van die bostaande verklaring getolk het.

Naam + van (drukskrif): _____

Adres: _____

Telefoon: _____

HANDTEKENING VAN TOLK

OPMERKINGS: NOTULEER DIE VOLGENDE: HET DIE VERKLAARDER NORMAAL VOORGEKOM? DIE RAS, GESLAG, OUDERDOM, KLEREDRAG EN VOORKOMS VAN DIE VERKLAARDER.

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256

TRUTH AND RECONCILIATION COMMISSION

HUMAN RIGHTS VIOLATIONS

SUBMISSIONS - QUESTIONS AND ANSWERS

DATE: 3 JUNE 1997

NAME: MATHEW SIMELANE

CASE: JB0280 - LEANDRA

DAY 1

CHAIRPERSON: Mr Simelane, can you hear me through your earphones?

MR SIMELANE: Yes, I can.

CHAIRPERSON: And could you please explain to us who is with you.

MR SIMELANE: The one seated by me is my wife.

CHAIRPERSON: Thank you. We would like to welcome you here. Please feel relaxed. Thank you very much for agreeing to come and also agreeing to be the first witness. It is always a difficult thing to do. Before I ask Tom Manthata to lead your evidence could I please ask you to stand and take the oath.

MATHEW SIMELANE: (Duly sworn in, states).

CHAIRPERSON: Thank you very much. Mr Simelane, you are here today to tell us the story of, particularly of your daughter, Nokuthula, and I would ask Tom Manthata, please, to lead your evidence. Thank you.

MR MANTHATA: Mr Simelane and Mrs Simelane, you are welcome and should you at any stage find yourself choked by emotions, please take your time and take your time to relate this story. Mr Simelane, are you working?

MR SIMELANE: Yes, I am working.

MR MANTHATA: You are working. And Mrs Simelane?

MR SIMELANE: We work together.

MR MANTHATA: You are working together as what?

MR SIMELANE: We have a business, we own a business.

MR MANTHATA: You have got a business. And the children, are they still at school?

T.D 1

MR SIMELANE: Only one is at school.

MR MANTHATA: Only one is at school. Thank you. As it has been said already by the Chairperson, can you please tell us the story of your missing daughter, Nokuthula Simelane.

MR SIMELANE: Nokuthula disappeared in 1983. She was attending at the University of Swaziland. Just when we were preparing to go and attend her graduation, that is when we discovered that she has disappeared and nowhere to be found. We searched all over for Nokuthula and we never found Nokuthula. Even at the border we went to enquire if she has crossed and to no avail. Some in Swaziland said the ANC people sent her to the Republic and we went to the ANC people and they denied any knowledge of Nokuthula. We searched everywhere. Even the neighbouring countries like Botswana, we went to search for Nokuthula. No one came to the surface to tell us about Nokuthula. Even the policemen could not help us in that regard.

In 1985 we decided to approach the press. Her picture appeared in the newspaper and one police contacted us after seeing her picture on the newspaper and said he knew that girl, because he kept guard at that girl in Vlakplaas Police Station and the last time that police saw Nokuthula, Nokuthula was ill and she was severely and brutally tortured. The investigation stated afresh now and the matter was under investigation. The Investigating Officer, Neville Toms, investigated the issue further and until the final part of it, but they still could not give us any sound matter in as far as Nokuthula's issue is concerned. All what we want now are her remains so we could bury Nokuthula in a decent way. In our culture we bury people decently and we would like to do that.

Finally, we found out that the policemen who arrested her, two of them were suspended. That they were suspended because they were investigating this matter. That is Coetzee and Pretorius and the ones that we do not know are the other three, because all of them were five in number. We found out that they have applied for amnesty. Still when I heard about their application, amnesty application I heard that they applied, that they had kidnapped Nokuthula and tortured Nokuthula and that was the end. They never mentioned any other thing beside that. I would like to know even more. What happened to my daughter and after the torture what was done to her.

MR MANTHATA: Yes. Do you mind telling us the name of the police who tipped you after seeing the press coverage about the whereabouts of Nokuthula?

MR SIMELANE: I will not disclose the other name. We called the other one Mr X. The ones that came to my house, the officers, was Neville Toms and Captain Lisk.

MR MANTHATA: Thank you and what was Nokuthula doing at the University of Swaziland, that is study-wise?

MR SIMELANE: She was studying and enroled for B.Admin.

MR MANTHATA: And you did not know that she could have affiliated to ANC at the time?

MR SIMELANE: I suspected that, but she never made mention of that fact to me.

MR MANTHATA: What did you suspect, Mr Simelane?

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MR SIMELANE: I suspected that the ANC was using her, because at one stage it was discovered in Swaziland that they were corresponding that were delivered at my brother-in-law's place. Those were in exile and the ANC members were using her to go to the Republic.

MR MANTHATA: When you approached ANC offices did they say they did not know where she had gone to or they said they did not know that she was a member of ANC?

MR SIMELANE: Often times than not it would be my wife going to the ANC offices and what she will tell me is that they will say we do not know, maybe her boyfriends know better. Some said she might be in Germany or West Germany. They never told us the truth.

MR MANTHATA: But finally, have they owned that she was in their camps, that is after all these press disclosures?

MR SIMELANE: After the newspaper issue some approached us and told us that they, she was there and she was being used and a very brave woman, but they never told us before the newspaper article.

MR MANTHATA: So you have said it that the torturers have since applied for amnesty and which means, what we need to know is where she was buried and, of course, how was she killed. Is this what you are saying?

MR SIMELANE: I want to know that.

MR MANTHATA: No further questions, Mr Simelane, back to the Chairperson.

CHAIRPERSON: Thank you, thank you Mr Manthata. I will ask the other Commissioners if they have any questions. Wynand.

MR MALAN: Thank you. Mr Simelane, just really one question and this relates to the suspended people in your statement. You say that two members of the police were suspended. You named them now as Coetzee and Pretorius.

MR SIMELANE: That is correct.

MR MALAN: You also gave us a copy of a news report in The Star of May five 1996 where reference is made to the suspension of these two people. The article quotes a spokesman of NCIS, Reg Crew and he says simply we have to treat them as suspects at this stage, referring to the two suspended people. Now this is a year and a month ago. Have you had any further information relating to developments here?

MR SIMELANE: No, all that I know is that they have applied for amnesty.

MR MALAN: Are you saying your information is that Coetzee and Pretorius applied for amnesty?

MR SIMELANE: Yes, those are the only two, they have applied for amnesty and the other three that I do not know their names.

T.P 07

MR MALAN: Were you informed that they applied for amnesty also in relation to Nokuthula's disappearance?

MR SIMELANE: Yes, they did notify me.

MR MALAN: Thank you.

CHAIRPERSON: Joyce. Mr Simelane and Mrs Simelane, I would like to just ask one more question. In the Sowetan story about Nokuthula they describe her as MK's Mata Hari. Do you have any doubts in your own mind that that was a description that fitted her and her activities?

MR SIMELANE: No, I do not have any doubts.

CHAIRPERSON: So that you do not yourself have any doubt as to who might have been responsible for her disappearance?

MR SIMELANE: Will you please repeat your question.

CHAIRPERSON: Do you have any doubt as to who was responsible for her disappearing?

MR SIMELANE: It is a little bit difficult to admit there, because I know she was being used and sent as a courier of ANC and suddenly thereafter she disappeared, but what hurts the most is that they never told me the truth and also that the never sent her, they pretended as if they did not know Nokuthula at all.

CHAIRPERSON: Mr Simelane, I think that we are in the position very much that you are at the moment and that is to watch and wait for the outcome of the amnesty applications which have been made. I understand that there have, as you indicate, that there are, in fact, five applications that have been made and we will hear from that, we hope, considerably more, because we understand very well the pain that you must have had all these years. It is a pain not only that of feeling that your daughter has disappeared and you cannot reach her, but also of not knowing what actually happened to her and finally not being able to know how she died, where she died and where she has been buried. We will certainly follow up, we will keep a very close link, close watch on the amnesty process. We will also see what we can do further about following up with the ANC, because they must have some information about her and then, as you know, there is a programme within the Commission for reburial of loved ones. So we will be in touch with you about all those three major points and I would like to thank you and your wife for having the courage to come today and tell us this story. We sympathise very much with you and we will do what we can to bring you the information that you require. Thank you very much for coming.

TP 17

FOUNDATION FOR HUMAN RIGHTS

POLICE DOCKET: PRIORITY INVESTIGATION: JV SQUARE: 1469/02/1996
COMPLAINANT: SIZAKELE ERNESTINAH SIMELANE

MEMORANDUM

INTRODUCTION

1. Consultant is the Foundation for Human Rights ("FHR").

2. FHR sought a memorandum on the police docket into the abduction, torture and disappearance of Nokhuthula Simelane ("Simelane") for purposes of briefing the Simelane family.

3. FHR seeks to bring justice to those responsible for the abduction, torture and disappearance of Simelane. Certain obstacles however stand in the way of a prosecution of those former South African Police (SAP) Security Branch members alleged to be responsible for these crimes.

3.1. All involved in the abduction of Simelane have been granted amnesty by way of a decision (AC/2001/185) of the Amnesty Committee of the Truth and Reconciliation Commission.

TP 17

3.2. Prosecutors state that they do not have sufficient evidence to proceed with murder charges against the suspected Security Branch officers. However, prosecutors state that there is ample evidence to proceed against the same officers on charges of assault or assault to do grievous bodily harm.

3.3. Prosecutors state however that they are prevented from proceeding with assault prosecutions as the right to prosecute such offences have prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977. This law prevents the prosecution of certain offences after 20 years. Assault is not listed as one of the exceptions to the 20 year prescription period. As matters stand, the right to prosecute those responsible for this 1983 offence has lapsed.

4. FHR has requested Wim Trengove SC and myself to prepare an opinion setting out the prospects of success of a constitutional attack on the validity of section 18 of the Criminal Procedure Act 51 of 1977 (brief outstanding).

5. The purpose of this memorandum is to consider whether the police docket discloses sufficient evidence upon which a prosecution could proceed successfully. In my view there is considerable evidence available to support an assault or assault with intent to do grievous bodily harm prosecutions. This evidence will be summarized below.

TP M

6. The memorandum will also highlight other matters of concern arising from the police docket and propose recommendations going forward.

BACKGROUND

7. On the evidence contained in sworn statements in the police docket the following pertinent facts have been alleged by several deponents:

7.1. Nokhuthula Simelane ("Simelane"), a young woman who performed underground activities for the ANC as a courier, was lured into a trap at the Carlton Centre by members of the South African Security Branch in August or September 1983.

7.2. She was removed to the police barracks in Norwood where she was interrogated and repeatedly assaulted for one to three weeks.

7.3. Simelane was then removed to an isolated farm in Northam near Thabazimbi where her interrogations and torture continued. She was so badly assaulted that Simelane's face was barely recognizable and she could no longer walk.

TPM

7.4. Towards the end of the year Simelane was removed from the Northam farm by Security Branch members W H Coetzee, A Pretorius and F B Mong and never seen again. These policemen claimed at the time that they were returning her to Swaziland. Several of the police deponents to statements in the docket however suspect that Coetzee, Pretorius and Mong removed Simelane from the farm in order to murder her.

EVIDENCE OF ASSAULT AND TORTURE

8. Four Security Branch members stated under oath in their statements that they personally witnessed assaults perpetrated against Simelane or they saw clear evidence of assault marks on her face and body.

9. These four persons were members of the SAP's Security Branch at the time Simelane's ordeal. All worked under the direct command of W H Coetzee and A Pretorius. At the time Coetzee was a warrant officer and Pretorius was a sergeant.

Mzimkulu Nimrod Veyi

10. Sergeant MZIMKULU NIMROD VEYI stated that while at the farm in Northam, Simelane was interrogated by Coetzee, Pretorius and Mong. He personally observed the assaults and it seems he took part in the torture of

TPM

Simelane. According to Veyi, her hands and feet were cuffed. Her sleep was kept to a minimum. She was kicked and slapped. A bag was pulled over her head. At times she could no longer stand. He stated: "I was present and did what was expected of me".

11. The last time Veyi saw Simelane was close to the 4 way stop of Fochville/ Carltonville and the Johannesburg/ Potchefstroom roads. He saw Simelane in the boot of Coetzee's vehicle. Simelane was alive with her hands cuffed behind her back. Her feet were also cuffed. A few days later when he asked Pretorius where Simelane was Pretorius responded: "Moenie baie vrae vrag nie". (Don't ask so many questions). Veyi spoke to one of his colleagues, Sergeant Mathibe, who said that Coetzee and Pretorius had shot, killed and buried Simelane near Rustenburg. Mathibe has since died.

Mokone Sefuthi

12. MOKONE SEFUTHI, a former policeman, was posted to guard Simelane while she was held in a room on the roof of the Northam police barracks. He stated that one of the residents in the flats, a child,

> **"...discovered us detaining her there after she had been screaming from assaults".**

13. While Simelane was held at the farm in Northam she was interrogated by Coetzee, Pretorius and Mong. She was hand and foot cuffed, severely

TP

beaten and tortured. At one stage she was unrecognizable. According to Sefuthi at one stage she was too badly injured to walk. He stated that Coetzee, Pretorius and Mong continuously threatened her with death during the interrogations.

14. After Simelane had been removed, Sefuthi asked Pretorius what happened to her and he stated that he "would never see her again".

15. At paragraph 44 of Sefuthi's life history which he supplied to police investigators he explained how an attempt had been made on his life by white security policemen. Following an investigation he states that he was summoned by a state advocate to the office of the Attorney General in Johannesburg. He was advised by this advocate that there was "a strong case" but he could not allow it to proceed as the "attackers were state members acting under cover and he cannot hamper the image of the state." This anecdote tends to support the notion that apartheid era prosecutors were unlikely to proceed with politically sensitive prosecutions against persons aligned with the State.

Moleke Peter Lengene

16. Sergeant MOLEKE PETER LENGENE was forced under duress to make a false statement to the police. At the time of the police investigation in 1996 he was still under the direct command of Coetzee.

TP

17. However, even in his statement in which he concealed the full truth he conceded that Simelane "did have some bruises on her face". He said he also notice bruises on her hands. He claimed that Simelane explained to that this was because of the handcuffs.

18. In a subsequent interview with the investigating officer Lengene admitted that his "original statement was not the whole truth." Before making his statement he met with Coetzee and Pretorius who advised him that they would receive a copy of his statement and they told him:

"... that the case could not be proved because there is no proof."

19. Lengene stated that he feared Coetzee and Pretorius very much and "at no cost must they become aware of my statement ...." He was sent to guard her at the Norwood Police Barracks. The first time he saw her "she was already beaten up." She had bruises on her face, hands and feet. Her hands and legs were cuffed. He claimed that he was never present when she was interrogated at the police barracks.

20. It appears that Simelane was permanently handcuffed, and possibly foot cuffed as well. This appears from the statement of Lengene where he states that at the Northam farm Sergeant Sefuthi

"... was in possession of the keys for the cuffs. This was so he could untie her if she wished to relieve herself."

21. Lengene stated that on his arrival at the farm he found that "this lady was in a bad condition." Lengene said that Simelane told him that she was very afraid of Coetzee as he was "very hard on her during interrogation."

Mohapi Lazarus Selhmolela

22. Inspector MOHAPI LAZARUS SELHMOLELA stated that he was one Simelane's guards at the Norwood Police Barracks. He said that while in his presence nobody assaulted her at the barracks, but:

"... it was however clear to me that she had been assaulted. Her face was badly swollen."

23. Selhmolela stated that the interrogation at the farm was carried out by Coetzee, Pretorius and Mong. He said that Mathiba was also present. He stated that Simelane was assaulted by use of a bag over her head and the use of electrical shocks. According to Selhmolela:

"She became very weak and could no longer walk. Us black members always tried our best to nurse her but had to be careful not to be caught by our superiors."

24. He said that the assaults were the cause of her changing her physical appearance. He continued:

TPM

"She was treated very badly for a woman. ... One night this same lady was taken to the zinc dam where Radebe threw her in. She was thrown into the dam after interrogation bouts."

OTHER MATTERS ARISING FROM THE DOCKET

25. On 19 February 1996 the Head of Priority Crimes, Gauteng addressed a letter to the Secretariat of Safety and Security and the National Head of Priority Crimes. In this letter, which summed up the investigations to date, it was stated *inter alia:*

25.1. That Simelane was detained and tortured at the married quarters of the SAPS Norwood for about 2 weeks. She was then taken to a farm at Northham where she was further detained, tortured and interrogated. This lasted till the festive season, December 1983. This was the last time she was seen by the witnesses.

25.2. The actual interrogators were alleged to be Coetzee, Pretorius, Mong, Lengene and Radebe. Deceased witnesses or suspects are Sergeant Mathuba and Frank Langa "Big Boy".

25.3. On 17 February 1996 Sergeant Lengene was re-interviewed at his request. He said his first statement was not truthful. Lengene explained that Pretorius told him that "it was up to him and Norman "Scotch" to save

TP

their skins"; that Director Thoms (Head of Priority Crimes, Gauteng) would reveal all that he said in his statement; and that Captain Leask (the investigating officer) would not be able to prove any charges as "he had no proof of a body." After the first interview Lengene was taken to Coetzee who wanted to know what had been said in the interview. He was told to rewrite a statement which Pretorius okayed and told him to keep it in a safe place so that it could later be handed to their attorney as they were busy arranging this through the police.

25.4. On 10 February 1996 Pretorius and Coetzee secretly met with Scotch and coached him into what his version should be if Captain Leask approached him. This discussion was secretly taped by the investigation team.

25.5. It has become "very clear" from the meeting with Sergeant Lengene on 17 February 1996 that the Simelane incident was: "

> **"not a one off event but part of an extensive programme involving bombings, kidnapping and murder of numerous persons."**

25.6. Lengene confessed his own part in a murder in which he shot someone with an AK47 given to him by Pretorius and Coetzee.

TP

270

25.7. It was of great concern that Coetzee and Pretorius were still in positions in the police where they could easily continue with intimidation and defeating the ends of justice because of their contacts with the CIS and its members. This could lead to the elimination of members. It was suggested that they be transferred to the Uniform pro-active division.

26. On 26 February 1996 the investigating officer requested the Electronics Unit of the Forensic Lab to "diminish the background noise" on the micro cassette tape which recorded the conversation between Coetzee, Pretorius and Scotch on 10 February 1996. It is not clear from the police docket whether the Electronics Unit was successful in this endeavour. A document titled "RESULT OF TRIAL: INVESTIGATION BY FORENSIC SCIENCE LAB. REF NO: 8625/96 (T1759)" was returned to Captain Leask but nothing was stated in the document.

27. According to the investigation diary the case was discussed with Deputy Attorney General Kevin Attwell and Advocate De Vries on 23 February 1996. .They recommended that the matter be discussed with Dr De Oliviera of the Third Force Investigations. A discussion was held with Dr de Oliviera. At this meeting it was decided that all possible evidence must be gathered and the investigation must proceed.

TP

271

28. On 6 March 1996, the Assistant Commissioner NCIS, L Van der Westhuizen, sent a letter to all Provincial Commissioners calling on SAPS mortuaries to supply lists of all unidentified bodies removed by the SAPS between 1980 and 1996, including setting out race and sex, place of discovery and cause of death, case or inquest number, fingerprints or photos on record. No responses were recorded in the police docket.

29. On 22 October 1996 the following entry was made in the investigation diary:

> **"Saak word vir afwagting van PG terruggehou. Adv Ebrahim lees die stukke. Open n Ondersoek dag we..eus (?) boek - NW Thoms"**

The matter was to be held back pending the instructions of the Attorney General. Advocate Ebrahim was reading the statements and exhibits. Captain Leask then filed the investigation notes in the "respective files". No instructions from Advocate Ebrahim were recorded in the investigation diary.

30. The final entry in the investigation diary was dated 10 February 1998 which stated: "amnesty hearings o/s". O/s presumably means "outstanding".

31. On 6 July 1998, Willem Coetzee was warned of his rights in terms of section 35 of the Constitution in respect of the "murder" of Nokuthula Simelane. He declined to make a statement.

TP

CONCLUSIONS AND RECOMMENDATIONS

32. There is more than sufficient evidence on hand to proceed with assault and assault with intent to do grievous bodily harm charges against Coetzee, Pretorius and Mong. This much has also been confirmed by the state advocate handling this matter. It should be noted that in the amnesty hearing, Coetzee, Pretorius and Mong conceded that on the "odd occasion" Simelane would be given "a slap or a punch in order to secure her co-operation".[1] (Another consultant is conducting a review of the Amnesty hearing).

33. FHR should proceed with its endeavours to challenge section 18 of Act 51 of 1977 which is preventing a prosecution of the perpetrators in this matter.

33.1. Counsel should also be requested to give an opinion on whether potential assault charges in this matter may be considered as crimes against humanity as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002. Crimes against humanity are listed as one of the exceptions to the 20 year prescription provision contained in section 18 of Act 51 of 1977.

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[1] Page 3 of the Amnesty Decision, AC/2001/185

TP 07

33.2. Counsel should also be requested to provide an opinion on whether the Amnesty Committee misdirected itself in granting amnesty to Coetzee, Pretorius and Mong on the abduction of Ms Simelane. The Amnesty Committee rejected the evidence of Coetzee, Pretorius and Mong on several aspects, including in relation to the circumstances of Simelane's captivity. The Committee stated:

> **"... we have no doubt that the versions of Coetzee, Pretorius and Mong are untruthful where they conflict with those of Veyi and Selamolela on the issues of dispute"** [2]

Notwithstanding the manifest failure of Coetzee, Pretorius and Mong to disclose in full, the Amnesty Committee granted them indemnity against prosecution in respect of the abduction.[3] Counsel should be required to give an opinion as to the prospects of success of setting aside this decision before the High Court.

34. In terms of matters arising from the review of the police docket I would suggest that FHR meet with the investigation team to discuss the following aspects:

34.1. The bringing of defeating the ends of justice charges against Coetzee and Pretorius for intimidating Sergeant Lengene into making a false statement

---

[2] Page 6 of the Amnesty Decision, AC/2001/185

[3] Section 20(1)(c) of Act 34 of 1995 stipulated that amnesty may only be granted in respect of an act, omission of offence if "the applicant has made a full disclosure of all relevant facts."

TP 67

and for attempting to coach Norman Mkhonza (Scotch) into making a false statement.

274

34.2. The investigation of numerous acts of sabotage, murder and other false flag type operations carried out by the Security Branch as referred to by Sergeant Lengene. These include the booby trapping of limpet mines and the provision of such mines to unsuspecting recruits; the shooting of recruits; attacks on houses of councilors and other prominent persons; and the bombing of municipal offices and hostels.

34.3. The following up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and the following up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.

34.4. Detective Inspector Msebenzi Timothy Radebe's sworn statement is inconsistent with the statements made by his colleagues in several respects. His statement is in all likelihood untruthful. He admits his participation in the removal of Simelane from the Carlton Centre to the SAP married quarters in Norwood. Other witnesses also place him at the farm in Northam. In particular, Inspector Selhmolela alleges that Radebe threw Simelane into the zinc dam. Radebe was not an applicant in the amnesty application in the matter of AC/2001/185 and accordingly he did

TP

not receive indemnity against prosecution in respect of the abduction or kidnapping of Simelane.

34.5. Kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. While Radebe claims in his statement that he "arrested" Simelane it is clear from the facts that this was no arrest but rather a kidnapping or abduction. Simelane was not taken to a police station or ever brought before a Court. The facts accord with the essential elements of the crime of kidnapping, which are the unlawful and intentional depriving of a person of liberty of movement.[4] There appears to be nothing in the way of a kidnapping prosecution being brought against Detective Inspector Radebe. Prosecutors should be urged to prosecute him without delay.

HOWARD VARNEY

CHAMBERS
SANDTON
18 AUGUST 2005

[4] J Burchell & J Milton, *Principles of Criminal Law*, 3rd ed, Juta & Co., 2005 at 758.

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TN 18

18

276

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MANDATE OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

REFERENCE:

G/SO 217/1/South Africa

24 July 2014

Dear Mr. William Kerfoot,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its 103rd session from 7 to 16 May 2014, in Geneva, Switzerland. I would like to refer to the reported disappearance in South Africa which your organisation submitted regarding **Ms. Nokulthula Aurelia Simelane (case No. 10004285)**.

The Working Group considered this case and transmitted it to the Government of South Africa in 13 June 2014. In transmitting this case, the Chair-Rapporteur of the Working Group expressed his hope that appropriate investigations would be carried out in order to clarify the fate and whereabouts of the disappeared person and to protect her rights. Any information received from the Government of South Africa concerning this case will be transmitted to you in due course. I wish to emphasize that, in view of the purely humanitarian character of the Working Group's action, any information given to you on this matter is exclusively destined for the relatives of the disappeared person.

I would like to take this opportunity to inform you that the Working Group shall hold its 104th session in Geneva from 15 to 19 September 2014. The Working Group would be grateful if any written information which your organisation wishes to submit for the Working Group's consideration at its 104th session could be received by 22 August 2014. I would like to bring to your attention that, however, information may be submitted at any time of the year and it will be reviewed by the Working Group during its forthcoming sessions as soon as it can be processed.

In conformity with its usual practice, the Working Group receives representatives of interested organizations and families of the persons reported disappeared during its sessions. Should your organisation wish to request a meeting with the experts of the Working Group at the 104th session, please contact the Secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 0041 (0)22 917 9286; fax: 0041 (0)22 917 9006; e-mail: wgeid@ohchr.org) by 22 August 2014, to

.../2

Mr. William Kerfoot
The Legal Resource Centre
3rd floor Greenmarket Place, 54 Shortmarket Street, Cape Town 8001, South Africa
Tel.: 2721 481 3000. Fax: 272121 423 0935
william@lrc.org.za

TP

schedule an appointment or for any additional information. Please note that unfortunately the Working Group will not be able to provide any financial assistance.

Ariel Dulitzky
Chair-Rapporteur
Working Group on Enforced
or Involuntary Disappearances

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My sister's heart

Thembi Nkadimeng @City_Press
26 December 2013 16:00

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Thembi Nkadimeng, Nokuthula Simelane's sister, at her home in Wingate Park, Pretoria East. Picture: Bram Lammers

On the 30th anniversary of her sister's disappearance, **Thembi Nkadimeng** writes about the MK envoy who refused to turn her back on the cause

The story of my sister, Nokuthula Simelane, is about freedom and betrayal. My sister believed in freedom with every fibre of her being.

It was her unshakeable dedication to freedom that took her to the Carlton Centre in Johannesburg on the morning of September 8 1983.

TALKING POINT



Oscar Pistorius sobs as he is found not guilty of murder

Paralympian Oscar Pistorius is not guilty of murder but can still be found guilty of culpable homicide, Judge Thokozile Masipa said in the North Gauteng High Court in Pretoria today.

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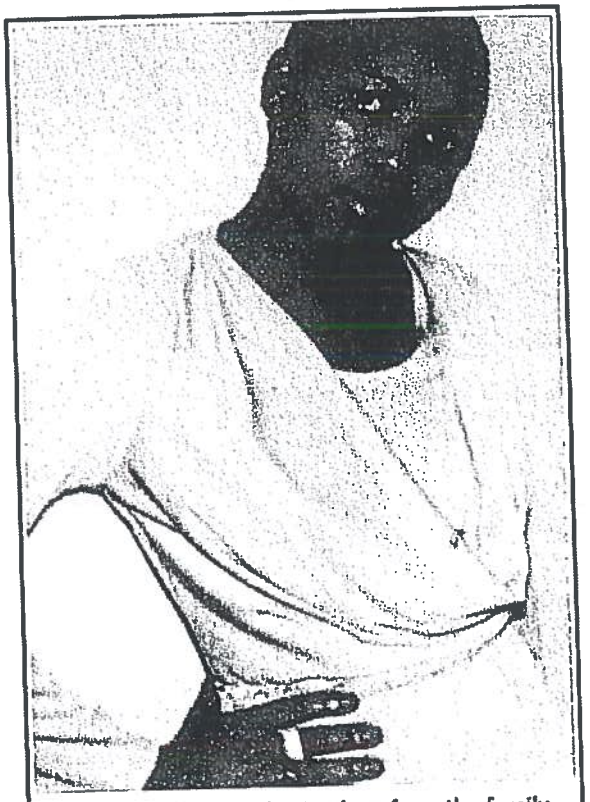
TP 1

This year marks the 30th anniversary of her disappearance.

A 23-year-old university graduate at the time, she was a courier for Umkhonto weSizwe (MK), the ANC's armed wing, moving between Swaziland and South Africa. She was betrayed by one of her own.

Instead of a scheduled rendezvous with a comrade, she was met by members of South Africa's hated security police, who shoved her into the boot of a vehicle.

This betrayal was to condemn Nokuthula to a choice between life and death. An informant's life – a betrayal that would crush her spirit – or death with her dignity intact. In reality, there was no real choice for Nokuthula.



A photo of Nokuthula Simelane from the family archives

Her commitment to what she loved most dearly made the first option unthinkable.

My sister's death was not swift and it was not painless. The security police drove her to the police barracks in Johannesburg.

There, they tortured her.

After several days, she was moved to an isolated farm in the

without white people – Julius Malema

2 Watch – Judge Masipa: 'No proof of premeditated murder'

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○ As always, Bafana's major problem is a lack of goals

VOTE VIEW RESULTS

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north of the then Transvaal, where her abuse intensified. It lasted for some three weeks.

Her torturers were convinced that with enough force this young, inexperienced woman would break and become an informant.

They believed that it was just a question of more violence and more fear: a few more vicious blows to her head, to her face and her body, or perhaps a few more near-drownings in an icy dam.

Maybe more days of solitary confinement shackled in handcuffs and leg irons in filthy conditions would push her over the edge.

The black police officers who testified before the Amnesty Committee of the Truth and Reconciliation Commission (TRC) reported that after weeks of torture, my sister was unrecognisable. H

er face was an appalling mess of bruises and swelling. She was too weak to walk.

The last time they saw her was when she was being pushed into the boot of one of the white officer's vehicles.

My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died and where her body is today. We have spent three decades looking for Nokuthula.

We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.

We did not expect the former South African Police to investigate themselves. However, we firmly believed that the new democratic South Africa would take the necessary steps.

We were wrong. This was the second betrayal of Nokuthula and everything she stood for.

This betrayal cut the deepest. My father went to his grave without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing – and without burying Nokuthula's remains with the dignity she deserves.

The Amnesty Committee of the TRC concluded that the white officers had lied to the commission about the degree of

TP

torture as well as her ultimate fate. They, nevertheless, granted amnesty to those officers for Nokuthula's kidnapping.

Nobody applied for amnesty for her murder. The committee betrayed its own law, which states that amnesty can only be granted in exchange for the truth and full disclosure.

How could they grant amnesty when they knew that the white officers had lied about what they did to Nokuthula during and after her kidnapping? The Amnesty Committee betrayed our faith in them and in the truth and reconciliation process.

The police and the prosecutors could have taken up the matter. However, they chose not to, though a police docket was opened in 1996.

After the amnesty decision in 2001, the matter was referred to the National Prosecuting Authority.

When I approached them, they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. When the new prosecution policy emerged in late 2005, it essentially created a backdoor amnesty.

It gave perpetrators, like my sister's killers, a second opportunity to escape justice.

Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy. In 2008 a Pretoria High Court judge struck down the policy, declaring it to be absurd and unconstitutional.

We thought this meant that the path was eventually cleared for justice to take its course. Again, we were wrong.

This time the prosecutors claimed that the police were refusing to provide investigators. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010 – but apparently the docket had gone "missing".

Three years later, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone.

They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, I instructed my lawyers to demand the

TP

holding of a judicial inquest into her death.

This request was refused. After 17 years of idleness, the prosecutors advised us that their investigations were still not yet complete. We do not believe them.

We have lost all faith in the prosecutors and police. They have betrayed our trust.

They now claim that they are occupied with inquiries, which could conceivably drag on indefinitely while witnesses and suspects grow old and die. We do not know why the authorities in the new South Africa would turn their backs on one of their own.

Nokuthula's ultimate sacrifice helped to pave the way for the freedom and democracy we now enjoy.

We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete.

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One day freedom will reign not this rainbow nation facade we are currently under

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Umlilo ↛ Jungle Jazz · 8 months ago

Really sad.....and to think that this is what we were in the struggle for; not only the corruption and self-entitlement, but also the marginalisation of struggle comrades/cadres, many of whom made the supreme sacrifice.

In time, when the poor mother passes on, and Thembi too, Nokuthula will cease to exist. In African custom, however, the spirit will never rest and the curse of the ancestors will be on us all!

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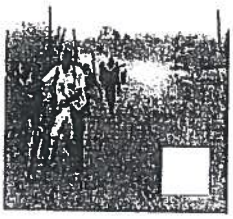
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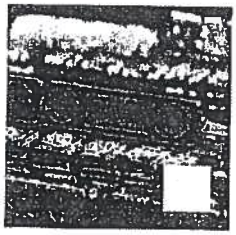
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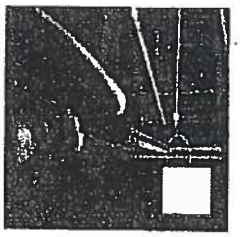
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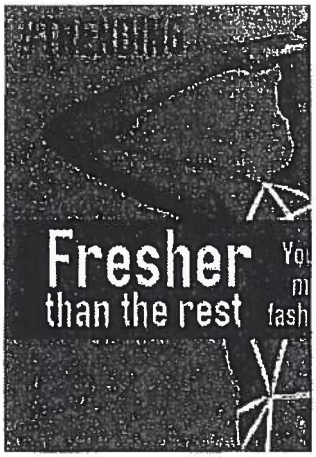
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29 January 2013

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

BY HAND

Fax: (012) 845 6337

Dear Dr Silas Ramaite,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I am the sister of Nokuthula Aurelia Simelane ("Nokuthula"). My identity number is 730210 0329 088. On behalf of my family, I seek the holding of a formal inquest in terms of Act 58 of 1959 in respect of the circumstances surrounding the murder and other offences perpetrated by members of the former South African Police Security Branch against Nokuthula.

Background

Nokuthula was the first child of Ernestina and the late Matthews Simelane. She was a member of Umkhonto we Sizwe (MK), the military wing of the African National Congress (ANC). My sister was a student at the University of Swaziland in the early 1980s. During this time, she acted as a go-between for the ANC and exiled leaders in

TP

Swaziland. In September 1983 shortly after completing her university studies, and whilst on an MK mission to South Africa, she was kidnapped by the Security Branch from the Carlton Centre in Johannesburg. She was then brutally tortured over a period of several weeks and then disappeared.

Most of the policemen who kidnapped and tortured her and then caused her disappearance applied to the TRC for amnesty. They received amnesty for her kidnapping even though they were found to have been untruthful about their treatment of my sister.[1] The senior officers were denied amnesty for her vicious assault. None of the police officers applied for amnesty for the murder of Nokuthula. The senior police officers, in whose presence she was last seen, have refused to disclose the whereabouts of the remains of Nokuthula. To this day her remains have not been found for a burial with dignity.

My family and I have constantly searched for the truth about what happened to my sister. Shortly after her disappearance we spoke with ANC members. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her. We even made inquiries in neighbouring countries such as Botswana. Nokhuthula's disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.

All these efforts proved fruitless until early 1996 when the Sowetan newspaper published a story about Nokuthula's disappearance. The newspaper article appeared to finally spur the police into action. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. During July 1998 one of the senior officers was warned of his rights in terms of section 35 of the Constitution in respect of the "murder" of Nokuthula Simelane. He declined to make a statement.

[1] Decision (AC/2001/185) of the Amnesty Committee of the Truth and Reconciliation Commission.

We raised her disappearance with the TRC. We have pleaded with prosecutors to take the case forward. I have even appointed private detectives. A documentary was made and screened on TV ("Betrayal", 2006). A statue was erected in her memory in Bethal. However we are still without answers.

We know from the TRC hearings that my sister suffered terribly at the hands of the South African security branch. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price. My father died in 2001, without knowing what happened to his daughter. I refuse to give up the search for the truth and justice.

Attempts to seek justice

I have met police officers as well as prosecutors from the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA) on a few occasions. On each occasion various excuses were provided as to why this case could not go forward.

Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised us that they were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977.

The PCLU also advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. They were not permitted to proceed until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. Together with the wives of the Cradock 4 I applied to court to have this policy set aside as unconstitutional. The Pretoria High Court struck down the policy in the case of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD

TP

case no 32709/07). In this matter the NPA had argued that the amended policy survived constitutional scrutiny as families could still bring private prosecutions in matters where the NDPP declined to prosecute. The court rejected this contention stating that it was the primary responsibility of the NPA to prosecute. The NPA was denied leave to appeal.

Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations.

During the course of 2006 one of my legal representatives presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokhuthula constituted the international crime of torture. Torture was, by 1983, a prohibited and unlawful act in terms of customary international law. South Africa was obliged to investigate and prosecute transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

My legal representatives also proposed that those suspects who did not apply for amnesty be prosecuted for kidnapping. I am advised that kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. Notwithstanding that there was no legal impediment to the preferring of such charges this proposal was rejected. My legal representatives also proposed that charges of defeating the ends of justice be brought against two of the senior officers for intimidating a junior officer into making a false statement and for attempting to coach a witness into making a false statement. The PCLU declined to pursue such charges.

Other excuses include an apparent lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is without merit. It is based on an erroneous reading of section 31 of the Promotion of

TP 07

National Unity and Reconciliation Act 34 of 1995 which, in any event, was not invoked in these particular proceedings before the TRC.

The need for a formal inquest

This matter is now urgent. Nearly 30 years has passed since Nokuthula's disappearance. Some 17 years has lapsed since the more recent police docket was opened. My mother is now elderly and sickly. Witnesses are also getting old. Some have died in suspicious circumstances.

The PCLU had previously suggested that an inquest be held in this matter. At that time my family and I preferred to see a prosecution taking place. Indeed we have been trying to launch a private prosecution, but we have been unable to raise sufficient funds to pay the security for costs, which we are advised will be a substantial sum of money. In the circumstances we now wish to have formal inquest held as speedily as possible.

If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution.

Last week I met with the investigating officer, Captain Masehela. He advised me that he submitted his report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act. I then spoke with Advocate Macadam who advised me to approach Madeleine Fullard, the Head of the Missing Persons Task Team at the National Prosecuting Authority of South Africa.

I met with Ms Fullard who advised that her Task Team had not been able to locate the remains of Nokuthula. She suggested that I approach the suspects and offer not to

TP

prosecute them if they disclose the location of Nokuthula's remains. I have discussed this suggestion with my family and we have decided not to do a deal with the suspects. The suspects have had more than ample time to come forward and disclose the whereabouts of the remains. They have chosen rather to cause me and my family untold pain and anguish by maintaining a wall of lies and deceit.

Please advise me per return whether the statements and relevant documents have been submitted to a magistrate or judicial officer in terms of section 5 of the Inquest Act. If not, please advise why not. If the documents have been submitted, please advise which magistrate or judicial officer is dealing with this matter. I am advised that I am entitled to be given reasonable notice of the holding of an inquest in terms of section 7 of the Inquest Act. I further request that steps be taken to ensure that the inquest is a formal public inquest which includes the giving of oral evidence. Given the sensitivities of this matter I request that this inquest be held in the High Court of South Africa.

Should you at any point choose to institute criminal proceedings in this matter I request that you appoint a special prosecutor to lead the prosecution, in consultation with me and my family.

I accordingly ask that you treat this request with great urgency and advise me at your earliest convenience.

Yours sincerely,

Simelane

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit

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ANNEXURE "TN 21": IN CAMERA AFFIDAVIT

(SEE ATTACHED FILE)

ON RESUMPTION ON 20 MAY 1999 - DAY 12

CHAIRPERSON: For the record, it is Thursday the 20th of May 1999, we are continuing with the amnesty applications of Coetzee & Others in respect of the Simelane matter.

Mr Lamey, you hadn't completed your evidence-in-chief?

MR LAMEY: Yes Mr Chairman.

CHAIRPERSON: Mr Veyi I remind you that you are still under oath.

NIMROD VEYI: (s.u.o)

EXAMINATION BY MR LAMEY: (cont)

Sorry Mr Chairman, my client just points out to me that he wants to change his headphones. Thank you Mr Chairman.

Mr Veyi, I just want to come back on one aspect, can you hear me, during the times that you were present during interrogation sessions at the farm in Northum, can you comment about, can you give any comment about the question whether the lady Simelane, about whether she was allowed to sleep and if so, how did it happen?

MR VEYI: As I have already said, she would sleep maybe for 30 minutes or an hour and then she would be woken up and questioned again.

MR LAMEY: Okay, now you say in your supplemented application in paragraph 9(a)(i) that you apply for amnesty for your involvement, participation and the kidnapping of this person and the assaults on her during interrogation, is that correct?

MR VEYI: That is correct.

MR LAMEY: So you also apply for amnesty for every other offence or delict which may be inferred from the facts of your participation and involvement, is that correct?

MR VEYI: That is correct.

MR LAMEY: Further you state that in so far as you have been informed by the late Sergeant Mothiba, this lady was shot and her body buried at Rustenburg, you also apply for amnesty for your omission to report this or for the possible offence of being an accessory after the fact, is that correct?

MR VEYI: That is correct.

MR LAMEY: In this regard, when Sergeant Mothiba told you this that she was shot and killed and buried at Rustenburg, can you comment as to why you did not report this to any authority?

MR VEYI: After I met with Mkhize at the four way stop ...

MR LAMEY: Is that now Coetzee, Mkhize? Who is Mkhize?

MR VEYI: It is Coetzee. At the four way stop I saw Nokuthula in the car boot, I didn't tell anybody, but I kept that to myself.

MR LAMEY: Right, perhaps can I just get back, when you saw her in the car boot, she was still alive,

TP

is that correct?

MR VEYI: Yes, she was still alive. She was swollen, her face was swollen.

MR LAMEY: I am asking when Sergeant Mothiba told you that she was shot and killed and buried at Rustenburg, you didn't report that, or you didn't report this to any authorities?

MR VEYI: Yes, that is correct, I didn't report it.

MR LAMEY: Can you explain perhaps why you did not do that?

MR VEYI: I didn't report it because the situation at those times, it did not allow me to report it. If I would have reported this, I would be regarded, I don't know how to put this, I would be regarded as a sell-out, as somebody that cannot keep the government secrets.

MR LAMEY: And if you were being regarded as a sell-out, what in your mind, could something happen to you?

MR VEYI: Yes, I would be charged for revealing that sensitive information.

ADV GCABASHE : Explain that, you would be charged for revealing that information, just explain that?

MR VEYI: Everything that we did at those times, those things were secrets. If you joined the Police, you take an oath, especially at the Security Branch, that everything that would be said there, you won't reveal it to anybody. Everything that took place, you won't tell anybody. If it happened that they found out that you are selling out the information, you would be charged.

MR LAMEY: Now the secrecy aspect, what was the reason behind the secrecy aspect and the way the Security Police worked at that stage? The secrecy, you say that you worked under secret conditions during those times, is that correct?

MR VEYI: Yes.

MR LAMEY: In your mind, what was the reason behind all this secrecy among the Security Police members and their activities?

MR VEYI: I can put it this way, because at those times it was during the struggle, if the information, if I would give out the information, it might be possible that the enemy would get that kind of information.

MR LAMEY: Would the enemy then use that information to their advantage against the Security Police and the government at that stage?

MR VEYI: Yes, that is correct.

MR LAMEY: So in other words it was, the reason behind the secrecy if I may make an assumption from what you are saying, it was in order to protect the workings and activities of the Security Branch who actually had to combat the ANC and MK during the struggle and also to protect the government at large, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: Now further on on this paragraph 9(a)(iii) you say, you refer also to the places is that correct, the Carlton Centre, Northum and so forth?

TP

MR VEYI: Yes, that is correct.

MR LAMEY: You explained that she was seriously assaulted as to the nature of her injuries and she suffered injuries on her body, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: And further on, if we get to the political objective, Mr Chairman, can I proceed just to lead the witness on this and to read it out to him and ask his confirmation on this?

CHAIRPERSON: Yes.

MR LAMEY: Thank you. The witness is saying he cannot hear me. Can you hear the Interpreter?

MR VEYI: No, I can't.

MR LAMEY: Which channel? 3? Can you hear me now, can you hear the interpretation?

MR VEYI: Yes.

MR LAMEY: You say under the paragraph, it is Exhibit S, page 8, yes, thank you.

MR VISSER: Paragraph 1.

MR LAMEY: Paragraph 1, you say one of the main tasks of the Security Police was to combat the armed struggle led by Umkhonto weSizwe, MK, being the military wing of the ANC, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: And you were part of that Security Police, is that correct?

MR VEYI: That is correct.

MR LAMEY: You say further that this armed struggle posed a serious threat to the existence of the previous government, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: "As a member of the Security Police at that stage, I

regarded it as my duty to follow orders in combating the activities of the ANC and in particular the armed struggle?"

MR VEYI: Yes, that is correct.

MR LAMEY: You say further that -

"... this particular lady was a member of MK who was intercepted as a result of the undercover work done by Norman Scotch Mkhonza and she was detained for the purposes of interrogation in order to obtain information from her."

MR VEYI: That is correct.

MR LAMEY: You say that the information which was mainly sought as far as you know, was the presence of other MK members or terrorists in the RSA, particularly in Johannesburg, Soweto area?

TP

MR VEYI: That is correct.

MR LAMEY: Further on, particulars on planned attacks or infiltration of MK insurgents from Swaziland, armed caches and the like information, is that correct?

MR VEYI: That is correct.

MR LAMEY: Further on in paragraph 3, page 9 you say the impression that you gained during the interrogation that she was not co-operative and refused to divulge information?

MR VEYI: Yes, that is correct.

MR LAMEY: She was assaulted in order to force her to divulge information which the Security Branch was interested in which you believed that she had?

MR VEYI: Yes, that is correct.

MR LAMEY: From your political own motivation, paragraph 10(b) you say your participation is motivated by the fact that you were at that stage a member of the Security Branch at Soweto and that you strongly believed that the armed struggle of the ANC in collaboration with the South African Communist Party, posed a serious revolutionary threat to the previous government and population, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: You also followed orders from your superiors, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: You also say that you kept quiet after you heard from the late Sergeant Mothiba that this lady was shot and killed by Coetzee and Pretorius as the disclosure or report would have placed your own life in danger?

MR VEYI: Yes, that is correct.

MR LAMEY: You worked as a Security Policemen under highly secret conditions? You have already actually said that, I am just reading this to you out.

MR VEYI: Yes, that is correct.

MR LAMEY: Such a report would have been regarded as a serious breach of the secrecy, as a result you would have been regarded as a similar threat to the Security Police and be viewed in the same category as the enemy, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: You referred previously also as a sell-out, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: You received no any other remuneration as a result of your participation here, except that you received your normal salary?

MR VEYI: Yes, that is correct.

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MR LAMEY: Mr Chairman, that is the evidence in chief.

NO FURTHER QUESTIONS BY MR LAMEY

CHAIRPERSON: Thank you Mr Lamey. Mr Visser, any questions?

CROSS-EXAMINATION BY MR VISSER: Thank you Mr Chairman. Mr Veyi, I understand that you are still a member of the South African Police Service, is that correct?

MR VEYI: Yes, that is correct.

MR VISSER: What is your rank at the moment?

MR VEYI: I am a Sergeant.

MR VISSER: Did you attend Police College and pass out from the Police College?

MR VEYI: Yes, I attended.

MR VISSER: I want to read something to you Mr Veyi, Chairperson, I will refer to Exhibit T, specifically to the newspaper reports, in my order it is the first ...

ADV DE JAGER: I don't know what is wrong with our system. There seems to be something wrong with the system, we receive constantly other noises on the system.

CHAIRPERSON: Yes, I know sometimes if people touch this when it is on, then of course it produces a disturbance, but I don't know ...

MR VISSER: (Microphone not on) Yes Chairperson, I am referring to the newspaper reports and unfortunately we did not paginate it, we should do that, Chairperson it is the one with the heading "Burden of Guilt lifted off Mr X", it is about the sixth page I think, from the front yes. It is dated February, 15, 1995, I just want to read something to the witness. Mr Veyi, would you please listen to what I read to you and I will ask you some questions about that. Under the heading "Time for Truth" it states, this newspaper report states "he knew" and that he refers to Mr X and we have heard that Mr X was you, is that correct?

MR VEYI: Yes, that is correct.

MR VISSER: "He knew it was time to reveal the truth, the evil deeds of his Intelligence Unit and especially those of his white Commanders had remained hidden for long enough. Mr X thinks it is time they were brought out into the open, his conscience demanded that he do something about it." I skip a sentence and then the next paragraph "besides his getting on years and after almost two decades of serving in the Police Force, he remains a lowly Constable. His white bosses have climbed the ranks to Colonel and General." Now is that information which you gave the reporter?

MR VEYI: The information I gave was about the shooting of Nokuthula because after it appeared in the Sowetan ...

MR VISSER: ... can help you?

MR VEYI: The article that appeared in the Sowetan was this photo. The heading said "Missing in Action". This is what made me to go to the Sowetan and tell them about my story.

MR VISSER: My question to you is this, did you in fact give the information to the reporter, which I have just read to you?

TP

MR VEYI: Yes.

ADV GCABASHE : Can I just get clarity on that Mr Veyi, you are saying that you told the reporter that these evil deeds had to be divulged essentially and that your bosses had moved, climbed the ranks from Colonel to General, while you are still a lowly Constable, that is what Mr Visser read to you in essence, you say you gave that information to the Sowetan?

MR VEYI: I apologise, I didn't understand the question, I didn't say anything about the ranks, but what happened is after I saw this heading in the Sowetan, "Missing in Action" and this photo that I have already showed you, I then went to the Sowetan and then I told Sharon Chetty that I know about this story. She then made a follow up and she wanted to know what happened and then I told her from Carlton Centre, I told her what happened.

ADV GCABASHE : Mr Visser's question is specific, he actually read that passage to you in full and that is what he wants a comment on, not generally what you said to whom, he actually asked you a specific question.

MR VEYI: I didn't say that, I don't know anything about that.

MR VISSER: Are you saying that which I read to you is something which the reporter came up with and it is not based on anything you told her?

MR VEYI: Maybe she just wrote that, but what I told her is about the missing of Nokuthula.

MR VISSER: Yes, and that was after you saw her photograph in the Sowetan, is that right?

MR VEYI: Yes, it was after I saw the photo and then read the story.

MR VISSER: And you indicated, you showed the Committee members the photo that you were referring to, isn't that right?

MR VEYI: Yes, that is correct.

MR VISSER: Is this the one that I am holding in my hand at the moment?

MR VEYI: Yes, that is correct.

MR VISSER: Are you sure of that?

MR VEYI: Yes, I am sure.

MR VISSER: It is not true and I will tell you why not, because the article that I read to you from, is dated February, the 15th 1995 and the one that you showed the Committee is dated two years later, in May on the 22nd of May 1997. What you say, can't be true.

MR VEYI: The photo appeared in the Sowetan and the story you are referring to, I don't know anything about that. I saw this photo and the heading of that story was "Missing in Action".

MR VISSER: But would you agree with me that the reader of the portion which I read to you, might come to the conclusion that you resented your white co-Policemen? Would you agree with that? There is a resentment towards white Policemen that emanates from what I read to you, do you agree with that?

MR VEYI: It is the first time that I hear that I resented them, I don't agree with that.

MR VISSER: You don't agree with that, all right, now you told this Committee that Mkhonza came

TP

back from Swaziland and you said "we had a meeting". Do you remember saying that?

MR VEYI: I said there was a meeting. I know about the meeting but I don't remember whether I was present at that meeting.

MR VISSER: Try to listen to the questions and answer them instead of trying to find out where we are going.

MR LAMEY: I don't think that is a reasonable conclusion to make by my learned friend.

MR VISSER: Chairperson, can he just answer the questions. Where was this meeting held?

MR VEYI: I have already said that I don't remember about the meeting, but I knew that we were supposed to go to the Carlton Centre.

MR VISSER: Mr Veyi, let's start again, you said "when Mr Mkhonza came back from Swaziland, we had a meeting", did you say that?

MR VEYI: I said there was a meeting but I don't remember whether I was present in that meeting, but I knew that there was, people were going to go to Carlton Centre.

MR VISSER: Are you saying you attended a meeting where it was said that people would go to Carlton Centre, is that what you are saying?

MR VEYI: I am saying because this happened at that time, I don't remember whether I was present in the meeting or not but I knew about what was going to happen.

MR VISSER: How did you know what was going to happen?

MR VEYI: First of all in the Unit, we were working like this, even if you were not present at the meeting, if there was going to be a meeting, we as members of the Unit, especially black members, if Lazarus attended the meeting, he would then report back to me about the discussion. Even if I attended the meeting, I would tell him. That is how we were working.

MR VISSER: Well, all right, we heard that there was a meeting and within an hour or two after that, the arrest was apparently carried out. Do you know anything about that space of time between the meeting and the arrest?

MR VEYI: Yes, I have already said that I knew that a lady from Swaziland was going to be arrested in Carlton Centre.

MR VISSER: I just want to put it to you that I am going to argue that you were present at the meeting which Coetzee and Pretorius and Mong and Williams and Ross testified about and that this was the meeting where you heard what the plan was in regard to the arrest of this lady. Do you want to make any comment on that?

MR VEYI: I have already said that I can't say I was there or not, but I knew about it.

MR VISSER: You see Mr Veyi, I want to put a few things to you and I want to suggest to you that what has happened here with what was put on your behalf to the witnesses which I have just mentioned, creates the impression that you opposed what they said basically just in principle, and let me tell you what I am talking about. You see on your behalf it was put by Mr Lamey to those applicants which I have just referred to that you did not attend the meeting where Coetzee informed those present, that the intention was to kidnap Simelane in order to recruit her as an informer. That was put, now ...

TP

MR LAMEY: Mr Chairman, if I remember correctly it was put specifically about a meeting about a "kop draai aksie", that he did not attend such a meeting where there was a specific discussion about the purpose of kidnapping for a "kop draai aksie."

MR VISSER: Mr Chairperson, I put it exactly correctly as I wrote it down, and I don't withdraw that question. I will repeat it then.

CHAIRPERSON: In whose cross-examination was that put Mr Visser?

MR VISSER: That was put to both Coetzee as well as Pretorius as well as to Mong that when Mong gave evidence Chairperson, I am not quite sure but I think in Mong's cross-examination it was conceded that he might have been there. To Coetzee and Pretorius it was specifically denied that he was present at any such meeting.

MR LAMEY: Mr Chairman, if I may come in here, in Exhibit T there is specific reference, I don't have it now in front of me Exhibit T, by Coetzee and also repeated by the other members about the meeting of the "kop draai aksie" and it was about the way in which they put it in a "kop draai aksie", in a meeting where that was specifically spelt out to the members present, but it was put to the witness, as far as I recall that he was not present at a meeting where specifically a "kop draai aksie", or - my learned friend put it in the way of recruitment, that is just perhaps another way of saying it, but that was the gist of I think if I remember correctly, what was put.

CHAIRPERSON: Just remind me Mr Lamey, is there a reference in the statements of Coetzee & Others to the effect that, or to the allegation that your client was present at a meeting where a "kop draai" was discussed, I don't want to search for that here, I am trying to look at Coetzee's ...

MR VISSER: Mr Chairman, page 5 of Exhibit T Chairperson, from paragraph 10 onwards.

CHAIRPERSON: (Microphone not on), paragraph 10 was about a "kop draai".

MR VISSER: Well, that was the evidence Chairperson, there was only one meeting at which all of this was discussed.

CHAIRPERSON: According to my colleague, drew my attention to paragraph 15 on page 7 of Exhibit T, the last sentence, it says -

"... that a kidnapping would take place."

And then paragraph 12, yes, this is Muller all right, then paragraph 13 says -

"... Muller decided on the second option 'ontvoering en kopdraai' ..."

so that seems to be what Exhibit T says.

MR VISSER: That is what those witnesses stated Chairperson and what was put to them was that Mr Veyi will say that he was not present at that meeting. That is what I am putting to him now. The record will speak for itself.

MR LAMEY: Mr Chairman, may I just come in here, in Exhibit W it could be that this was, I can't remember exactly to which witness it was put, but in paragraph 5 of Exhibit W Ross states that, paragraph 5 onwards, page 3 of Exhibit W Ross states that he was told beforehand that it was decided by Brigadier Muller to give approval for this turning action and that certain members were informed as such. Yes, he just makes mention of certain members ...

MR VISSER: No, no, he mentions them, he lists them Chairperson. My learned friend can't just say that he just makes mention of certain members.

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MR LAMEY: Sorry then, I was looking actually for that whether he was mentioning it specifically, but it could be that it was then specifically put to this witness, but I remember putting it in the context of a meeting where there was mention specifically made of a decision of kidnapping for purposes of the "kop draai aksie".

MR VISSER: That is what I was referring to. I don't understand the objection Chairperson.

MR LAMEY: Perhaps we are speaking then on cross purposes here, Mr Chairman.

CHAIRPERSON: Yes, the objection seems to be that Mr Lamey is of the view that what he had put to your witnesses, to your clients was that Mr Veyi was not present at a meeting where the "kop draai" of this intended arrestee or abductee was discussed, so it is in that context that he had put that Mr Veyi wasn't there. From there I understand, from that submission I understand that he is disputing that he had put on behalf of Mr Veyi that he was not present at a meeting in the sense that you have referred to in your cross-examination, a meeting where there was discussion about arresting and so on. This witness' position seems to be that he could have been there, I can't remember but he could have been there.

MR VISSER: Chairperson, I don't want to make this more involved than what it is, because really it is quite simple. The applicants whom you have heard up to now, have given you evidence about a meeting that was held where it was discussed that this person had come into the Republic, that she was going to meet Mkhonza, that she was an MK agent, that she was going to be grabbed and the purpose would be that she would be recruited to become an informer. Mr Lamey quite explicitly put that Mr Veyi wasn't present at that meeting and the only point that I am making now, is only when Mr Mong gave evidence did Mr Veyi concede that he might have been present at that meeting. That is as simple as that.

CHAIRPERSON: Yes, but except that on what Mr Lamey says, there seems to have been a lack of common ground as to what was discussed at this particular meeting. Mr Lamey says that what he had put to your clients was focused on the question of whether a "kop draai" was discussed beforehand or not. He says his client wasn't present at a meeting where that was discussed. His client seems to say that he knew about the arrest, he could possibly have been present at a meeting where that was discussed, he can't remember and he can't dispute it, so it seems to be that that is where you part company, you and Mr Lamey.

MR VISSER: I will put the question on this basis if I may then Chairperson, I put to you Mr Veyi, that on your behalf if was put that you did not attend any meeting at which the kidnapping of Simelane was discussed. I put to you that the evidence of Mr Mong, it was conceded on your behalf that you might have been present, but you had forgotten about it. In fact it was in your own evidence yesterday, you said that you might have been present, but you might had forgotten about that, is that correct?

MR VEYI: What I am saying is, it might be possible that I was there or not, but I knew that people would go to Carlton Centre.

MR VISSER: I am sorry, I didn't have my, I am sorry, could you just repeat for my benefit the answer, please.

MR VEYI: What I am saying is, it is possible that I was present or not, but I knew that people would go to Carlton Centre and arrest a lady from Swaziland.

MR VISSER: All right. Let's go on to the next thing. Do you agree that it was put on your behalf that your Unit, the Intelligence Unit, in 1983 had safe houses available which they used?

MR VEYI: Yes, that is correct.

TP 07

MR VISSER: Did I understand you correctly when you gave evidence yesterday to say that they came later than 1982?

MR VEYI: No.

MR VISSER: I see. Let's go on to the next point. You, it was put on your behalf, consistently, that you never knew that Simelane was being recruited while she was in your detention, is that correct?

MR VEYI: There is a question that I didn't answer, I thought that we were still continuing about the safe houses. Yesterday I said there were safe houses before 1983, at the time when Simelane was kidnapped, there were safe houses and I quoted about Peter Lengene. After Peter Lengene was kidnapped in Botswana, he was taken to Klipspruit. We then sometimes would be in Rustenburg.

MR VISSER: I am sorry, you know Mr Veyi, if you want to discuss that, we can do so, I have already stepped off that point, but let's discuss that. Were you involved in the kidnapping of Mr Lengene?

MR VEYI: No, I was not involved.

MR VISSER: Yes, so how do you know anything about it?

MR VEYI: But I was working in that Unit.

MR VISSER: How do you know where he was kept and where he was questioned?

MR VEYI: I was working with that Unit even though I didn't go when they went to kidnap him.

MR VISSER: So are you saying that you told the Committee something which you heard from someone else, is that what you are saying?

MR VEYI: When there would be an operation, for example, maybe there would be eight of us in the Unit and then six of us would go outside and there would be those who are left inside the country, those who would handle the sources inside the country and collect reports. In Lengene's case, that is what happened. Others went outside to kidnap and I was inside the country. That is why I didn't go, but when they brought him here, I was present. When we were recruiting him and turning him, convincing him to join us, I was there. I was one of the members who took part, we tried to turn him.

MR VISSER: ... while he was being assaulted?

MR VEYI: Yes, that is correct, he was assaulted and that didn't take a long time like in Nokuthula's case. It only took a short period and then after that he agreed to cooperate with us until he became a full member of the South African Police Force.

MR VISSER: And exactly where was he assaulted where you were present? In which place were you?

MR VEYI: In Klipspruit, as I have already said we had three safe houses and then we abandoned the two, we used one. It is where we were interrogating people in Klipspruit West.

MR VISSER: Yes, right, now let me tell you something which may come as a surprise to you. In Bundle 2 at page 382 and following the late Mr Lengene's application form for amnesty can be found. From page 395 onwards, from paragraph 22, he describes in great detail in the minutest detail in fact, how he was kidnapped and how the next day in paragraph 23, he regained consciousness while he was sprawling on a garage floor. If you turn to page 396 you will see at the bottom of paragraph 24, the names which he mentioned of the people who kidnapped him, Willem Coetzee, Anton Pretorius, Jan Martins(?) and in paragraph 26 he mentions Sergeant Mothiba. Coming back to the garage he says in paragraph 28 at page 397 that he later realised that that garage was in a house in Rustenburg, okay. He then goes on to say that he was assaulted, he was interrogated and he was brutally treated until

TP67

suddenly on a specific day, there was a message over the radio he says in paragraph 30, there was an announcement over the radio about himself and the allegation was that he had been kidnapped by the South African Police and from there onwards, his treatment changed and a Major Schoeman came to see him, he says in paragraph 32 apparently only after he had agreed to work with the Police, that they brought him to Johannesburg, in paragraph 33 you see that. The evidence of Mr Coetzee before this hearing was that it was only after he was recruited, "sy kop gedraai gewees het", that he was brought to Klipspruit West where he was given a house in which to stay, where other Policemen also stayed. What do you say of what I have just put to you? First of all, you are not even mentioned sir, and secondly his version is in direct conflict with what you have just told us?

MR VEYI: I would like to tell this Committee that the way that the Internal Intelligence of the SA Police was working, you wouldn't understand how it was working. The story that you are reading to me, sometimes what you are reading, might not be what happened. I think that the people who are mentioned, you are saying that they kidnapped Peter, I would like to ask whether you have referred to David Djane and George Putukezi.

MR VISSER: Are you saying that Mr Lengene is not telling the truth in his affidavit, in his application for amnesty, is that what you are saying?

MR VEYI: I would like to know whether George and David Djane are written in that list of names that kidnapped him?

MR VISSER: Can you just answer my question please, are you saying that Mr Lengene is not telling the truth in what I have just put to you, he says?

MR VEYI: Before answering that question, I would like to ask about David Djane and George, whether their names are in that list?

CHAIRPERSON: No, their names are not. Yes Mr Visser, I don't know where it is going to take us.

MR VISSER: I am not going to waste time, I am merely recording that the witness is either unable or unwilling to answer the question. May I refer you to page 400 Chairperson, paragraph 36, just to - I wasn't even going to cross-examine him on this, but he brought it on. The last, second last sentence, he says - actually he refers to him being taken to Benoni after having been taken to Johannesburg and Protea Police station and Benoni, I don't want to go into detail, but he says he was then guarded by three people who were changing days, they were Sergeant Mothiba, Lazarus Selamolela and Manuel Oliphant. I just want to point out that this witness' name doesn't feature anywhere.

MR LAMEY: Mr Chairman, may I just come in here, I think in all fairness, the witness should be asked - I don't want to be prescriptive to Mr Visser, but I think the question should be asked first whether he had an opportunity to read the statement in total of Mr Lengene, in order to enable him to reply to the question whether he - the general question -whether what Mr Lengene is telling, is not the truth. It is a very general question and there is a whole lot of detailed facts, as Mr Visser has put it, in very detailed information. I mean it is such a general question and perhaps the witness should be asked whether he had an opportunity to read this, in order to comment where he agrees and where he does not agree, as it pleases you.

CHAIRPERSON: Yes, I think Mr Visser has indicated he has stepped off this. It is up to you if you want to deal with it in re-examination.

MR LAMEY: Thank you Mr Chairman.

MR VISSER: Let's come back to the question where we were, I put it to you that it was put on your behalf to the previous witnesses that you never knew that Simelane was being recruited "kop gedraai", if you want to use the word, as an informer of the Police. Do you agree with that?

MR VEYI: What I am saying is that I knew that people were going to go to Carlton Centre and arrest Nokuthula. What I was expecting to happen after her arrest, I expected her to be detained. The fact about "kop draai" and all that, I didn't know about that.

MR VISSER: You never knew about that until the last time you saw her, is that what you are saying?

MR VEYI: This happened when we were in Northum, that is where she was recruited. We were also present, but when initially she was going to be kidnapped in Carlton Centre, the idea was to arrest her.

MR VISSER: I am not talking about the Carlton Centre, I am talking about the farm, it was put on your behalf that you never realised that she was being recruited. Do you agree with that, on the farm?

MR VEYI: When we were with her at the farm, when she was interviewed, we would tell her about the advantages when she would agree being a Police, that was the way we were using to recruit her, that happened at the farm.

MR VISSER: I just want to put it to you your evidence is crystal clear that you knew very well that she was being recruited, even though there was an attempt made to hide that fact from the black members, you knew very well and that is very clear from your own evidence, because you told this Committee yesterday she was told "we will do this and that for you", those were your words and you said "I got the impression that we were trying to recruit her, but she would not cooperate" and statements such as that, but let's step off that. The fourth issue which I want to raise with you is it was specifically denied on your behalf that any toiletries were provided for Simelane from the beginning on the farm. Do you agree with that statement?

MR VEYI: I don't remember seeing toiletries.

MR VISSER: Yesterday you conceded that it may have happened. Do you agree with that?

MR VEYI: I don't remember yesterday toiletries being referred to.

MR VISSER: All right. You, it was denied on your behalf that Coetzee is truthful when he says that his *modus operandi* when he turns a person to an informer, was to use the method of assaulting, that person. That was for some reason or other, denied by you, do you remember that? It was put on your behalf?

MR VEYI: Coetzee would assault a person if he was trying to recruit that person, that was the way he used.

MR VISSER: Yes, well that is exactly the point, because that was his evidence, and that was denied through Mr Lamey when Mr Coetzee was cross-examined? Do you have any explanation for all of this? All right, you see, I am going to argue that you placed these matters in dispute because you have a resentment against the white Officers that gave evidence here, and it was for the mere sake of denying whatever they were asserting, that is what I am going to argue, if you want to make any comment on that, please do. If you don't, then perhaps we can go onto the next one. You said something strange yesterday ...

MR VEYI: It is the first time that I hear that I resented them.

MR VISSER: All right, you said something strange yesterday, you were asked about what you knew about Simelane and you said and I wrote it down "she could possibly be an MK member", did I hear you correctly or is that not what you intended to say?

MR VEYI: Can you please repeat your question?

MR VISSER: You said "she could possibly be an MK member", that is what you heard about

Simelane, perhaps if one of the members would check my note, but I wrote it down exactly like that.

ADV GCABASHE : What were they discussing?

MR VISSER: The evidence, it was right in the beginning, Mkhonza came back from Swaziland and he told them about somebody that was coming in and then he said "she could possibly be an MK member" and because we haven't got a record, I want to be quite careful with my notes, they are notoriously bad. I am sorry for asking you to check for me, but that is what I wrote down.

ADV DE JAGER: In his evidence in chief?

MR VISSER: His evidence in chief, it was right at the beginning.

CHAIRPERSON: Yes, he said that he understood that this lady would be arrested, trapped and arrested because she might be a member of MK.

MR VISSER: Words to that effect yes, she might be, yes. That is the only point I want to raise with the witness now. Mr Veyi, could there have been any doubt in your mind at the time, that she was in fact an MK member?

MR VEYI: Because Scotch, Mr Mkhonza, in Swaziland, his contacts were MK members, so I took it for granted that this person who was coming this side, was also a member of MK.

MR VISSER: Yes. Just press your button, can you just keep your hands away from that then please, thank you. In other words you did not intend to convey to the Committee yesterday that you were uncertain about the fact that she was an MK member?

MR VEYI: At the time when she was coming to this country, I was not certain, but the way Mr Mkhonza was operating, I knew that he was operating with MK members, so I just assumed that she was also a member of MK.

MR VISSER: You know Mr Veyi, let me just tell you what you say in your own application, Exhibit S page 3, paragraph 3, you say

> - "... Scotch reported to his handler, Warrant Officer Coetzee, that there was an MK woman on her way from Swaziland to Johannesburg ..."

is that right or is that wrong?

MR VEYI: As I have said, Scotch was dealing with MK in Swaziland, so it was possible that this one was also a member of MK, that was what I was trying to say.

MR VISSER: Look at page 8, paragraph 2 -

> "... this particular lady was a member of MK ..."

Why suddenly the doubt in your mind?

ADV GCABASHE : Page what was the last reference?

MR VISSER: I am sorry, page 8, paragraph 2 the first sentence. In any event, perhaps if we can try to cut this short, are you conceding today she was an MK member or are you saying you are still doubtful?

MR VEYI: I would like to look at my statement first that I made.

MR VISSER: Are you saying you cannot say today in your own mind as you sit there, whether Simelane was an MK member or not, is that what you are saying, without looking at your statement?

MR VEYI: At the time when I was making the statement, I knew that she was a member of MK, but when she was arrested, I didn't know.

ADV GCABASHE : And today, the question is today, what do you think today?

MR VEYI: She was a member of MK.

CHAIRPERSON: On what information do you base that? Why do you say that?

MR VEYI: When we were in Northum, when she was tortured, interviewed and all these things, it is where we got the information that she was trained and she was an MK member.

CHAIRPERSON: Is that what she told you under torture?

MR VEYI: Yes, that is correct.

CHAIRPERSON: Have you confirmed that independently?

MR VEYI: According to the reports that Coetzee found and the contacts in Swaziland, confirmed that she was a member.

CHAIRPERSON: So Coetzee confirmed this you say, independently from what she was saying under torture?

MR VEYI: Yes, that is correct.

CHAIRPERSON: Mr Visser?

MR VISSER: Thank you Mr Chairman. You went to visit Simelane's parents not too long ago, is that correct?

MR VEYI: Yes, that is correct.

MR VISSER: Did you find out whether they did anything in the struggle?

MR VEYI: I was not interested of what they did in the struggle, I was concerned only about the child that was missing, the child that I knew about.

MR VISSER: You say that Simelane was kept at the Norwood flats for approximately a week, is that correct?

MR VEYI: That is correct.

MR VISSER: Are you quite sure of that, you are absolutely certain that it was a week, not one or two days?

MR VEYI: I can say it is a week because after she was taken to Norwood, I went there and I stayed something like three days guarding her and then I went back. I didn't know when she had arrived.

MR VISSER: I am sorry, I am not sure that you understood my question. My question to you is, how long was Simelane kept at the flats at Norwood?

MR VEYI: I think it was about a week.

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MR VISSER: When you made your statement, Exhibit S, did you - I am sorry - when was Exhibit S dated? I don't have a date on mine, the 7th of May 1999? When you made your statement on the 7th of May 1999, which was just the other day, did you say at page 4, in paragraph 5, with reference to the words -

> "...the day after her arrest, I was also posted to go to the farm to guard her"?

You made a footnote and in the footnote you say -

> "... the preceding two sentences appear in my initial statement which I made. After I had made the statement I remembered the lady was not taken immediately the day after her arrest, to the farm at Northum. She was first detained at Norwood Police quarters in Johannesburg for approximately a week where I also had to guard her with other members."

What this means in brief is in your original amnesty application you said she was taken to Northum the day after her arrest, do you agree with that?

MR VEYI: Yes, I agree with that.

MR VISSER: And this year, in May 1999, you changed that to a week, is that correct?

MR VEYI: There is nothing that I changed, I only added to what my initial statement was.

MR VISSER: Well, all right. Did you read Mr Selamolela's application at the time when you made your, when you completed your application, the first one?

MR VEYI: I don't remember reading it.

MR VISSER: Did you read it after you completed your original application form?

MR VEYI: No, I don't remember.

MR VISSER: Well, I want to suggest to you - well, did you speak to Mr Selamolela about the time that this lady was kept at Norwood?

MR VEYI: What I did when I was with Mr Lamey, he told me that Selamolela was also present, after taking my statement he would take Mr Selamolela's statement. Selamolela then came and I greeted him and we haven't been seeing each other for more than five years. We didn't discuss about Simelane's case.

MR VISSER: Did you listen while Mr Selamolela was telling Mr Lamey what he remembered about this incident?

MR VEYI: I was present, I was there.

MR VISSER: Yes, and you heard him say that Simelane was kept at Norwood for approximately a week, page 567 Chairperson, Bundle 3. Bundle 3, 567.

MR VEYI: Mr Lamey only wanted to know whether I know the story of Simelane and Selamolela, whether I was present in this case and I then agreed that I was present during the Nokuthula incident. Then I don't remember anything else.

MR VISSER: You are avoiding the question, did you hear Mr Selamolela tell Mr Lamey that this lady was kept at Norwood for approximately a week, it is a simple question?

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MR VEYI: No, I didn't hear him.

MR VISSER: Well, I suggest to you that that is exactly where you heard about the week and that is the reason why you changed your original statement from the - more or less the correct situation of one day, it was in fact two days, but one day after her arrest, to a week after her arrest. That is the reason why you changed it. I put it to you, what do you say to that?

MR VEYI: What I am saying is, I didn't change, I just added to what I have forgotten after I consulted with Mr Lamey.

MR VISSER: Did you tell this Committee yesterday that you visited Simelane twice during the time that she was at Norwood, did I hear you correctly?

MR VEYI: Yes, that is correct.

MR VISSER: And on each occasion for how long did you spend time in her presence?

MR VEYI: When she was in Northum ...

MR VISSER: I am talking about Norwood, at the flats, I am not talking about the farm. I am not talking about the farm, at the flats in Norwood, in Custodum Flats, at the office.

MR VEYI: In Norwood I went there twice if I still remember well.

MR VISSER: Yes, all right, the next question is, on each occasion, how long time did you spend with her?

MR VEYI: I would sleep there, spend the night there or spend two days there and then you would go back.

MR VISSER: All right, so while she was at the flats in Norwood, you spent two nights there with her, guarding her I take it and you say that you also spent two days with her, is that what you are saying?

MR VEYI: Please repeat your question?

MR VISSER: Perhaps you must tell us, how long on each occasion did you spend with Simelane while she was at the flats at Norwood.

MR VEYI: I went there twice, I would go this day. In a week I would go twice.

ADV GCABASHE : Now come back to the first time you went to see Simelane at Norwood, how long did you spend with her that first time, then you went away. Then tell us about the second time, how long did you spend with her that second time, that is the gist of the question. Break it down for us, thank you.

MR VEYI: I can say that when I first saw her, I stayed for two days and then I went again after two days, for another two days.

ADV GCABASHE : And on these two days each time, you would spend one night or two nights at the flats, just break it down for us again.

MR VEYI: If I would go to Norwood, I would arrive maybe today, let's say on Monday and I would spend the night, Monday night and I would spend Tuesday night and then I would go back, and maybe a day would pass, after a day I would then go back, spend two days and then I would go back again.

MR VISSER: During the time that you spent with Simelane at the flats at Norwood, were you alone

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with her or was there another black Policeman with you?

MR VEYI: I was not alone, in most cases I was with Selamolela.

MR VISSER: Well, we only know of two cases, was Selamolela with you on both those occasions that you have told us about?

MR VEYI: I don't remember whether the first day I went, I went with Selamolela the first day or the second day, I don't remember, I can't remember that.

MR VISSER: All right, are you saying you were not with him there on both occasions?

MR VEYI: I would not dispute the fact that I went with him the first time or the first day or second day, but I was there with him sometime.

MR VISSER: Are you saying you were not with him on both occasions, please it is a simple question? Is there a problem with the microphones again?

MR VEYI: The first, firstly I used to work with Selamolela and with Sefuti sometimes, I don't know whether the first time I went with Selamolela or Sefuti and I don't know the second occasion whether I went with either of them, which one of them I went with.

MR VISSER: All right. Let's come to the assaults of Ms Simelane. Why do you say at Norwood, I am just talking about Norwood at the flats, why do you say was she assaulted?

MR VEYI: She was assaulted because we wanted her to reveal about her activities and the contacts in South Africa and her mission in South Africa and the targets that were attacked during her presence in South Africa and the countries where she was trained and the people that she was trained with. That was the information that was needed from her. The reason that made her to be assaulted was because she was not willing to talk.

MR VISSER: Right. Coetzee and Pretorius said and Mong stated that they assaulted her by slapping her with the open hands, hitting her with the fists at Norwood in her back and in her ribs apparently, do you agree with that?

MR VEYI: Coetzee and Mong and Pretorius are not telling the truth, are not relating properly as to what happened. Some of the things did happen, but some of the things that they are saying are not true.

MR VISSER: What is not true about them saying that they slapped her and hit her with a fist on the body?

MR VEYI: First of all, if an MK member was caught or captured, an MK member used to be regarded as a most dangerous person, more than a criminal. The treatment would not be assaulted with open hand, the others would kick him, the others would strangle him or her, the others would even walk over his body or try to trample her body, something like that. The treatment was not soft at all.

MR VISSER: Okay, let's take that in turn. Did either Coetzee, Pretorius or Mong kick Simelane?

MR VEYI: They were kicking her, they were doing anything that you do to a person if she is captured, she was pulled roughly and hit against the wall and she would scream, that is why when she was in Norwood, she was later taken to Northum. It is because people were suspecting that something was going on at the penthouse.

MR VISSER: Mr Veyi, did Mr Coetzee kick Simelane?

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MR VEYI: The way he was kicking her, he even told her or he would tell her that he himself was more dangerous than ANC, and if she was not willing to talk, he would kill her.

MR VISSER: I am sorry. Did Mr Coetzee kick Simelane?

MR VEYI: Yes, he was kicking her and doing everything and smacking her face and he would do anything.

MR VISSER: Thank you. Mr Veyi, do you have a problem with the Translator?

MR VEYI: No, I don't have a problem at all.

MR VISSER: Did Mr Pretorius kick Simelane, at Norwood at the flats?

MR VEYI: The two of them were doing that and even though we were there ourselves, we wouldn't stand up and fold our arms, we would try and do something, though we knew very well deep down from our hearts, that what was happening was not acceptable.

MR VISSER: I don't know what that means really. The question was whether Pretorius kicked Simelane, that was the question.

MR VEYI: They were having turns, if Pretorius was hitting her and the others would be standing there and push her to the other side and the other person would take a turn also.

MR VISSER: Mr Veyi, I think we must sort out the problem that we have, I asked you whether Pretorius kicked Simelane and you talk about others standing around and pushing and - don't you understand ...

ADV GCABASHE: I was going to say it is a language issue. It is expression because what they were doing, he also is agreeing with you as I understand Zulu, Xhosa, they were in fact doing exactly that, but they were actually exchanging, he is adding to what you are saying, so he is agreeing and adds, he agrees and adds. Maybe you need to agree one way or the other that he is either going to be more specific and not expansive in language or something, but that is what I think the problem is Mr Visser.

MR VISSER: Here I was thinking that he has a disagreeable way of agreeing with me. All right, Mr Veyi, I just want to put to you that - let me ask you this, did Mr Mong kick Simelane at Norwood at the flats?

MR VEYI: I cannot say, as I was saying the other members were also participating whenever she was beaten up. Maybe if she happened to run towards your direction, you would try and push her and say go away and the room was so small.

ADV DE JAGER: Can you perhaps try and take it step by step? I suppose Mr Visser would come to the slapping and the pushing, but at first can we only deal with kicking? Who did the kicking?

MR VEYI: I don't know how to explain this. I think Mr Visser does not understand the way that the Police were working. If the suspect is captured by five Policemen and the suspect is there in front of the Police, there would be no time to check or monitor who is doing what. All the people who are there in front of the suspect, if perhaps I smack her across the face, the other one is kicking and the other one is punching her, such things used to happen. That was happening, that is what was happening there, I can not say that so and so did this and that, but it is something that would happen there.

CHAIRPERSON: Would you just all attack this lady? You would smack, you would kick, you would push, you would strangle, you would step on her body, all those things that you described to us that would happen to people in your care at that time?

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MR VEYI: Yes, that is correct.

CHAIRPERSON: So it wasn't a nice thing where you

would not all kick for five minutes and then you would slap for five minutes and then you would strangle for five minutes?

MR VEYI: No, that was not the case.

CHAIRPERSON: Was that what happened there?

MR VEYI: Yes.

CHAIRPERSON: Yes Mr Visser?

MR VISSER: Are you saying that for the time that you were in the presence of Simelane, four or five people assaulted her continuously together, is that what you are saying?

MR VEYI: Yes, that is what I am trying to explain. This is exactly why I say the way she was assaulted, she didn't look the same, her appearance changed. Her physical condition had changed completely.

MR VISSER: I just want to put it to you that it is most unlikely that that could have happened. I put it to you that what you are telling this Committee about strangulations, about trampling on her body, was never put to Coetzee or Pretorius or Mong in regard to Norwood, nor was it ever put to them that any of them ever kicked Simelane and that means only one thing and that is that you never told Mr Lamey that.

MR LAMEY: I think it was conceded by the clients of Mr Visser that they each participated in one way or the other in the assault by hitting with fists, slapping and also possibly kicking, they also conceded in their own evidence.

MR VISSER: That is just not so.

MR VAN DEN BERG: I have a note in which Mr Coetzee conceded that it is possible that he might well have kicked the deceased, Simelane, it happened I think on the morning, the second morning whilst he was being asked questions by members of the panel. I have a note specifically to that effect.

CHAIRPERSON: Yes, well I think the record will eventually bear out what was the position. Mr Visser, you had put your recollection to him.

MR VISSER: Chairperson, then obviously I can't take it any further.

CHAIRPERSON: Yes.

MR VISSER: The record will speak for itself. I also want to put it to you that you never, it was never put to Pretorius that he would push Simelane against another person who would slap her, that made her fall to the ground. That is evidence which we only heard for the first time when you gave evidence.

MR VEYI: It is, you are supposed to hear that for the first time from me, because I mentioned it for the first time.

MR VISSER: Yes, but you were supposed to make a full disclosure in your application, you know, Mr Veyi. All right.

MR VEYI: Even if you are in court, if you give evidence in court, you do make your statement, but when you are in the dock or if you are in the podium there, you start revealing, you get into details and the things, some of the things that you mention in court, are the things that you did not write down. That is what I am saying that even if I did not write some other things in my statement, right now I am having an opportunity to spell it out in details.

MR VISSER: Fair enough. Fair enough, this is after all your application, I accept that. Let's talk about your participation in the assaults. Did you slap Simelane, listen carefully, did you slap Simelane with the open hand at Norwood?

MR VEYI: I said as you are working together, all of us, I was not supposed to stand there and fold my arms if the other people are busy, because if I would do that, I was going to be perceived the other way.

MR VISSER: About not just saying "yes I slapped her", if that is your evidence, or no, I didn't slap her.

MR LAMEY: I think Mr Chairman ...

MR VISSER: Is it a language problem again?

CHAIRPERSON: Mr Visser, it might very well just be a cultural issue here. Let's try, Mr Lamey?

MR LAMEY: I don't want to be at all - interrupt my learned friend's cross-examination, but I get the impression that he answers it by implication, what he is saying, it is a way of expression.

CHAIRPERSON: Well, that seems to be the position Mr Lamey. Counsel is trying to find out exactly what you did, if you can tell us, if you can remember exactly what you did to Ms Simelane, exactly what you did, if you can help us. The first question was did you slap her with an open hand, can you remember whether you slapped her?

MR VEYI: Yes, I did.

CHAIRPERSON: You slapped her. Mr Visser, what is the next...

MR VISSER: I must come for lessons from you Mr Chairman. Did you slap her in her face?

MR VEYI: Yes, that is correct.

MR VISSER: Was it a hard slap?

MR VEYI: Yes, that is correct.

MR VISSER: Did you slap her more than once?

MR VEYI: Yes, that is correct, I was participating, I was smacking her as she was being assaulted.

MR VISSER: Yes, all right. Did you slap her many times, let me ask you that, did you slap her in the face many times?

MR VEYI: I did, but when we realised that she was

changing, her physical condition was changing, we withdrew, we did not participate.

MR VISSER: That is my next question, because of *inter alia* your slapping of her, did her face swell up and did she change her appearance? Is that what happened?

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MR VEYI: As she was still in Norwood, she was better there, the condition deteriorated when she was in Northum.

MR VISSER: Did you hit Simelane with your fist?

MR VEYI: I cannot remember, I can only remember me slapping her.

MR VISSER: Did you kick Simelane at Norwood at the flats?

MR VEYI: Yes, I did kick her, but I was not kicking her because I wanted to kick her.

MR VISSER: Yes. Where did you kick her on her body?

MR VEYI: Just on her body.

MR VISSER: Where on her body? On her head, on her foot, on her stomach, where?

MR VEYI: I don't know how to explain that, according to us the body is from the waist up to the shoulders. We don't regard the head as the body and even the foot, we refer to them as feet. I was kicking her on her body.

MR VISSER: That means then from the waist to below the head, that is where you were kicking her, is that what you are saying?

MR VEYI: Yes, that is correct. It is not because I am the one who was kicking her, but because people were kicking her, I was not alone in kicking her, this was happening in Coetzee's presence only. During their absence, that is Coetzee and the others, nothing would happen.

MR VISSER: Now you said yesterday, you kept on referring to "we assaulted her", now what I want to ask you is this, did you participate in assaults on Ms Simelane on both the occasions when you say you spent time in her presence, on both those occasions at Norwood, I am just talking about Norwood?

MR VEYI: When she was assaulted at Norwood during my presence, I would participate during those two times.

MR VISSER: So, at least on one occasions Mr Selamolela was present while she was being assaulted by you at Norwood?

MR VEYI: As I have already said all the members including the black members, they would do what the others were doing, they were participating though we knew very well that what was happening was not acceptable, but we were forced by the situation prevailing at the time.

MR VISSER: Did you see Mr Selamolela assault Simelane?

MR VEYI: I am going to repeat this, I explained this, if a person is a captive and the people who are present there, they are hitting him or her, you don't watch what the others are doing, as she was there, everyone was taking part in assaulting her.

MR VISSER: I take that to be a "yes" to my question.

MR LAMEY: I take that not necessarily as a "yes".

ADV DE JAGER: He is saying everyone was taking part, he didn't say everyone was kicking, it was about an assault. Could you then perhaps tell us whether Mr Selamolela, whether he in fact kicked or slapped or pushed her, what did he do?

TP

MR VEYI: He was also assisting in assaulting her, but I cannot remember exactly what he did, because assaulting refers to various things or methods. If you are kicking or punching or slapping a person, that is assault. 317

MR VISSER: Do you know what he says, in Bundle 3 page 567, let me tell you, he says, he refers to the Norwood flats as the married quarters and he says "whilst in my presence at the married quarters, nobody assaulted her." What do you think of that?

MR VEYI: I am saying she was assaulted.

MR VISSER: And in fact you say he also helped assaulting her?

MR VEYI: Yes, that is what I am saying.

MR VISSER: All right, I am going to go over to the farm now Chairperson, might this be a convenient time to take the adjournment?

CHAIRPERSON: Yes, we will adjourn for 15 minutes.

COMMITTEE ADJOURNS

ON RESUMPTION

NIMROD VEYI: (s.u.o)

CROSS-EXAMINATION BY MR VISSER: (cont)

Thank you Mr Chairman. Mr Veyi, can we come to what transpired on the farm in Northum and may I say that all the questions that I am going to ask you now, will only relate to what happened on the farm, do you understand that?

MR VEYI: Yes, I do understand.

MR VISSER: To cut a long story short, were the assaults on Simelane on the farm the same as those at Norwood perpetrated by the same people that you testified to this morning?

MR VEYI: Yes, that is correct.

MR VISSER: Except that on the farm, if I may remind you, there was evidence that a sack was also used to draw over Simelane's head to prevent her from breathing, is that correct?

MR VEYI: Yes, that is correct and when she was being put into the dam.

MR VISSER: All right, let's talk about the dam. What do you make of this, or what do you want us to understand about the putting into the dam of Simelane, what are you saying to us?

MR VEYI: As she was being put into the dam, she would be assaulted and later be put into the dam, I think that was part of the torture.

MR VISSER: That is not the impression that one gets when one looks at Bundle 3, page 567 of the evidence of Mr Selamolela, page 567. In paragraph 7 he says in the third sentence, "at night this same lady was taken to the zinc dam where Radebe threw her in, but hold her so that she could not drown." If I may stop there, do you agree with that?

MR VEYI: Yes, that is correct. When she was put into the dam, she would be put in there and be taken out, that was the procedure.

TP

MR VISSER: Right. And it was only done by Radebe? 318

MR VEYI: Yes, that was Radebe.

ADV GCABASHE : No the question was only done by Radebe? Only?

MR VEYI: Yes, it was himself and the others, Coetzee were present and that was an instruction from Coetzee.

MR VISSER: Well that was never put to Coetzee, I put it to you that he instructed Simelane to be put in the dam. That is a question for argument. I just want to continue reading to you - no, let me just make absolutely certain, you now say that putting her in the dam was part of her torture, is that what you are saying?

MR VEYI: Yes, that is correct.

MR VISSER: And that was in order to obtain information from her?

MR VEYI: Yes, that is correct.

MR VISSER: The next sentence of Mr Selamolela says this -

"... she was thrown into the dam after interrogation bouts ..."

and that seems to suggest that it was not part of her interrogation, but it came after that. Do you agree with my interpretation?

MR VEYI: Perhaps that was not his perception, but I maintain that it was part of interrogation.

MR VISSER: You disagree with him, all right.

CHAIRPERSON: You in fact say you think it was part of the torture? That is what you said?

MR VEYI: Yes, that is correct.

CHAIRPERSON: As he refers to interrogation?

MR VEYI: I am saying it was torture.

CHAIRPERSON: Okay.

MR VISSER: But you also say it was part of the interrogation, to elicit information, Mr Veyi, you just said so just now.

MR VEYI: I said she would be interrogated and be tortured at the same time.

MR VISSER: And putting her into the dam was part of her interrogation?

MR VEYI: Maybe I made a mistake there.

MR VISSER: What is the mistake you made?

MR VEYI: I am saying torture and interrogation were all happening all at once and by her being put into the dam, it was part of torture while she was being interrogated.

MR VISSER: Thank you, that is what I understood you to say. When - first of all, I am not certain how long you visited the farm, can you remember today on how many occasions did you go to the

TP

farm, two or three or four or six, can you perhaps remember?

MR VEYI: I think I would go there twice a week, twice or thrice a week, up to four weeks.

MR VISSER: Okay. So you would have gone then roughly eight times to the farm?

MR VEYI: Yes, that could be the case.

MR VISSER: And on those occasions, how long would you stay on the farm?

MR VEYI: If I go there let's say the distance between Johannesburg and Northum, it is about plus minus 300 kilometres, if I plan to go there, I know that I will be there for two days and after two days, I would come back again.

MR VISSER: Yes, but would it be two days and two nights or just two days and one night or what was your shift?

MR VEYI: I am going to calculate it like this, say for instance if I am there on a Friday, I would spend a night there, Friday and Saturday night and Sunday evening or during the day, I would go back to my place.

MR VISSER: So you would spend two nights there on each occasion?

MR VEYI: Yes, that is correct.

MR VISSER: Did you always go to the farm in the company of another black Policeman?

MR VEYI: Yes, we were changing shifts. When I arrived there with someone else, we would find the others there and we would release them, they would go back and we would stay over.

MR VISSER: I don't think you understood, would you always go to the farm in the company of another black Policeman?

MR VEYI: Yes, that is correct.

MR VISSER: And who would that have been?

MR VEYI: A person who used to be in my company was Selamolela or Sefuti.

MR VISSER: All right. I am sorry to ask you this but it is important, did you go there half the time with Selamolela and half the time with Sefuti or did you go to the farm with Sefuti more often than with Selamolela or the other way around?

MR VEYI: I cannot be certain about that.

MR VISSER: Were you used on the farm sometimes as an Interpreter?

MR VEYI: Yes, that is correct.

MR VISSER: And I want to ask you just to explain again about this question of sleep.

ADV DE JAGER: What language was Simelane actually speaking?

MR VEYI: She was speaking in Zulu.

MR VISSER: I understood your evidence yesterday and stop me if I am wrong, that Coetzee would arrive during the day and he would start interrogating Simelane until late at night, ten o'clock at night?

TP

Is that what you said?

MR VEYI: Yes, that is correct.

MR VISSER: And I understood you to say that if she became tired or sleepy, he would let her go to sleep?

MR VEYI: When she was getting sleepy, she would look tired, he would let her relax for something like an hour or 30 minutes and then he would later start questioning her thereafter.

MR VISSER: That is what I understood you to say, all right. So in other words, your evidence is when she got tired, she was allowed to sleep for a while, if I may sum it up.

MR VEYI: As I am saying her sleeping time was limited, she wouldn't sleep normally, her sleeping time was limited, she wouldn't sleep perhaps from eight o'clock and wake up the following day, that was not the case.

MR VISSER: Yes, I understand. Now was it only Coetzee when he was there, that would interrogate her? Let's try to role a few questions into one, when the white Officers came there, did they interrogate her together, whoever was there?

MR VEYI: Yes, that is correct.

MR VISSER: They didn't take turns among themselves to interrogate her through the night for example?

MR VEYI: If it would be Pretorius and Coetzee, Pretorius would ask questions and then he would hand over to Coetzee to say something, that is what was happening.

MR VISSER: While they were both interrogating her?

MR VEYI: This is what they were doing there, this is what they would go there for.

MR VISSER: Now, in regard to the assaults on the farm, if I may refer to Exhibit S page 5, perhaps in fairness to you, I should read to you what you said so that you can remember, paragraph 6 at page 4, the sentence starting with the following:

> "... Nokuthula was interrogated by Coetzee, Pretorius, Mong ..."

and over the page -

> "... she was kept at the place for more than a month, she was both hand- and footcuffed, her sleep was kept to a minimum, she was kicked and slapped. A bag was pulled over her head ..."

and then the footnote says this -

> "... at times during her interrogation, I also participated by slapping the lady. If I remember correctly almost every one at a certain stage participated in one way or the other in the interrogation or assault."

Would that still be correct, is that still your evidence?

MR VEYI: Yes.

MR VISSER: Would Selamolela have assaulted her on the farm as far as you can remember?

TP 07

MR VEYI: At some stage it says if I remember correctly, it might happen that Selamolela did take part, that is why I have mentioned there that if I remembered very well, because we wouldn't go there, we wouldn't be there at the same time, we were changing shifts. I would be present and he would be absent or things would happen *vice versa*.

MR VISSER: I am not quite sure, is it your recollection that Selamolela also assaulted Simelane on the farm, yes or no?

MR VEYI: Yes.

MR VISSER: There weren't any luxuries on this farm if I understand it correctly, do you agree? There was a toilet?

MR VEYI: It was a back room at the main house.

MR VISSER: Did you hear the evidence that this room was quite a distance away from the main house?

MR VEYI: Yes, I heard that.

MR VISSER: Do you agree with that evidence?

MR VEYI: No, I disagree with him.

MR VISSER: Mr Mong said you couldn't see the one building when you were standing at the other because of the bush? Did you hear him say that?

MR VEYI: This incident took place some time ago and Mong was still new there, it might happen that he cannot remember or perhaps he was not there, the distance from the main house to that back room, is from this wall that I am facing to the other wall that is behind me, you could see the main house. Mong, if my memory serves me well, mentioned something like 100 meters.

MR VISSER: Yes, did you tell your Attorney that Mr Mong is mistaken in that evidence?

MR VEYI: I did not tell him because he did not ask me.

MR VISSER: I see. Do you agree or disagree that there was a washbasin, a blue washbasin in which water was poured for Simelane to wash with?

MR VEYI: I just heard that for the first time, there was no washing basin there.

MR VISSER: All right. Did you wash on the farm?

MR VEYI: No.

MR VISSER: You stayed there for two nights and two days and you didn't wash, is that what you are saying?

MR VEYI: Yes, that is correct.

MR VISSER: Why didn't you wash on the farm?

MR VEYI: There were no facilities, there was no water, there was no time to wash.

MR VISSER: But there was a dam, I thought there was a dam with water in it?

TP

MR VEYI: The water was dirty and we wouldn't wash ourselves in dirty water or filthy water.

MR VISSER: I see. What was the purpose do you think, why Simelane was hand- and footcuffed?

MR VEYI: In those time's language, Simelane was referred to as a terrorist and a terrorist was a person who was regarded as a dangerous person, that is why she was cuffed because it was possible for her to escape any time.

MR VISSER: Yes, of course. And the whole point about foot or ankle cuffs is that one walks with difficulty when your feet are cuffed, isn't that correct?

MR VEYI: Yes, that is correct.

MR VISSER: Did you sometimes help her when she had to go to the bush, to the toilet, help her to walk?

MR VEYI: She, as I have already explained that her physical condition had completely changed, she could barely walk, we were assisting her.

MR VISSER: Are you saying that she was unable to walk properly because she was injured, is that what you are saying?

MR VEYI: Yes, that is correct.

MR VISSER: Where was she injured?

MR VEYI: She would be kicked on her body, I think that was a result, her condition was a result of her assault of her being assaulted.

MR VISSER: I am asking you the question Mr Veyi, can you tell us of any particular injury that caused her to walk with difficulty?

CHAIRPERSON: He seems to suggest that it was the condition, it was a result of the assaults Mr Visser. Does it help to take it any further than that?

MR VISSER: As it pleases you Mr Chairman. So this physical condition that you talk about, would that have been the result of the assault by all the people that you mentioned, on her?

MR VEYI: Yes, that is correct.

MR VISSER: Mr Veyi, I want to refer you again to the newspaper reports, this time Mr Chairman, let me count the pages again, we really must paginate these now ...

ADV DE JAGER: If you could just continue, I think the last page is the typed page 15.

MR VISSER: I am referring to the newspaper clippings that were attached to Exhibit T, is that what you are also referring to?

ADV DE JAGER: (Microphone not on)

MR VISSER: Mine consists of 60, don't ask me how that happened. There may have been a page duplicated, but I am suggesting that we should mark them 15(a), etc.

ADV DE JAGER: 16, 17, carry on.

MR VISSER: Mr Chairman ...

TP

CHAIRPERSON: Mr Visser, do we have the same sequence of articles? Won't you just refer to them as ...

MR VISSER: Chairperson, yes, I will do so. The first one, page 16 will be "Families plead with TRC", 17 will be "MK Agent's Death", 18 will be "Mother's Agony", 19 will be "Hope for Daughter Lingers", 20 will be "NCIS Suspense to Officials", 21 "MK Heroes Are Forgotten", 22 "SAP Informers Spied on ANC", 23 "Burden of Guilt Lifted", 24 "Cops Trapped and Killed MK Cadre", 25 "Police Strike Hard at ANC", 26 is a follow up page on that, I think Chairperson, it just says "motivated and protection", 27 "18 Trained Terrorists Apprehended", 28 will be - oh no, that is it, that is it Chairperson. Thank you I am sorry about that, we should have done that before, it kept on slipping our minds. Mr Chairman, I just want to refer now to page 24 of Exhibit T, there is a heading in the middle of the page "she was very beautiful" and just to place you in the picture here, Mr Veyi, I want to start reading directly under the heading "Constable X, that is you who prefers not to be named at this stage, said the black members of the Unit, guarded Simelane while the white members tortured her." Do you understand what I have just read to you?

MR VEYI: Yes.

MR VISSER: Did you tell the reporter that?

MR VEYI: Yes, that is correct.

MR VISSER: Why didn't you tell her the truth that all of you assaulted her?

MR VEYI: I am saying that today that all of us, we took part in assaulting her.

MR VISSER: But why didn't you tell the reporter that, this is a dishonest statement as it stands here, isn't it?

MR VEYI: I said when you are making a statement, you make a statement, but when the time to testify comes, that is where you get into the details of everything.

MR VISSER: And then the next paragraph appears to be a quotation of your own words which you told the reporter, it says-

> "... she was very beautiful, but by the time they (the white Officers) were finished with her, she could not be recognised ..."

he said, did you tell the reporter that?

MR VEYI: Yes, that is correct.

MR VISSER: But why did you lie to her?

MR VEYI: I want you to explain where did I lie, how did I lie?

MR VISSER: Because you did not tell her that all of you assaulted her.

MR VEYI: As I am here in front of this Committee, that is the reason that made me to be here, is to come here and tell exactly what happened. This is what I am telling today.

MR VISSER: Yes, I just want to put to you what I put to you right in the beginning, it is because you resented your white Officers and you wanted to get back at them, and that is why you told the reporter that, isn't that so?

MR VEYI: Please explain how did I resent them.

TP

MR VISSER: Because you implicated them in this assault which you describe here, without telling her that you were also involved in it. 324

MR VEYI: I am telling about my role, I am saying that I also played a role in that.

MR VISSER: I am not talking about now, I am talking about then, what you told her, and this is something that went into the world Mr Veyi, this is a newspaper that is circulated. It is circulated in the country.

MR VEYI: I think as I am here before this Committee, saying what I am saying now, it can be published, because I know that there are media people around, they can also publish this and tell the people that this is the truth.

MR VISSER: Yes Mr Veyi, I think you are far cleverer than you pretend, you understand exactly what I am asking you, let's step off that. When the white Officers were away, Coetzee, Pretorius and Mong, from the farm, did Coetzee order you to interrogate Simelane?

MR VEYI: No, during their absence nothing was going on, except for her paging the album, photo album because she would be given the album and she would be given instructions to identify the people in the photo album and they would tell her that they will be coming back the following day to get the identity of the people who were in the photo album.

MR VISSER: But you say Coetzee never ordered you to interrogate Simelane to get information from her?

MR VEYI: I said she studied during his absence, we would stay there with her and she would page the album and she would tell us that she doesn't know anything and when they come, they would tell her that she was lying and they would assault her.

MR VISSER: Mr Veyi, I cannot believe that it is a language problem, that you can't understand a simple question or that you are quite incapable of giving a simple answer. Did Coetzee order you to extract information from Simelane while he was away from the farm?

MR VEYI: What he would tell us during his absence was that he would tell us to talk to her and tell her about the disadvantages and advantages of being a Policeman and let her page the photo album and try to identify the people.

MR VISSER: Forget about what Coetzee told you to do, did you ever interrogate Simelane when the whites were not there?

MR VEYI: No.

MR VISSER: Did you ever assault her while they were away?

MR VEYI: No.

MR VISSER: Now when - you told this Committee that after some time, you decided that what you were doing was wrong and you felt sorry for her, is that right?

MR VEYI: Yes, that is correct.

MR VISSER: When did this happen, in the first week, second week, third week or fourth week or the fifth week while you were on the farm?

MR VEYI: I cannot remember clearly but during the first days, when she came, she started, she was assaulted first at Norwood and she came there after a week or two and her condition had changed.

TP

That is when we got this feeling.

MR VISSER: Somewhere in the middle perhaps, while she was being kept there?

MR VEYI: There were only white Officers who were assaulting her, and we just told ourselves that we are going to back off, we were not prepared to take part in assaulting her.

MR VISSER: You, please stop me if I am wrong, but didn't you say in your evidence that it took place in the latter part of her detention at the farm, in the fourth week, thereabouts?

MR VEYI: Maybe I made a mistake, I cannot say I did not say that, or I cannot say I said so.

MR VISSER: That is not the point, the point that I want to ask you is this, after you came to the conclusion that what you were doing, was wrong and you felt sorry for her, and the white Officers left, did you take off her shackles, her cuffs from her arms and from her legs to allow her to move freely because you felt sorry for her?

MR VEYI: We would take the cuffs off.

MR VISSER: Both the arms and the legs?

MR VEYI: Yes, that is correct.

MR VISSER: Did you ever tell anybody that you did that? Did you tell your Attorney that you did that?

MR VEYI: I did not tell him because he did not ask me.

MR VISSER: You see, what surprises one with respect to you Mr Veyi, is at page 5 of Exhibit S, you dealt with this whole question of the cuffs and there you never made the qualification. You were addressing yourself to that and you never made the qualification to say that when the white people were not there, the cuffs were removed. At page 5 the top of the page, you simply say this -

> "... she was kept at this place for more than a month, she was both hand- and footcuffed."

That is it. Now I am putting it to you that if it were true that you decided and in fact did remove her cuffs, then it was the easiest thing in the world just to say so. Don't you agree?

MR VEYI: I can see that I did not write that, but I am saying it now. I don't know where the difference is.

MR VISSER: You don't see it, all right. Were the white people still interrogating Simelane at the last week, during the last week when you were there?

MR VEYI: Yes, that is correct.

MR VISSER: Now at that stage, according to your evidence, she had now been interrogated for a month, a week in Norwood and three weeks on the farm, is that correct?

MR VEYI: That is correct, yes.

MR VISSER: And in all this time, she refused to cooperate?

MR VEYI: Yes, that is correct.

TP

MR VISSER: But what could possibly have been the point of continuing to interrogate a person who clearly doesn't want to cooperate and doing it for a month? What is the purpose of that, I mean it is rather stupid, isn't it? 326

MR VEYI: Mr Visser or Mr Venter is going to see this thing with his own eye because he doesn't understand the way the Police were operating, this was possible that this process could go on for more than a month because they would be hoping that this person might end up co-operating. That is the motivation behind that.

MR VISSER: Give us an example of another person that was interrogated for more than a month, who refused to participate right from the word go?

MR VEYI: As I am saying Nokuthula's case was different from the other cases because Joe who was from Angola, who was trained in Angola as an MK member, took two weeks and he co-operated. Peter Lengene who was from Botswana, he didn't take much, it was only less than a month and then he co-operated. During his first week of interrogation, he agreed immediately. The interrogation discontinued. With Nokuthula's case, she was totally refusing, it was something that was unusual to exceed two to three weeks, trying to turn a person without success. That is the reason why it took more than a month in her case.

MR VISSER: What you have just told us about Peter Lengene, is something that somebody else told you, is that right?

MR VEYI: I did not hear it from somebody else, I know him, I was in the Unit. When he was kidnapped, I was not present, but as part of my duty was to recruit the people, informers, giving them training, Peter Lengene was one of those people. I did not hear it from anyone else, I was working in that particular Unit.

MR VISSER: Mr Veyi, we have gone through this before, you were not present, you had nothing to do with the kidnapping and turning of Mr Peter Lengene, I put it to you before?

MR VEYI: Yes, I was not present during the kidnapping, but during the process of orientating him, telling him about the advantages and disadvantages of being a Policeman, not disadvantages, this is when he was staying at a safe house that was in Klipspruit and sometimes he would be at Mr Coetzee's in-laws in Rustenburg, he was staying there in a garage.

MR VISSER: Did you participate in the attacks on the power stations of either Bryanston or Fairlands or both?

MR VEYI: Yes, I was present at Fairlands and Bryanston.

MR VISSER: What was that about, why did you do that?

MR VEYI: It was part of my duties as a member of the Security Police.

MR VISSER: Mr Selamolela says that it was done to preserve the credibility of SAP agents in Swaziland, page 571 of Bundle 3 Chairperson, paragraph 2.

MR VEYI: Yes, I agree with you.

MR VISSER: You don't have to agree with me, do you agree with him that that was the purpose?

MR VEYI: Yes, that is correct.

MR VISSER: It was a false flag operation?

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MR VEYI: Yes, that is correct.

MR VISSER: Do you know about the fact that a certain MK Mpho, was arrested while Simelane was held on the farm?

MR VEYI: I think Mpho's case is different to Simelane's case. Mpho's case is different from Nokuthula's case.

MR VISSER: Why don't you just answer the question?

MR VEYI: Will you please repeat your question?

MR VISSER: Please listen to the question then. Do you know about the fact that Mpho was arrested while Simelane was on the farm?

MR VEYI: He was not arrested because of Nokuthula.

ADV GCABASHE: The question was do you know of his arrest at the time that Nokuthula Simelane was at the farm, at that time?

MR VEYI: That was not the time of his arrest when Nokuthula was on the farm.

MR VISSER: Did you hear that Coetzee and Pretorius and Mong gave that evidence?

MR VEYI: Yes I heard so.

MR VISSER: Did you tell your Attorney that you disagree with them?

MR VEYI: He did not ask me about that.

MR VISSER: I didn't ask you whether he asked you, I asked you whether you told him.

MR VEYI: I did not tell him.

MR VISSER: Do you know about the arrest of some 17 other ANC members later?

MR VEYI: I was surprised to hear about the 17 people who were arrested.

MR VISSER: Do you find it impossible to answer a question? Did you hear of 17 people who were arrested later?

MR LAMEY: Later here at the proceedings or when exactly, can we just get clarity on that.

MR VISSER: They were arrested not at the proceedings Chairperson, my learned friend couldn't possibly think that I am saying that.

MR LAMEY: No, at the moment when he heard it. At the moment when he heard that.

CHAIRPERSON: Yes, will you try to specify Mr Visser.

MR VISSER: Do you know or did you hear that some 17 ANC or MK members were arrested towards the end of 1983 and in 1984?

MR VEYI: The people who were arrested were arrested in the beginning of 1984 if my memory serves me well, it was from 1984 upwards. They were not 18.

MR VISSER: All right. You see that is the point I tried to make right at the beginning, anything that is

TP 97

put to you on behalf of the white Officers in principle, you will oppose, but let's go on. Can you deny that those arrests were made possible from what was either directly or indirectly, learned from Simelane? 328

MR VEYI: I dispute that. The people who were arrested were not arrested because of Nokuthula, they were arrested by SWT66, that is Nompumelelo. They were arrested because of SWT66. There was Cheche among them, Justice Ngedi.

MR VISSER: Yes, all right. Did you concede yesterday, did I hear you correctly to say that Simelane wrote down stuff on paper?

MR VEYI: I said I did not remember her writing down, but she was paging the photo album.

MR VISSER: Did you ever see her write anything on paper?

MR VEYI: No, I do not remember that.

MR VISSER: Can you deny that she wrote things down on paper when she was requested to do so by Coetzee?

MR VEYI: I cannot dispute that, perhaps she did during my absence, but I do not remember seeing her doing that.

MR VISSER: Do you recall Pretorius giving evidence that when they left, Coetzee told the black members who stayed behind with her to see to it that she writes down things on paper?

MR VEYI: Yes, I remember hearing that from him.

MR VISSER: Do you agree that that was correct? Is that evidence correct?

MR VEYI: I am saying during my presence, I do not remember that. Perhaps if he is referring to black members, he is also referring to the other people excluding myself. I was not the only black member there.

MR VISSER: Yes, we all know that. You stated in Exhibit S page 7, paragraph 9(b) right at the bottom of the page, you say -

> "... she was seriously assaulted and as a result suffered injuries on her body ..."

Now, we know what you are talking about when you refer to body, but later on and I am not quite sure where it was, but later on you stated that she was swollen, swollen over her whole body, did I hear you correctly, swollen all over I think you said? That was yesterday afternoon.

MR VEYI: I said her face was swollen, her body and she couldn't walk. I think the reason for that was because she was being kicked, but her face was swollen.

MR VISSER: And I think you also added her wrists I think Mr Chairperson, you pointed that out to me when I didn't hear the answer. I just wanted to make sure of that. What would have happened to you Mr Veyi, in 1983 if the ANC had suspected that you were a sell-out?

MR VEYI: If it happened that the ANC learned that I was a sell-out, the MK and the SAP Intelligence were working almost the same, but what was going to happen, the ANC would try to recruit me and let me go back to them and work there, work for them there and work here in South Africa.

MR VISSER: And are you naive enough to believe what you have just said?

T.P

INTERPRETER: Will the speaker please repeat the question.

MR VISSER: Let me rephrase the question. Were sell-outs not a legitimate target of MK?

MR LAMEY: Could we just get clarity, sell-outs as sell-outs from the Security Force's side, namely people that turned against the Security Force or sell-outs that turned against MK? From what area are we talking about? I think that is where the ...

CHAIRPERSON: Or was your client a Security Policeman?

MR LAMEY: Yes.

CHAIRPERSON: Your client was a Security Policeman all along?

MR LAMEY: Yes, I believe so.

CHAIRPERSON: Do you mean in that sense Mr Visser, what would happen to a Security Policeman?

MR VISSER: No, I mean sell-out in the sense that the ANC means it in their target selection. They talk about sell-outs, government stooges, meaning people whom they suspected of working with the system, with the government. Obviously Policemen fell under that.

CHAIRPERSON: They were the system, the Police were the system, people who worked with the system.

MR VISSER: They were the system, yes.

CHAIRPERSON: People who worked with the system, as I understood it, were members of the community who were assisting the system. So what is the ...

MR VISSER: Well, I understood this witness to be an undercover agent.

CHAIRPERSON: No, not him.

MR LAMEY: No.

MR VISSER: Oh well, all right, well then I can understand my learned friend's objection, all right, fair enough, I am sorry, then I withdraw that. I am sorry, then I withdraw that. Let me ask you this, if the ANC came to know that the Police had arrested Simelane and kept her on a farm for five weeks in seclusion, what do you think would their reaction have been if she were to be released thereafter?

MR VEYI: First of all Nokuthula Simelane was an MK member. Coetzee wouldn't take that risk of taking Nokuthula back to Swaziland knowing very well that he had kept her for that time. The ANC would know obviously that that person was sent, was on a mission. That was not possible.

MR VISSER: Why wouldn't Coetzee take her back to Swaziland after five weeks, what would happen to Simelane do you think?

MR VEYI: He wouldn't do that, first of all I do not remember since I started working for the Security Branch, I do not remember an MK member after being turned to work for the Police, and be taken back again. What used to happen was if the person works for the Police and if Coetzee does not want that person to work with him in the Unit, he would be taken, he or she would be taken to Pretoria, not for that person to be taken back again. That never happened, more especially with an MK member. If she did go back, she would go back there and there would be people who would be monitoring her movements in Swaziland, if she had co-operated with the system this side and she goes back to Swaziland, Coetzee would get a report that this person has changed her mind.

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MR VISSER: Bluntly Mr Veyi, I really don't know what your answer has to do with my question, but wouldn't she be killed in all probability by the ANC, if they suspected that she had become an informer?

MR VEYI: Because she was trained, it would be impossible for Coetzee to take her back. There was never a case like that before, a case whereby an MK member is taken back after being turned to work for the system and then be taken back again to Swaziland.

ADV GCABASHE : Mr Veyi, Mr Visser is asking you to speculate because you were part of the Security Branch. He is asking you to speculate on what you think might have happened to Nokuthula if indeed she had been put back, speculate, he wants your opinion?

MR VEYI: As a person who was working for the ANC, Nokuthula that is, I think the ANC would tell her that they were having suspicions about her and they would tell her to go back to South Africa as if she was there to give a report, and then she would be a person, she would pretend as if she was working for the Police, therefore she would be working for the ANC and for the Security Police at the same time.

CHAIRPERSON: Do you mean they would turn her into a double agent?

MR VEYI: Yes, that is correct.

CHAIRPERSON: And use her in turn against the Security Police?

MR VEYI: Yes.

CHAIRPERSON: Yes Mr Visser.

MR VISSER: And is that what you think would probably have happened?

MR VEYI: Yes, that is correct.

MR VISSER: Yes. Can you deny that Simelane was in fact recruited as an informer? Can you deny that?

MR VEYI: What I didn't understand, if Nokuthula was recruited Selamolela and myself were working with those people, we knew about her and if she was recruited, we would know that she was recruited and she was working. Coetzee would tell us, that is why I was surprised when I heard him saying that she was already working.

MR VISSER: I understand that you are drawing inferences from what you know, but I ask you this, can you deny that in fact without you knowing it, Simelane had become an informer, can you deny that?

MR VEYI: Yes, I dispute that on the basis that during the last weeks of her being kept on the farm, she was still swollen and her condition was not changed and if she was really recruited and sent back to Swaziland with swollen face like that, what story would she give to the people in Swaziland.

MR VISSER: Yes, well of course, there is a conflict of the evidence you see, because the applicants whom I represent, disagree with you. They say that the assaults took place during the first week and thereafter only occasionally, you have a different story about that. Can you deny that she was registered as an informer in Soweto?

MR VEYI: I heard Superintendent Coetzee saying that. What my Attorney asked me or the family Attorney asked was the number, her number, but Coetzee could not tell her number. That is impossible for a person who is recruited, and I know Mr Coetzee is very, very brilliant, he will never

T.P

ever forget that number.

MR VISSER: Can you deny it or can't you deny it, are you speculating that it didn't happen because he cannot remember the number?

MR VEYI: I dispute that, because he could not tell the Committee about her number.

MR VISSER: Is that the only reason why you deny it? I am sorry, that is an unfair question, I withdraw that. You - I want to come to the meeting at the Fochville/Potchefstroom roads. Was Selamolela present?

MR VEYI: I was with him.

ADV DE JAGER: I am not sure whether it was, whether the road the four way cross-roads was identified as the Fochville/Potchefstroom road.

MR VISSER: (Microphone not on)

ADV DE JAGER: Oh, was Fochville mentioned? I know Carltonville was mentioned.

MR VISSER: (Microphone not on), page 5, paragraph 7 of Exhibit S. Nothing turns on it, I just want to identify where I am going to now, nothing turns on Fochville or any of the other names. The day where you met Coetzee on his own with his blue XR6, Ford motor car on the road at the crossing, where you saw according to you, Simelane in the boot of the car, that is the incident I am referring to, do you understand?

MR VEYI: Yes.

MR VISSER: Thank you. Was Selamolela present?

MR VEYI: I was with Selamolela if my memory serves me well.

MR VISSER: Yes, you said it all over, you said it in your statements, etc, etc, you said it in your evidence. So he also saw Simelane in the boot of the car?

MR VEYI: Yes, that is correct.

MR VISSER: And if he is talking the truth, he will come and confirm that as far as you are concerned?

MR VEYI: Yes, that is correct.

MR VISSER: And when you saw Simelane in the car, the boot was closed and Coetzee told you to go back to Soweto?

MR VEYI: Coetzee opened the boot, when I saw him there, I want to explain this so that you know what happened, what led to those circumstances.

MR VISSER: I am sorry, you lost me completely. Would you please explain that.

MR VEYI: We were now at the office, there were guards that were at Northum.

MR VISSER: Mr Veyi, I am sorry ...

MR VEYI: We were to go back to Northum to guard her, but before going to Northum, we would stop at the office and get instructions because we would go to the office and get instructions, because Mr

T.P

Coetzee was not in the office, he was on the farm at the time, because when we saw him before that day, he had told us to go to the farm, but when we arrived at the office, the plan had changed. He said we should meet with him at Potchefstroom at the Security Branch office where Colonel Loots or Colonel Steyn was, who was involved with the Western Transvaal Security Branch. We drove to Potchefstroom to meet him in those offices. On our way on this Fochville crossing Carltonville, we saw an XR6 car approaching and then he flashed the lights, it was during the day, he stopped and we realised that that was him, Mr Coetzee that is. We went to his car and he got out of his car and he told us not to go to Northum because the guards were withdrawn. He instructed us to go back and then he said here is the lady, he opened the boot and then he told us that he was taking her back home. After that he closed the boot and then we went back. When I looked at her, she was cuffed on foot and her hands were at the back and they were also tied and then he closed the boot and then we went back to the office.

MR VISSER: I don't know how that is an answer to my question but you said something interesting, he opened the boot to show you the lady and he told you he was taking her home? That is what you have just said.

MR VEYI: That is correct.

MR VISSER: What did you understand by that?

MR VEYI: There was nothing else that I could think about because I was listening to what he was saying, he said he was taking her home.

MR VISSER: What did that mean to you, was he going to release her?

MR VEYI: Yes, I thought so because he was taking her home, it means he was releasing her.

MR VISSER: Now let's come back to my question, according to you, after you and Selamolela saw Simelane in the boot, Coetzee closed the boot and he told you to go back to Soweto?

MR VEYI: Yes, that is correct.

MR VISSER: That is the question I asked. My question to you is on your evidence, why do you think did Coetzee let you come down to Potchefstroom to do what he did?

MR VEYI: This meeting here on the way, we were on our way to Potchefstroom but when we met her on the way, stopping us, we did not know why did he leave Potchefstroom because when we moved from the office, we were going to Potchefstroom but we met with him on the way to Potchefstroom.

MR VISSER: But he said nothing to you, he told you nothing, he gave you no orders, he just showed you Simelane in the boot and he told you to go back to Soweto?

MR VEYI: That is correct, yes.

MR VISSER: Do you have any idea why he would have done that?

MR VEYI: I don't know.

MR VISSER: Well, neither do I. I want to put it to you that this meeting where Simelane would have been shown to you, is a figment of your imagination. It never happened, there was no reason for it and you can't even give any kind of explanation of why it should have happened.

MR VEYI: It happened.

MR VISSER: And lastly, your version is not supported by Mr Selamolela.

T.P

ADV DE JAGER: Mr Veyi, did you have radio's at that time in the motor cars, the Police vehicles?

MR VEYI: The way we were operating, we were working like underground Policemen and our identity was not to be revealed because we were working with sensitive information and the informers were not supposed to know anything. Therefore we did not have radio communication.

ADV DE JAGER: Thank you.

MR VISSER: Mr Chairman, I see it is close to one o'clock, can I go on a little while longer. I want to refer you again to Exhibit S, page 6, paragraph 8 where you said that a few days later, that is now a few days after you saw her in the boot of the car, you spoke to Sergeant Mothiba who told you that Coetzee and Pretorius had shot, killed and buried Simelane at Rustenburg, is that still your evidence?

MR VEYI: Before talking to Sergeant Mothiba, I asked Mr Pretorius as to what happened to Nokuthula, and he said to me I must stop asking a lot of questions. I kept quiet. After a few days, after a day or two, as we were chatting in the office with Sergeant Mothiba, Mothiba told me and said to me Mchana, I am scared of these white men. I asked him why and then he said that they are very cruel. Then he said they shot her, killed her and buried her in Rustenburg.

MR VISSER: Yes. And if you have resentment for white Officers, that is a very nice story to tell, particularly because Mr Mothiba is dead and he can't come and tell what he says about this?

MR VEYI: It is the same, Mr Coetzee and Sergeant Mong's evidence, in their evidence they did not mention myself and Selamolela who are still alive, they were talking about SRA to Fred Langa who is no more and Sergeant Mothiba and I want to know, I am talking about Sergeant Mothiba who is no more and they mentioned Sergeant Mothiba who is no more, where is the difference now?

MR VISSER: Why would you think if Coetzee and Pretorius wanted to kill Simelane, why would you think would they tell Mothiba about it? One wouldn't expect that, would one?

MR VEYI: Will you please repeat your question?

MR VISSER: One wouldn't expect the murderers to spread the story around, would one, that they killed someone?

MR VEYI: The way he was telling me this, Sergeant Mothiba, it looked like he witnessed this incident.

MR VISSER: Oh, I see, so he was actually part of the killing of Simelane, as a witness or as an accomplice or whatever? Is that what you are saying?

MR VEYI: I think so because when he told me, it was not a hearsay, it is something that he was present when it was being done.

MR VISSER: Why would he have told you about this do you think? Is there any reason why you could think why he should come and tell you about that if he was involved?

MR VEYI: Perhaps he was not feeling good about it, so he decided to tell someone about it.

MR VISSER: Yes. Now when you spoke to the newspaper reporters about this alleged killing of Simelane, did you tell them that Mothiba told me this or did you state it as a fact that she was killed by Coetzee and Pretorius?

MR VEYI: I told them that Mothiba told me that Pretorius and Coetzee killed her.

MR VISSER: Well that takes care of that question Chairperson, it has just landed on the floor, all my

TP 9

papers. I see it is one o'clock, so the clock has come to my assistance. 334

CHAIRPERSON: Yes, we will take the lunch adjournment, and we will reconvene in 30 minutes' time.

MR VISSER: (Microphone not on)

CHAIRPERSON: We will meet you, yes.

COMMITTEE ADJOURNS

ON RESUMPTION:

NIMROD VEYI: (s.u.o)

CROSS-EXAMINATION BY MR VISSER: (cont)

Thank you Mr Chairman. Mr Chairman, as promised, I did draft a new list of Exhibit to bring it up to date, I think it has been handed to you, it should have been handed to you. It now goes to AA2 and I am going to hand up an Exhibit straight away within a moment or so, which will be Exhibit BB. Thank you Mr Chair. Mr Veyi, I better get my headset on, just before we adjourned, I asked you whether you had told the reporters that you heard from Mr Mothiba that Simelane was killed by Coetzee and Pretorius, do you remember that?

MR VEYI: Yes, I do remember that.

MR VISSER: What was your answer, I don't remember your answer?

MR VEYI: I said I told the reporters that Coetzee and Pretorius killed Simelane and I was told by Sergeant Mothiba.

MR VISSER: Page 17 of Exhibit T, Chairperson, in the right hand column, the third paragraph I just want to read that -

> "... the Policeman, that is you, told the Sowetan that Simelane had been held captive by his Unit and tortured so badly her body was unrecognisable. He also claimed that Coetzee and Pretorius were responsible for Simelane's death."

Would that have been what you told the reporter Sharon Chetty?

MR LAMEY: Sorry, may I just give the article to him? Is it on page 17? Which column?

MR VISSER: My question is, is that a correct reflection of what you told the reporter?

MR VEYI: The heading about "MK agent/cop seeks amnesty", I would like you to go back to the one with the heading "Cops trapped and killed MK", that is what I said. I think this is a story that followed up from what I said.

MR VISSER: Which is this page?

MR LAMEY: It is pointed out, there are some loose leaflet pages that have also been distributed about articles in the Sowetan, there is a number 3, I don't know they are marked Exhibits, I know that they were distributed to the legal representatives. I think that is repeated in the Exhibit T, although the copy that we have before us on Exhibit T is not a good copy, the loose leaf copy in front of the witness is a better copy. I think he refers to what is on page 24.

TP

MR VISSER: What on page 24 are you referring to?

ADV DE JAGER: (Microphone not on)

MR VISSER: He was told by Sergeant - yes thank you Chairperson, thank you Mr Veyi, I missed that, I am indebted to you. The other reference which I could find was at page, yes, that is page 17 and then at page 18, just a short sentence in the right hand column, first, second, third paragraph, "he claimed that she was killed after held for about two months", but you have also pointed out the other one where reference is made to the Sergeant, yes. Thank you. Now, in Exhibit S, at page 4, you listed the names of those people that you could remember, who came to the farm at Northum, is that correct? Is that correct?

MR VEYI: That is correct.

MR VISSER: All right, then at page 6 in paragraph 8, the second last sentence, you stated -

> "... I just wish to mention that I had forgotten to mention that Constable Patrick Kobe was also used as a guard."

We are talking about the farm, is that evidence correct?

MR VEYI: No, I made a mistake here.

MR VISSER: Yes.

MR VEYI: After we discussed, the first heading of City Press, I made a mistake.

MR VISSER: Yes, and Mr Kobe was informed about what you said and he made a statement, Chairperson that was a statement that was handed to me by the Evidence Leader, it professes to be a statement under oath, but mine is not attested to, oh, I see, it is a retyped version of, yes, in fact, it is an affidavit, it is in fact an affidavit, and Chairperson, as I want to refer to one sentence of that, perhaps it should go in as Exhibit BB? BB1 and BB2? I remember it was placed on your table yesterday.

CHAIRPERSON: Yes, we have a hand-written statement by a Mr Kobe, yes and then somebody had retyped it for us, a typed version where he is referred to as Robe?

MR VISSER: Yes. Perhaps if you want to mark the manuscript BB1 and the typed version BB2. Thank you Chairperson. Now you say you made a mistake, all right. He says and I am referring to the last paragraph of BB2, the third last sentence, he says -

> "... I also said, it should read he also said, that is you, also said he once heard from the late Mothiba that Warrant Officer Coetzee and his team once arrested a lady ..."

I am not so sure whether this should be, perhaps I should refer to the hand-written portion Chairperson, it doesn't make sense, yes, it should be he.

ADV GCABASHE: Second last line.

MR VAN DEN BERG: "I also said I once heard from the late...",

so it is "I".

Thank you, I will read it again -

TP 17

"... I also said I once heard from the late Mothiba that Warrant Officer Coetzee and his team once arrested a lady whom he never mentioned the name to me and said the lady disappeared and was killed by his team."

It must clearly refer to the witness or Mothiba? I also said I once heard ...

ADV GCABASHE: He heard from Mothiba Mr Visser.

MR VISSER: He, being Kobe?

ADV GCABASHE: Yes.

MR VISSER: Chairperson, yes, then it doesn't make sense at all, because it starts off by saying "he told me that he knew about the lady, he explained to me that the lady was being arrested by our Branch. I also said I once heard ..."

MR LAMEY: In the context it would appear a conversation between him and Veyi.

MR VISSER: Arrested the lady, well, then there is no point to be made out of this and I leave it Chairperson. I just want to put it to you or let me rather ask you, Exhibits AA1 and AA2 do I understand correctly that that is a statement you made to the South African Police, Mr Veyi?

MR LAMEY: May we just have an opportunity just to get that portion.

MR VISSER: Don't you recognise the statement?

MR LAMEY: It has just been placed before the witness, I was trying to find it.

MR VISSER: I thought he handed it in.

MR LAMEY: Yes, he did hand it in but when the question was asked, I took it out from my pile here and just placed it before him.

CHAIRPERSON: Is Mr Veyi looking at Exhibit AA1?

MR LAMEY: Yes.

CHAIRPERSON: All right Mr Visser?

MR VISSER: Mr Veyi, is that the statement that you made to the Police?

MR VEYI: I haven't read the whole statement but this is my signature.

MR VISSER: Did the police give you indemnity against prosecution, Mr Veyi? - the Attorney-General.

MR LAMEY: Mr Chairman, I don't know whether the Attorney-Attorney can as a matter of law, give indemnity to any witness.

MR VISSER: Well, what is the purpose of Section 24?

MR LAMEY: It's for the court, as I understand, to give indemnity.

MR VISSER: Yes.

MR LAMEY: You asked about the Attorney-General.

TP

MR VISSER: Perhaps I should choose my words better then. Were you promised indemnity by, anyone, Mr Veyi? 337

MR VEYI: I can't remember.

MR VISSER: I see. You can't remember whether you were promised indemnity in case you gave satisfactory evidence against someone else in a case, in this particular case of Simelane?

MR VEYI: No, I don't remember, I can't remember.

MR VISSER: Thank you, Mr Chairman, I have no further questions.

NO FURTHER QUESTIONS BY MR VISSER

CHAIRPERSON: It looks like that kind of indemnity doesn't bear very much weight nowadays, Mr Visser.

MR VISSER: ...(indistinct)

CHAIRPERSON: Yes, Advocate Gcabashe?

ADV GCABASHE: Is it Gobe or Kobe?

MR VEYI: Kobe.

ADV GCABASHE: K-O, Kobe, thank you.

CHAIRPERSON: Yes, Mr van den Berg?

MR VAN DEN BERG: Mr Chairperson, I have a logistical difficulty at the moment. There is a person who might be a potential witness, but he has time constraints and he needs to leave fairly soon. Could I have a short adjournment, no more than five minutes, just to make those logistical arrangements? I apologise for the inconvenience. I know that we're running well behind schedule and at the rate we're going, it looks like we will battle to finish by the close of business tomorrow. So I apologise for that.

CHAIRPERSON: Yes.

MR VAN DEN BERG: Thank you, Mr Chairperson, I'm indebted.

CHAIRPERSON: Yes, we'll stand down for a few moments.

COMMITTEE ADJOURNS

ON RESUMPTION

CHAIRPERSON: Mr Veyi, you're still under oath. Mr van den Berg?

NIMROD VEYI: (s.u.o.)

CROSS-EXAMINATION BY MR VAN DEN BERG:

Mr Chairperson, I'm indebted for the short adjournment. I have been able to make other arrangements in respect of this particular witness.

Mr Veyi, can we just start with your relationship with the other members of the unit that you were part of. If we can just take them one by one. Sergeant Mothiba, what was your relationship with him? How long had you worked with him? That's the kind of information I'm looking for.

T.P

MR VEYI: Sergeant Mothiba, I knew him very well. I started working with him when I joined the Police Force in 1978. He was stationed in Meadowlands. I met him in Meadowlands in 1978, and then in 1981 I joined the Security Branch in Protea when I again met him. We then worked in the same unit until he died. I can't remember when he died, but it was the mid-'80s.

MR VAN DEN BERG: And this work that you did as a member of the Security Branch, this was fairly dangerous work, you were involved with the tracking down of information relating to MK cadres and to other members of the liberation movement. Would you agree with that assessment?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: And it would be necessary that the people that you worked with were people that you trusted?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: If we can move on. Sergeant Langa, RS269 I believe his code was, is that correct?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: When did you first meet him?

MR VEYI: I can't remember well when he joined but when he joined the Police Force, I met him then for the first time. It was the early '80's. I think it was '81 or '82, I'm not sure, but it was the early 1980's. We were the people who were training him when he started at the police, until he died.

MR VAN DEN BERG: And what was his role in your unit?

MR VEYI: Langa was an undercover police. He was playing the same role as Mr Mkhonza's role.

MR VAN DEN BERG: Was he a person who reported to the same office as you did or was he a person who - ja, let me ask you that way, was he a person who reported to the same office as you did?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: And he would report for duty regularly at Protea?

MR VEYI: No, those who were working undercover were not doing the same job as ours, they were not reporting at the office.

MR VAN DEN BERG: So where and when did he report?

MR VEYI: He would phone and then he would tell where he was and Mkhize would send Lazarus or myself to pick him up. We'd meet in a certain place and then he would interview him..

MR VAN DEN BERG: So your unit was the way in which both Langa and Mkhonza reported to the police, their reporting would be through your unit, is that correct? Do I understand you correctly?

MR VEYI: They were the police, but they were working undercover. They were reporting to Coetzee. Each and every report was reported to Coetzee.

MR VAN DEN BERG: Now what was the position in respect of Peter Lengene, when did you first meet him?

TP

MR VEYI: I met Peter Lengene, if I still remember well, in 1982.

MR VAN DEN BERG: And from the evidence we'd heard earlier today, this was after he had been abducted in Botswana and he had agreed to work for the South African Police, is that correct?

MR VEYI: That is correct.

MR VAN DEN BERG: What was your relationship like with him?

MR VEYI: I ...(indistinct) were working together with Peter Lengene after he was turned to be a police official. He worked the same way as us, together with Lazarus.

MR VAN DEN BERG: There's a policeman referred to in these papers, by the name of Sefuti. I understand he was a member of your unit, is that correct?

MR VEYI: That is correct.

MR VAN DEN BERG: What was his role in the unit?

MR VEYI: Sefuti was from the Police College. We were doing the same job, the normal police duties.

MR VAN DEN BERG: And then I presume the same goes for Radebe?

MR VEYI: Yes.

MR VAN DEN BERG: How did the RS programme work? What I'm really interested in is who reported to who? To whom did informers report, to whom did the undercover policemen report?

MR VEYI: RS programmes was operating this way; in Protea there was an office, a recruiting office where everybody who was joining the Police Force would be at that office. We would go to that office and then observe these people and if we could see that a particular person can be able to work with us, we would take that particular person to our office. And in our office that person would tell us whether he wants to be a police, and then after that, because there were a lot of them, there was a group of people, we would recruit that particular person and then Coetzee would tell him that there's a short way that he would use to help him to be a police, he won't take six weeks to be a police. We would then take his papers, his particulars and fill in the papers.

He would then give out a story at home to the people who saw him, that he's a police. He would say that he doesn't want to be a police anymore, he stopped being a police, he found a job somewhere else. And then after that he would be trained and we would tell him and explain all the ways of infiltration and then he would be sent to that particular organisation to infiltrate.

MR VAN DEN BERG: Is this - are we talking her about people like Mkhonza and Langa, is that who you referred to now? Are they examples of what you referred to?

MR VEYI: Yes, all those who were RS were police.

MR VAN DEN BERG: Now the informer network, to whom did the informers report? For example, SWT66? And I don't want you to mention her name.

MR VEYI: All of them they were reporting to Coetzee.

MR VAN DEN BERG: Did they report directly to an officer like Coetzee, or were there instances where they might report to somebody like Langa or Mkhonza?

MR VEYI: They were reporting directly to Coetzee.

TP

MR VAN DEN BERG: Was there ever a situation where an informer would report to an uncover policeman? - just by way of general.

MR VEYI: No, that didn't happen. I don't remember something like that happening. 340

MR VAN DEN BERG: Would there have been a reason why that didn't happen, or are you saying it simply didn't happen?

MR VEYI: I don't remember it happening.

MR VAN DEN BERG: When you last saw Nokuthula Simelane, your version is that she was in the boot of Coetzee's car. You remember giving that evidence?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: Can you describe her condition at that time, what was she wearing and what did she look like?

MR VEYI: As I've already said, the last time I saw her at the farm when I was going back, she was swollen. The condition had not changed. Her face was swollen and she was wearing a brown overall, police overall.

MR VAN DEN BERG: Do you know a policeman by the name of Garibe? Does the name mean anything to you?

MR VEYI: Radebe we're talking about here?

MR VAN DEN BERG: Not Radebe, Garibe; G-A-R-I-B-E. Does that name mean anything to you?

MR VEYI: Yes, I do remember Garibe.

MR VAN DEN BERG: Was he involved in this incident at all?

MR VEYI: There were different units in Protea. We were in the Intelligence Unit and Garibe, if I remember well, was in the group that was under Captain Grobbelaar. When there was an information that there's a terrorist somewhere, that particular group would go there and arrest the terrorist.

MR VAN DEN BERG: So if I understand you correctly, this person was not involved in this incident at all? He was no involved in either guarding or the interrogation of Nokuthula Simelane?

MR VEYI: No, I don't remember him there, he was not there.

MR VAN DEN BERG: I want to show you a photograph. This is the photograph that was given to me, or put in my possession by Mr Wagener and Mr Visser, the photograph of what is described here as MK Mpho. Do you recognise this person at all?

I'm afraid, Mr Chairperson, there aren't copies of it, but I'll hand it up once he's had a look at it.

You will see that there is a person crouching, wearing dungarees. Do you recognise that person at all?

MR VEYI: I can't see this person clearly. I don't know him.

MR VAN DEN BERG: Sorry, I wasn't listening to the interpretation, what was the answer?

MR VEYI: I don't know him.

TP 97

ADV DE JAGER: Sorry, are there two people on the photo?

MR VAN DEN BERG: Mr Chairperson, the photo contains three individuals, two white persons who from the look of the photograph, appear to be policemen and then a person with his hands cuffed behind his back, kneeling. And then the designation on the back of the photograph is "MK Mpho", with the date "1983". Can I hand the photograph back to the Panel, Mr Chairperson?

CHAIRPERSON: Yes, it was handed to us at some stage and it drifted back to Mr Wagener. I'm not sure if that was handed in as an exhibit, not really.

MR VAN DEN BERG: My recollection is that it wasn't handed in as an exhibit and I don't think that anything particularly turns on it. It's certainly different from the Mpho who was the handler of Nokuthula Simelane, the person known as Gilbert Twala.

CHAIRPERSON: The Swaziland one, okay. Yes, no, we've got enough documents.

MR VISSER: We make no point that it's the same person as my learned friend's witness, not at all.

MR VAN DEN BERG: Thank you, Mr Chairperson. I'm indebted to Mr Wagener for the loan of his photograph, or his client's photograph.

The group of 18 ANC members who were arrested, reference is made to it in pages 25, 26 and 27 of Exhibit T, and from what I understand from the evidence of Messrs Coetzee and Pretorius, included the arrest of Cheche. What is your recollection as to when that occurred? Was it at the same time as the arrest or the detention of Simelane, was it before, was it after?

MR VEYI: I think it was the following year when Cheche was arrested. If I still remember well it's either 1984 or 1985, but it was after Nokuthula's arrest.

MR VAN DEN BERG: Now I put it to both Coetzee, and I think I put it to Pretorius as well, that Cheche is a person known as Justice Ngedi and that he was arrested on the 25th of May 1984. Can you confirm or deny that?

MR VEYI: That might be so.

MR VAN DEN BERG: In your opinion, what led to the arrest of Ngedi and the 18 other, or the 17 other people?

MR VEYI: I can't remember the 17 people, but Ngedi's arrest was after Frank and Scotch used to frequent in Swaziland, and they would come with the report and there was RS SWT66 was also in Swaziland, in Manzini. He was from Swaziland. He brought a report to Coetzee and then RS SWT66 was close to Cheche, he knew him.

According to the information I got, he had to recruit a person here in South Africa and take that person to Swaziland. So he told Coetzee, he gave this report to Coetzee and then he took Selamolela and said that he was the one who was supposed to be introduced to Cheche because Cheche was the one who was supposed to come to South Africa. Selamolela then went, they went to the border post in Oshoek. That is where Cheche was arrested.

They were together with Nompumelelo, and the three of them with Lazarus were arrested there. I still remember that when Coetzee came back, it was during the night. He came with Cheche because when he went to Swaziland, Nompumelelo phoned and said that they were on the way, together with Cheche and then Coetzee drove to the border post where he was arrested, where Cheche was arrested.

MR VAN DEN BERG: When you say "they" were on their way to the border post, you refer to Cheche and to - was it RS269, to Langa? Do I understand you correctly, that he was one of those

TP 01

people?

MR VEYI: SWT66 and Selamolela and Cheche. There were three of them. SWT66 phoned, confirming that they found Cheche and they were on the way out.

MR VAN DEN BERG: Sorry, I misunderstood you. Thank you for correcting me.

ADV GCABASHE: Sorry, just for some clarity. All you are really - not all, but one of the things you are saying is that SWT66 was instrumental in Cheche's arrest?

MR VEYI: That is correct.

ADV GCABASHE: Thank you.

MR VAN DEN BERG: Did you have any dealings with SWT66? Did she pass information on to you? Did you handle her at all?

MR VEYI: As I've already said, SWT66 I knew her. According to the information she was from Swaziland, staying in Manzini. Most of the MK cadres that were in Swaziland would go and hide weapons in her home.

I remember one time when Coetzee sent us together with Selamolela to Swaziland, that SWT66 said that there were weapons. Her boyfriend was a cadre. We went there and then she gave us those weapons. We brought them back to the office, explosives and AKs.

MR VAN DEN BERG: I don't want to revisit the aspects of the interrogation which you testified to at some length during your cross-examination by Mr Visser, and I think that we have sufficient evidence insofar as that is concerned. I just want to ask you about the participation of Strongman, the Mozambican. Was he also involved in both the interrogations and the assaults?

MR VEYI: Strongman was working, was doing the same job as I was. He took part in interrogations, because sometimes when an informer was to be fetched or an RS, Coetzee would send him to go and pick up that particular person, together with Malung(?).

MR VAN DEN BERG: Sorry, I want to return to the aspect of SWT66.

ADV DE JAGER: Could we just have clearance here. Did Strongman participate in this interrogation?

MR VEYI: Yes, that is correct, he took part, he participated. As I've already said, the black members also took part. The fact that he was guarding the farm is not true.

ADV DE JAGER: But what language did he speak, what did he ask her? Do you remember anything about what his role was in the interrogation?

MR VEYI: For example, if she was assaulted he would take part as any other person who was there, and he was speaking English and Zulu. He knew Zulu, a little bit of Zulu.

CHAIRPERSON: Yes, carry on, Mr van den Berg.

MR VAN DEN BERG: Sorry, I want to return to the, one or two further aspects surrounding SWT66. Do you know if she was ever withdrawn from Swaziland?

MR VEYI: I can't remember that. When I was still working at the Security Branch - I left there in 1986 and I was ...(indistinct) to the CIDs in Cape Town, when I left she was still working.

MR VAN DEN BERG: And do you know if she had any contact with the person who has been

TP

referred to in these proceedings as Mpho, the handler of Nokuthula Simelane?

MR VEYI: No, I can't remember. If I still remember well, I can connect Mpho and Cheche's case. I can connect her with Mpho and Cheche's case. After Cheche was arrested he came to South Africa and then when he arrived here in South Africa, he was together with the Investigation Team of Protea. They were taking him to John Vorster. On the way to John Vorster -they took him to John Vorster and then they brought him back. On the way, under the chair the police had placed weapons and then on the way he took one firearm and he pointed them and they jumped out of the car, they ran away, and then he drove the car and he abandoned the car in Diepkloof. That's when he managed to escape the first time.

After his escape, Mkhize sent Nompumelelo back to Swaziland to report because according to my understanding they were working under the command of Gabuza Sephiwe Nyanda. He was sent to tell him that this person had not escaped, he was working together with the police. And then if I still remember well he got a lift from Swaziland back to South Africa. On the way she arrived back here and then she was together with an informer. After some time he was then arrested again. Then she went back to Swaziland and Nompumelelo reported again.

MR VAN DEN BERG: If I understand - I could extract from what you've told us, the aspects which I believe are relevant, it would seem that this SWT66 was well placed and that she had access even to a person like Gabuza, who is, that was the MK name for Sephiwe Nyanda. Did I understand that correctly?

MR VEYI: Yes, that is correct. As I've already said, most of the MK cadres that were in Swaziland, they trusted her. Everything that she said they were listening to it, because when Cheche escaped Gabuza took Nompumelelo's story as the truth. He then sent her again so that she could be ... (indistinct) the second time.

To add on that, on the case of the 18 cadres who were arrested, after Cheche was arrested I remember we were going to Dube to SWT66's uncle. We were with her and we told her to call, to phone Swaziland because there were people who were supposed to pick her up, and we told her to tell them that everything was okay, she arrived and she is fine. Then Cheche would phone and the people would come to South Africa and then they would be arrested. There was nothing else you could do because we were there with him and then he was phoning.

MR VAN DEN BERG: This discussion that you had with Sergeant Mothiba, during which he apparently said that he was afraid of these white men and that they were very cruel. Can you just give us a bit more information about that? You said to us in-chief and in cross-examination, that this took place some few days after you last saw Nokuthula Simelane. Can you remember where the discussion took place, were at the offices, were you out on an assignment? Can you give us that sort of information?

MR VEYI: If we would be in the office we would just chat generally about the work and I think it was about a week when we had come back from Northum.

Usually what used to happen is Coetzee and them would then give us the feedback about what happened, but in this case we did not get any feedback, they kept quiet. It is when I then decided to ask Pretorius where this girl was, what happened to her. He then told me not to ask a lot of questions. Two days after that, after asking that question we were, I was together with Sergeant Mothiba and then he said to me: "Mchana, I'm very scared of these white policemen". I ask him why, he said: "They are very cruel", and I asked why, he said: "They shot her and they killed her, they buried her in Rustenburg". That was the end of the story.

MR VAN DEN BERG: Where did this discussion take place, in the office?

TPM

MR VEYI: We were on the premises, Protea premises.

MR VAN DEN BERG: Was anybody else present when this discussion took place?

MR VEYI: At the Security Branch you would not just talk anything, sensitive things, you would tell a person that you trusted, that you knew that he would keep the secret, because if that kind of information can be revealed, if it could be found out that you knew something that you were not supposed to know, that would place you in a dangerous situation.

MR VAN DEN BERG: I accept that it wouldn't have been discussed with other members of the police, would it have been discussed with other members of the unit, were there other members of your unit present when Mothiba, when you had this discussion with Mothiba or was it just the two of you?

MR VEYI: It was just the two of us.

MR VAN DEN BERG: Did you repeat the story that Mothiba had told you, to any of your other colleagues?

MR VEYI: No, I didn't repeat it to other colleagues, I first started talking about this, I think it was in 1995.

MR VAN DEN BERG: That was when you saw the newspaper story.

MR VEYI: That is correct.

MR VAN DEN BERG: Mr Chairperson, the original or the newspaper clipping which gave rise to this whole thing is not before you, so I'd like to hand it up to through this witness. I have made copies available to my learned friends, I think that only the Panel are not in possession of this. It's a series of three photostat copies. If I could hand a copy to the witness and then hand up copies to yourselves and I'll get him to identify it and to sort it out.

Mr Veyi, if you have a look - can we mark that, Mr Chairperson? There is some duplication between this and what is contained in the other bundles, but if perhaps we could mark it CC 1, 2 and 3. There should be a single copy of each page, 3 pages.

MR LAMEY: Which one will be 1, 2 and 3?

MR VAN DEN BERG: The first page ...(indistinct) - sorry, my microphone, I apologise, is a copy from the Sowetan and headed:

"Missing in Action"

... with a poor photograph on the left-hand side.

CHAIRPERSON: Is that with the 2 written on it, and "perpetrator"? Switch on, switch on your mike.

MR VAN DEN BERG: With the 2 at the top, yes.

CHAIRPERSON: Is that the first one?

MR VAN DEN BERG: That's the first one.

CHAIRPERSON: Is it a single page?

MR VAN DEN BERG: It's a single page and then later from the same edition of the Sowetan, a page

TP

headed: 345

"Mom's question: Where is my child?"

CHAIRPERSON: Alright, so that's the second article?

MR VAN DEN BERG: That's the second article.

CHAIRPERSON: Now let's start marking them. The first one will be CC1, the one that you've just identified. And the second article in that same edition of the Sowetan, dated January 27, 1995, will be CC2. Which is the next article, Mr van den Berg?

MR VAN DEN BERG: The next article is, there's already a copy of this before you in Exhibit T, but that's the Sowetan of the 6th of February, Monday the 6th of February, headed:

"Cops trapped and killed MK cadre"

CHAIRPERSON: Yes, so you want that ...

MR VAN DEN BERG: As CC3.

CHAIRPERSON: Marked Exhibit CC3. Yes? What is the next one?

MR VAN DEN BERG: Those are the three that I handed up.

CHAIRPERSON: Oh, then this is just simply duplicates, extra copies.

MR VAN DEN BERG: Well, if I could retrieve those from you at the end of the hearing.

CHAIRPERSON: Yes, very well.

MR VAN DEN BERG: Thank you, Mr Chairperson.

CHAIRPERSON: Yes, I think we're no on board. Mr van den Berg?

MR VAN DEN BERG: Mr Veyi, can I refer you to CC1? Do you recognise that?

MR VEYI: Yes.

MR VAN DEN BERG: Is it correct that this is the article which caused you to go to the Sowetan to speak to the reporter, Sharon Chetty?

MR VEYI: That is correct.

MR VAN DEN BERG: And this is an article dated 27th of January 1995?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: And then what you told the Sowetan is recorded in CC3, the article dated the 6th of February 1995, is that correct?

MR VEYI: That is correct.

MR VAN DEN BERG: And that's the article on which you've been cross-examined by Mr Visser earlier on today?

MR VEYI: Yes, that is correct.

TP 49

MR VAN DEN BERG: Now at a stage you were referred to Exhibit T and page 17 thereof, do you have that exhibit in front of you? Do you have it in front of you, Mr Veyi?

MR VEYI: Yes.

MR VAN DEN BERG: Would you agree with me that that photograph is the same photograph which appears on CC1?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: And the newspaper seems to have used the same photograph continually throughout its reporting of this matter?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: Obviously this is an article of a much later date, the 22nd of May 1997?

MR VEYI: Yes, that is correct.

MR VAN DEN BERG: No further questions, Mr Chairperson.

NO FURTHER QUESTIONS BY MR VAN DEN BERG

CHAIRPERSON: Thank you very much, Mr van den Berg. Ms Thabethe?

MS THABETHE: No questions, Mr Chair.

NO QUESTIONS BY MS THABETHE

ADV GCABASHE: I'm going back to the very beginning of the evidence-in-chief. You were talking about knowing that somebody was going to come to the Carlton Centre and meet Mr Mkhonza. Did you know it was a woman? That's the note I have here. It wasn't clear to me.

MR VEYI: I knew that there was a person who was going to come there. I didn't know what kind of a person.

ADV GCABASHE: Then my next note is about your role in the interrogation of Nokuthula. You said she was questioned about whether she was trained etc., etc., what answers did she give you? Just give us examples of the answers she gave you.

MR VEYI: I think that she did say that she was trained. I don't know where Coetzee got it, but we heard that this lady was trained. That is when we made a follow-up, asking her where she was trained and who were other people that she knew.

ADV GCABASHE: Now assist me, I just want you to tell us about what you heard, what you heard from Nokuthula herself, not what you might have heard from Coetzee or Pretorius, just what you yourself heard during that interrogation. Did you hear her say that?

MR VEYI: I don't remember hearing her saying that.

ADV GCABASHE: You then talked about going up to the farm, you were picked up at the police station. Who did you find on the farm the first time you went there?

MR VEYI: I can't - I don't remember clearly who we found there in the farm, but there were people that were there.

TP 67

ADV GCABASHE: White officers, black officers or just civilians?

MR VEYI: There were police. I think there were both black and white police. I can't remember clearly.

ADV GCABASHE: We have heard evidence about Mr Mothiba's involvement in recruiting Nokuthula, do you know anything at all about that, that he was this father figure and he would be explaining certain things to her? Do you know anything at all about that?

MR VEYI: No, I don't know anything about that.

ADV GCABASHE: Ah, you know when you were being cross-examined by Mr Visser I think it was, you were asked about Nokuthula's stay at the Norwood flats, and essentially what you were being asked about was that you said she had been there for a week before she was taken to the farm, alright? And then you were asked if you were sure and you said "yes", and my note may be incorrect, but what I've got here is:

> "Yes, because after she was taken to Norwood, I stayed three days at Norwood guarding her. I didn't know when she had arrived."

Now the "I didn't know when she had arrived", lost me a bit. Just help me through that one, - unless I recorded it incorrectly.

MR VEYI: I said I didn't know when she arrived there because that was my first time to go there after she was taken in Carlton Centre. I don't know whether she was taken from Carlton Centre to Norwood, but I first guarded her in Norwood. That is what I meant.

ADV GCABASHE: So you are simply explaining that you don't know if she went directly from Carlton Centre to Norwood? You went there three days after Saturday, is that correct? - three days after Saturday.

MR VEYI: That is correct.

ADV GCABASHE: Then you were asked about where you washed when you were at the farm, and you said you wouldn't wash in that dirty water in the tank, in the dam, remember that?

MR VEYI: Yes, we didn't wash.

ADV GCABASHE: Nokuthula, how did she wash? I mean you were there when she went to wash, what happened?

MR VEYI: I don't remember seeing her washing herself.

ADV GCABASHE: Nothing was made available for her to wash herself?

MR VEYI: I don't remember anything like that.

ADV GCABASHE: And on the occasions that she was thrown into the dam, she was thrown in fully clothed in that brown attire that she was wearing?

MR VEYI: Every time that she was there she was wearing that brown overall.

ADV GCABASHE: I understand that. So when Radebe threw her into the dam she was still in that brown overall?

MR VEYI: Yes, that is correct..

TP 17

ADV GCABASHE: And she would keep it on wet as it is, she wouldn't get a change of clothing or anything like that?

MR VEYI: It would dry, she would not change it.

ADV GCABASHE: Is Radebe still alive?

MR VEYI: Yes, I think he is in the Fraud Unit here in Johannesburg.

ADV GCABASHE: Do you have any idea why he hasn't applied for amnesty in this matter?

MR VEYI: I don't know.

ADV GCABASHE: Ah, my last question. SWT66, did she know Nokuthula, or did Nokuthula indicate that she knew SWT66, or both ways?

MR VEYI: No, they didn't know each other according to my knowledge.

ADV GCABASHE: Thank you. Thank you, Chair.

CHAIRPERSON: Mr Veyi, where did the white officers wash?

MR VEYI: I can't remember, I don't know where they will wash.

CHAIRPERSON: Now what kind of water was it in this tank? You say it was dirty water, but what was it, what was in the water?

MR VEYI: I don't know whether it was water that was used to, that was drunk by the cows because that was a farm.

CHAIRPERSON: Was it just an open dam, the top was open?

MR VEYI: It was a sink and then water inside.

CHAIRPERSON: And it was standing high on the ground, it wasn't sunk into the ground, it was on top?

MR VEYI: It was high.

CHAIRPERSON: If you stand on the ground outside, can you look into the dam or is it too high for you to look in? Must you get on or what?

MR VEYI: Yes, you were able to see inside.

CHAIRPERSON: But on what level would it be, would it be, would you have to stand on your toes for example or would you stand normally and be able to look over the top? What did you have to do to be able to look inside?

MR VEYI: If you just standing up normally you were able to see.

CHAIRPERSON: Over the top?

MR VEYI: Yes.

CHAIRPERSON: Now when Ms Simelane was taken to that dam, did she still have the foot-cuffs on?

MR VEYI: She was always foot-cuffed, there was no time when she was not cuffed. So yes, she was

TP

foot-cuffed. 349

CHAIRPERSON: We don't have an idea as to how tall she was, now if she had to stand up straight outside the dam, would she be able to look inside?

MR VEYI: Yes, she was able to see.

CHAIRPERSON: If you had to go and wash in the dam, what would you have to do to be able to wash in the dam?

MR VEYI: You wouldn't be able to wash there because the water was dirty, there was fungus there. So you wouldn't be able to wash there.

CHAIRPERSON: Would you - assume the water was clean in the dam and you wanted to wash in the dam, what would you have to do?

MR VEYI: You were to jump inside the dam, to the dam.

CHAIRPERSON: So you'll have to - you must get over the side and into the water inside the dam?

MR VEYI: Yes, that is correct.

CHAIRPERSON: And you'd have to stand up there or whatever?

MR VEYI: Yes, that is correct.

CHAIRPERSON: Now you say that when Radebe put Ms Simelane into the dam he had to help her not to drown, did I understand that correctly or what?

MR VEYI: What I'm saying is, this dam was used when she was tortured. He would put her in and then take her out of the dam.

CHAIRPERSON: Would he hold onto her, put her in the water and hold onto her or what would he do?

MR VEYI: Yes, that is so.

CHAIRPERSON: Now if he left her, if he didn't hold onto her what would have happened to her?

MR VEYI: Maybe she would drown because she was hopeless.

ADV GCABASHE: Helpless or hopeless?

MR VEYI: She was cuffed.

ADV GCABASHE: Oh.

CHAIRPERSON: Yes, that's fine. Did you see the white policemen giving Ms Simelane painkillers?

MR VEYI: I don't remember seeing that when I was present.

CHAIRPERSON: Did you see anybody giving her medicine, medication?

MR VEYI: I didn't see anybody doing that.

CHAIRPERSON: Did she complain about pains or any discomfort or anything in that nature?

TP

MR VEYI: Yes, when she was with us she would complain.

CHAIRPERSON: About what?

MR VEYI: About pain and the fact that she wanted to go home.

CHAIRPERSON: And I assume you had nothing to give her, no medication to give her?

MR VEYI: No, we had nothing to give her.

CHAIRPERSON: Did you see any - inside this room, did you see any toiletries?

MR VEYI: No, there were not, I didn't see them. They're not there.

CHAIRPERSON: Did you ever see Ms Simelane using any toiletries?

MR VEYI: I don't remember seeing her.

CHAIRPERSON: No I think Mr Visser asked you about this and I wasn't sure what you were explaining. Was there a place where one could put toiletries or anything like that into a cupboard or whatever? Was there anything like that in the room?

MR VEYI: No, there was nothing like that.

CHAIRPERSON: Yes, thank you.

ADV DE JAGER: When she complained about pain and having nothing to take for the pain, didn't you think you should buy some disprins or aspros or whatever and take it with you next time you got to the farm?

MR VEYI: No, that did not occur to us.

ADV DE JAGER: Well you were - she complained and you said you were worried because she wasn't treated well, why didn't you do something about it?

MR VEYI: We did not think about it.

ADV DE JAGER: You said in answer to a question, that she was always foot-cuffed, is that correct?

MR VEYI: Yes, that is correct.

ADV DE JAGER: Didn't you tell us that when the whites left you took off her cuffs?

MR VEYI: Yes, we used to do that when they were not present.

ADV DE JAGER: Yes, so she wasn't - you answered here:

"She was always foot-cuffed. At no time was she not cuffed."

So that wasn't correct?

MR VEYI: When the whites were present she would be cuffed but when the whites were not there we would remove the cuffs.

ADV DE JAGER: So at times the whites weren't there, not one of them, is that correct?

MR VEYI: Yes, sometimes they would go and leave the black officers behind.

TP

ADV DE JAGER: For how long would they leave?

MR VEYI: They would be away, sometimes they would leave in the morning and come back late.

ADV DE JAGER: Yes, and sometimes did they stay away for a few nights?

MR VEYI: I do not remember them staying away for the night, but they used to leave the farm and come back again.

ADV DE JAGER: When these explosions at Bryanston, or is it Roodepoort, took place, Sandton, were they away or were they on the farm?

MR VEYI: The Bryanston incident had long passed. It's a different incident from this one.

ADV DE JAGER: Because I don't know whether I'm wrong, perhaps somebody could correct me, but I believe the bombing was round about the 9th and the 10th of September.

MR VEYI: It had nothing to do with this incident. Those are two different incidents.

ADV DE JAGER: Weren't those incidents while she was still on the farm?

MR VEYI: No, they did not take place when she was still on the farm.

ADV DE JAGER: Right. So for the whole four or five weeks while she was on the farm, did they whites return every day and were they present at night? - for the full period. Did they sleep there very night?

MR VEYI: Yes, I can say so, but the person who did not sleep there every day was Sergeant Mong, but Coetzee and Pretorius, even if they leave during the day or in the morning, they used to come late, even it's about eleven, the time is about eleven, but they used to spend all the nights there.

ADV DE JAGER: For the full four/five weeks, or at least when you were there?

MR VEYI: Yes, during my presence I used to see them spending nights there. I don't know during my absence, but when I was there they would be there also.

ADV DE JAGER: So did Simelane ever sleep without foot-cuffs or handcuffs?

MR VEYI: She was always cuffed.

ADV DE JAGER: And you people ...(intervention)

MR VEYI: If the handcuffs were removed, the foot-cuffs would remain.

ADV DE JAGER: Yes. So when did you take of the cuffs when they weren't there, only during daytime?

MR VEYI: Yes, we would remove them when they were not there.

ADV DE JAGER: And weren't you afraid they would come back and find that she's not cuffed?

MR VEYI: We knew that we would hear the car when they were coming and then we would put back the cuffs.

ADV DE JAGER: And at a stage you were told to tell her of the advantages that could come her way if she would join the police, is that correct?

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MR VEYI: Yes, that is correct.

ADV DE JAGER: Who did that, who told her about that? Who was her spokesman?

MR VEYI: Sometimes it would be myself, sometimes I would interpret or Sergeant Mothiba and Lazarus would do the job.

ADV DE JAGER: What language did Sergeant Mothiba speak?

MR VEYI: He was a Sotho-speaking person.

ADV DE JAGER: So he couldn't speak directly to her in Zulu?

MR VEYI: He was able to speak Zulu.

ADV DE JAGER: Now why did you have to interpret for him?

MR VEYI: We would only interpret from Afrikaans into Zulu.

ADV DE JAGER: No, but when he spoke to her and he told her about the advantages, why should you interpret between the two of them?

MR VEYI: There would be an interpreter if Pretorius or Coetzee were there.

ADV DE JAGER: And if they weren't there, there wasn't an interpreter?

MR VEYI: There would be no interpreter.

ADV DE JAGER: Now didn't Mr Mothiba speak to her about the advantages in the police and she should rather co-operate and so on, then she would be treated better when the police weren't there, the white people?

MR VEYI: We would talk to her, all of us, telling her as to what to do and what were the advantages.

ADV DE JAGER: Yes. And Sergeant Mothiba was the father figure, wasn't he? You addressed him as, what was it, Malume?

MR VEYI: Yes, he was older than us, that is correct.

ADV DE JAGER: And was he a fatherly figure? - the old man.

MR VEYI: Yes, that is correct, we used to respect him.

ADV DE JAGER: And how did he treat Ms Simelane?

MR VEYI: We were - he was treating her the same as we were treating her.

ADV DE JAGER: So if the whites weren't there he was treating her nicely?

MR VEYI: Yes, that is correct.

ADV DE JAGER: Did you any soap there to wash with or any toiletries?

MR VEYI: No, we did not have that.

ADV DE JAGER: Did anybody have toiletries there, soap and...?

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MR VEYI: We did not wash ourselves, we would only go and wash ourselves at home. The same used to apply with him.

ADV DE JAGER: So do you say Ms Simelane never washed during the whole period of four/five weeks?

MR VEYI: I can say that is so.

ADV DE JAGER: And you told us that she even soiled herself.

MR VEYI: Yes, that is correct.

ADV DE JAGER: And there was no washing thereafter?

MR VEYI: No, there was no time to wash. He would perhaps during their absence, if we were there she would try and clean herself. We used to do anything secretly. We used to, we tried to organise some water but we did not want the people to see us doing that.

ADV DE JAGER: Yes, okay you tried to organise the water, did you manage to organise water?

MR VEYI: That was done secretly when the whites were not there.

ADV DE JAGER: So secretly you organised water and she was able to wash herself, is that correct?

MR VEYI: Yes, that is correct.

ADV DE JAGER: Now can you give me one single reason why you denied all the time that she washed herself?

MR VEYI: What made me to say that is because it's something that was no allowed, we were doing it out of our own and we were doing it secretly.

ADV DE JAGER: Yes, and did you secretly give her medicine?

MR VEYI: No.

ADV DE JAGER: Why not?

MR VEYI: I do not have a reason for that.

ADV DE JAGER: Because according to you she was in need of medicine.

MR VEYI: Yes, that is correct.

CHAIRPERSON: Just one other thing, what did she have to eat?

MR VEYI: There were takeaways that we would buy whenever we go outside. Sometimes we would buy food for her at the shop in Northum.

CHAIRPERSON: What kind of food did you buy?

MR VEYI: Fish and chips and some bread.

CHAIRPERSON: And did she eat that?

MR VEYI: Yes, she did.

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CHAIRPERSON: Yes. Mr Lamey, re-examination?

RE-EXAMINATION BY MR LAMEY: Thank you, Mr Chairman.

Just on the last question, the question was asked of you; "Did she get food to eat?", what do you understand by food in this regard?

MR VEYI: I'm talking about something that you eat.

MR LAMEY: Alright. You say that you, when the whites were not there you used to buy food for her at Northum, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: Mr Coetzee testified, perhaps also Pretorius, I can't remember, they made mention of "rat-packs" that was given to her. Do you know anything about that?

MR VEYI: Yes. She used to rat-packs but if you eat that for a long time, it's not very nice. It's not nice at all.

MR LAMEY: I just want to clarify this, when the question was asked about the food you did not mention the rat-pack. Do you draw a distinction about a rat-pack and the food that is referred to?

INTERPRETER: Excuse me, Chairperson, the mistake was coming from the side of interpreter. I interpreted them as takeaways. He did mention the rat-pack.

CHAIRPERSON: ...(inaudible)

MR LAMEY: I hear the English and the interpreter apparently says now that she's made a mistake, she interpreted it as takeaways, but he in fact said rat-packs.

CHAIRPERSON: Yes, that's what I wanted to hear from you, whether you heard the explanation that the interpreter gave.

MR LAMEY: Yes.

CHAIRPERSON: Alright.

MR LAMEY: Okay, so what you mean is, to sum it up, she was given rat-packs as food, but at the times when the white policemen were not there and you also used to buy additional food at ... (intervention)

MR VISSER: That's not what he said, Chairperson. When did he ever say it was only at times when the white people were not there? He didn't say that.

CHAIRPERSON: Yes, just ask him, Mr Lamey.

MR LAMEY: Perhaps I made a wrong assumption, I thought that is what he said. I merely wanted to sum it up.

CHAIRPERSON: ...(indistinct)

MR LAMEY: At what times did you buy the food at Northum, the so-called takeaways?

MR VEYI: We would buy them when the whites were not there.

TP

MR LAMEY: Alright. And at the times - did she get food in any form when the whites were there?

MR VEYI: She would eat those rat-packs.

MR LAMEY: Okay.

CHAIRPERSON: I'm sorry to intervene. What is a rat-pack?

MR VEYI: It is a package of food in the box, soldiers' food in a box where you get a tin, tinned stuff, baked beans with biscuits in. The tin in the box with baked beans and biscuits and something called post toasties.

CHAIRPERSON: Is it a sort of a thing that you can, a provision that you can carry around with you and if you're on the move you can use it to eat, to feed yourself, like a soldier? I think you said "like a soldier".

MR VEYI: Yes, it was used by police and soldiers who were on border, who were performing border duties.

CHAIRPERSON: Alright.

MR LAMEY: Can I just ask you this, Mr Veyi ...(intervention)

ADV DE JAGER: So it was bully beef and post toasties and beans and biscuits and tinned mielies, that kind of thing?

MR VEYI: Yes.

MR LAMEY: Mr Veyi, from my own experience in the army, a rat-pack was not a thing that the Force members were very fond of, what was the situation in your case?

MR VEYI: I said it's not a very nice package, more especially if you eat for a very long time.

MR LAMEY: Now at the times when you went away to buy takeaways, food at Northum, was it for your, did you also buy food for yourself and for Simelane, or did you give some of your food to Simelane, or did you only buy food for Simelane or what was the situation?

MR VEYI: We used to buy food for ourselves and we would buy something for her and eat, all of us.

MR LAMEY: Okay. You testified that at times during interrogation she was also thrown into the dam, is that correct? - or put into the dam by Radebe.

MR VEYI: Yes, that is correct.

MR LAMEY: Were the white police officers present during those stages?

MR VEYI: That was done per their instructions.

MR LAMEY: Now you also testified that she soiled herself during interrogation sessions, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: Now the stages when she was thrown into the dam, was the throwing into the dam connected with the fact that she soiled herself or wet herself, or was it not connected with that?

TP 11

MR VEYI: Sometimes he would put ... into the dam without being soiled and that would take place as a result of being thrown into the dam. That used to be the case sometimes.

MR LAMEY: Do you say that as a result of the throwing into the dam she would soil, also soil herself? I don't really understand what you are saying there.

MR VEYI: Yes, that is correct.

MR LAMEY: If she soiled herself during interrogation -well did it happen during interrogation that she soiled herself, but not at the stage when she was put into the dam?

MR VEYI: Yes, that used to happen also.

MR LAMEY: And when that happened was she put into the dam? - when she soiled herself.

MR VEYI: No.

MR LAMEY: So what you're saying is she was put into the dam at stages when it had nothing to do with the soiling of herself?

MR VEYI: Yes, that is correct.

MR LAMEY: But then she would sometimes perhaps soil her in the dam?

MR VEYI: Yes, that is correct.

MR LAMEY: Now you were asked questions by Mr Visser, and it was put to you that you resented the white policemen and he referred particularly to your white superiors in the police at that stage. What prompted you, what led you to make this statement or speak to the reporter of the Sowetan?

MR VEYI: I would like to rectify something first. This newspaper article that was shown to me, that was quoted, the one that he quoted, that I resented my superiors, I don't know where that comes from because it's not what I said in the report. I think he showed me the different newspaper.

MR LAMEY: Ja, initially Mr Visser showed you page 17 of Exhibit T. That is a report dated the 22nd of May 1997, was that report made as a result, well was that the report which was made, which you made to the Sowetan, which was published in the Sowetan, dated the 22nd of May 1997?

MR VEYI: No, I know nothing about that report, the one that he had.

MR LAMEY: Now I just want to bring you back. What caused you to report, to speak to the reporter of the Sowetan and to report what you know about the missing lady? What caused you to do that, why did you do it?

MR VEYI: After reading the article, the newspaper article something came to my mind. I remember that I know what happened and my conscience was bothering me and that made me to go to the newspaper.

MR LAMEY: Now the article that you have read, we have articles before us, could you point out the article which placed a burden on your conscience and which led you to speak to the reporter?

MR VEYI: It is the one that is referred to as CC1.

MR LAMEY: It's called:

"Missing in action"

TP 11

... with the photograph of Simelane, is that correct?

MR VEYI: Yes, that is correct.

MR LAMEY: Now before you were asked by Mr Visser about what you have purportedly stated to this reporter, Sharon Chetty, in the report published on Monday, February the 6th, which is marked Exhibit CC3, did you have an opportunity to look at that carefully before the questions were asked?

MR VEYI: Will you please repeat your question, it's not clear to me.

MR LAMEY: When Mr Visser asked you questions he quoted from the report published in the Sowetan, Monday, February 1996 and he put it to you that you have said that to the reporter, prior to this question coming up during cross-examination, did you have prior to that a careful look at the contents of that report in the newspaper?

MR VEYI: No, I did not get that opportunity.

MR LAMEY: Now I want to get back to this aspect which Mr Visser has pointed out. The report states here:

> "Constable X, who prefers not to be named at this stage ..."

Let us just stop there. Is it correct that you preferred not to be named at that stage?

MR VEYI: Yes, that is correct.

MR LAMEY: Now further reports said:

> "Constable X, who prefers ... said the black members of the unit guarded Simelane, while the white members tortured her."

Is that the totality of what you told her? In other words, that the black members merely guarded her - will you refer now, the report doesn't specify Norwood or Northum, it's general.

> "... said the black members of the unit guarded Simelane, while the white members tortured her."

Is that the totality of the involvement of the members of the unit, that you conveyed to her there?

MR VEYI: Yes, that is correct.

MR LAMEY: Okay. So what you her at that time when she says that the black members of the unit guarded Simelane, while the white members tortured her, you say that is, you told her that, but that is not correct. Do I understand you correctly?

MR VEYI: Yes, that is correct.

MR LAMEY: What is the correct version?

MR VEYI: Something that I did not mention here is this. Even us black officials we did play a role when she was being guarded. That is what I told the Committee here. That is what I did not mention initially.

MR LAMEY: So you didn't explain the participation of the black members in the assault to the reporter, is that correct?

TP 11

MR VEYI: Yes, I did not mention anything about the role that we played.

MR LAMEY: Now at that stage why did you not mention it to her?

MR VEYI: I do not have a reason.

MR LAMEY: Do you say you have not reason? But there must have been a reason in your mind. Can you just explain what your thinking was at that stage?

MR VEYI: There was no reason.

MR LAMEY: What was your rank at the stage of the abduction of Nokuthula Simelane?

MR VEYI: I was a Constable.

MR LAMEY: And at the stage when you, in 1995, when you made this report to the reporter of the Sowetan, what was your rank then?

MR VEYI: I was still a Constable.

MR LAMEY: Were you still a Constable?

MR VEYI: Yes.

MR LAMEY: When did you become a Sergeant?

MR VEYI: In September 1995.

MR LAMEY: Now if you say you had no reason why you said that to her, do I take it that it was not a result of resentment to the white members that you said that? You know that when you referred only to the white members involved in the torture and not the black members.

MR VEYI: No, that is not correct.

ADV GCABASHE: I'm sorry, Mr Lamey, I missed the question. I heard the answer but I actually missed the question.

MR LAMEY: Let me just repeat that. You said, at the time when you made the statement to the Sowetan, that while the white members tortured her, and you said only the black members guarded her and you did not make mention of the involvement in the assaults and so on of the black members, you said that you can't think of a reason why you told her that. But my question is, did you specifically mention the involvement of the white members, relating to the torture, because of resentment against the white members?

MR VEYI: No, that is not true.

MR LAMEY: Now you were also asked about your involvement in the Lengene incident, who was abducted. Did I understand your evidence correctly that you, the kidnapping part you were not involved in?

MR VEYI: Yes, that is what I said.

MR LAMEY: At what stage, where was Lengene or where was he at the time when you - let me ask you this first, what was your involvement during his, after he was abducted?

MR VEYI: I only interfered when we were recruiting him, as we wanted him to be a member of the

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Police Force.

MR LAMEY: Was it during the stage when the recruitment exercise was applied?

MR VEYI: Yes, that is correct.

MR LAMEY: Now where was he at that stage? - that is now Lengene.

MR VEYI: He was in Rustenburg with Superintendent Coetzee's in-laws. Sometimes he would be in Klipspruit West.

MR LAMEY: Were you also at Rustenburg?

MR VEYI: Yes, I used to go there.

MR LAMEY: Were you at Klipspruit?

MR VEYI: Yes, I would visit Klipspruit. There was a safe-house there.

MR LAMEY: This place in Rustenburg, what place was that?

MR VEYI: That was Mr Superintendent wife's home. Mr Superintendent - Mr Coetzee's wife's home.

MR LAMEY: Was that - did you regard that as, what you call a safe-house?

MR VEYI: No, that was not a safe-house, it was just a place because sometimes Coetzee, if he was leaving, if he wanted to go to his in-laws and work from there he would take people with him because he was working all the time. He was always working.

MR LAMEY: Now the place at Klipspruit, what was that? - when he was recruited or interrogated there?

MR VEYI: It was a safe-house where we used to - it was a safe-house where the informers, informants used to be interviewed.

MR LAMEY: What is a safe-house?

MR VEYI: If you work with an informant, he or she must not be seen by people. There should be a house that is secluded or a house that would be used secretly so that their identities could not be revealed.

MR LAMEY: Mr Chairman, I just want to point out that in the statement of Lengene, for what it may be worth, there is reference made to Rustenburg, and then in paragraph 34 thereof, page 339, there's also reference made that he was taken to a certain house, driven to a certain house in Klipspruit West.

MR VISSER: Well will my learned friend just tell you whether he thinks it was before or after he had been recruited, Chairperson. Let's get the correct facts on record.

MR LAMEY: Well perhaps Mr Veyi could comment on that. When he was taken to Klipspruit, how far was the development in this interrogation and recruitment process?

MR VEYI: It was still in process when he was taken to Klipspruit.

MR LAMEY: By that time was he already recruited? In other words, already turned or not yet?

MR VEYI: We were still busy with the process.

TP

MR LAMEY: Are you saying that it did not happen yet?

MR VEYI: Yes, it was not yet over, we were still busy with it. We were not trusting him yet. Sometimes he would be on leg-irons.

MR LAMEY: Now in paragraph 36, Lengene stated that he was, after that, after being at Klipspruit ... (intervention)

ADV DE JAGER: This last answer:

"We were still not trusting him".

So did you already recruit him, but you wanted to keep an eye on him, you were not trusting him, or why did you add "we were not trusting him yet"?

MR VEYI: We were still busy with the process of recruiting him. You won't just trust a person completely during that process. That is why I said so.

MR LAMEY: Perhaps I should ask you this, at that stage at Klipspruit was there positive signs about his recruitment, from his side? In other words, that is was different from the situation at Rustenburg.

MR VEYI: There were positive signs that he will change and he eventually changed and we could trust him.

MR LAMEY: Okay. When did he eventually change and when was the situation that you could trust him?

MR VEYI: After he had changed he used to be in the company of one person and if you happen to be with him, you even monitor his behaviour and you would even detect from what he says, whether he can escape or not and then you would go back to Coetzee and give a report. At some stage he would be sent, he would be given a mandate alone and then he would come back alone.

MR LAMEY: Ja, but what I want to ask specifically, that situation at the stage, when it reached the stage that he could be trusted, was that still while he was at Klipspruit or was he then somewhere else?

MR VEYI: He was in Klipspruit.

MR LAMEY: So when he was taken to Klipspruit he hadn't reached that stage, but during the time at Klipspruit the recruitment of him improved, is that what you're saying?

MR VEYI: Yes, that is correct.

MR LAMEY: Then in paragraph 36 he has stated that he was also taken to Benoni, do you know of that? Do you know anything about that?

MR VEYI: I do not remember anything about Benoni.

MR LAMEY: I want to take you back to the situation at Norwood. Perhaps I should just ask you in general, and I'm referring now to the situation at Norwood as well as at Northum. Let me rather leave that, I'll bring you back to Norwood. When you were - you testified that the first time that you got to Norwood was - in examination by the Commissioner Gcabashe, three days after the Saturday, in other words the third day after the Saturday that she was abducted you got to Norwood first, is that correct?

MR VEYI: Yes, that is correct.

ADV DE JAGER: So that would be the Tuesday?

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MR VEYI: I think that is so.

MR LAMEY: Okay. How long - did you stay there at Norwood, when you were there, continuously, in other words, the whole day or did you also come and go from there?

MR VEYI: I would spend a night there and I would go and spend two nights there and leave perhaps on the third day and we would change shifts.

MR LAMEY: How many nights in total did you spend at Norwood? Can you remember?

MR VEYI: I'm not certain about that, but I can say that maybe I spent four nights there.

MR LAMEY: When you spent nights there, did you only spend nights there or were you there also during daytime?

MR VEYI: If you arrive there during the day you wait and you spend the night there and you wake up there the following day.

MR LAMEY: Were you there - during the time that you were there, were you there 24 hours out of 24 hours of the day?

MR VEYI: Yes, that is correct.

MR LAMEY: Now, and the white policemen?

MR VEYI: Yes, they would be there for the whole day and go away and come back late in the evening because they were staying there.

MR LAMEY: Who also stayed at those quarters, if you talk about them or "they"?

MR VEYI: If I remember very well in those quarters, Block A and Block B, Coetzee was staying at another block and Pretorius was at the other block and even Pretorius was there. I think even Ross was staying there, if my memory serves me well. It was a place that was occupied by police.

MR LAMEY: Now the - during the interrogation sessions and the assaults during those interrogation sessions, did that happen at day, during day time or night time or both?

MR VISSER: Mr Chairman, I have been sitting here very patiently, listening to my learned fried starting a whole new case in re-examination, because that's what it boils down to. My learned friend is entitled, if this were a court of law, to deal with matters of clarification arising out of that which was asked of his witness by either the judge or other people. We know this is not a court of law and we know that we're here to try and establish the truth, but at some stage or other there's got to be some semblance of discipline, Chairperson.

I already find myself in a situation here where I'm now going to have to start asking you to recall my witnesses, to deal with matters which have not been raised, which we hadn't been aware of, which were never put to your witnesses. And Chairman, I don't want to restrict my learned friend unnecessarily, but there is a limit. My learned can't just now start leading evidence-in-chief afresh while he's in re-examination. And I would submit to you, Chairperson, he's exceeding the bound of what is reasonably permissible by way of re-examination.

CHAIRPERSON: Mr Lamey?

MR LAMEY: I'm not exactly clear. My learned friend's objection in very general terms. I don't know whether he's objecting to my questioning about the Norwood aspect only or whether he refers to the other aspects as well.

TP 07

MR VISSER: It's a general objection and it's just getting to the point now where it's becoming absurd. "Who lived in the flats?", etc., etc.

CHAIRPERSON: That's common cause, Mr Visser. In fact Coetzee and your people already told us who lived there, so it's really just, it's common cause. So I don't know where ...(intervention)

MR LAMEY: Can I just take ...(intervention)

CHAIRPERSON: Now the Norwood flats issue was part of what you cross-examined on and I assume that Mr Lamey is dealing with that.

MR LAMEY: Well my learned friend has said it's in general. What he's in fact saying to the Committee is, I am exceeding the bounds of re-examination in total, from the outset. Now if I need to take the time, I can take the Committee back step by step on each and every aspect which I started on re-examination. I started with the dam - well I mentioned the dam incident. That was clearly arising from questioning from the Committee. I also went further with the newspaper report. I went -I mean it is clear, I know that I, on this particular aspect about Norwood, it goes a bit slow at this stage, but I really want to get at an aspect which is important but also to clarify aspects regarding my position. And I must get to that and I must be very clear about this.

CHAIRPERSON: That's what I assumed.

ADV DE JAGER: But is it really of importance whether they stayed in Block A or Block B at Norwood? Could that assist us in coming to a finding in this thing?

MR LAMEY: That was perhaps a side issue that came unnecessarily in, Mr Chairman, but what I'm really aiming at is to get clarity on what really transpired at Norwood, as far as this witness is concerned, the involvement of other members etc., and it also ...(intervention)

CHAIRPERSON: Yes, I understand, I know exactly what you're saying and that's what I thought you were getting at. Unfortunately your client did refer to things which are already on the record, Block A and Block B. We know exactly where the people lived. So go ahead, please just ...(intervention)

MR VISSER: Mr Chairman, ...(intervention)

MR LAMEY: I see it's 4 o'clock.

MR VISSER: It's 4 o'clock. Can we be excused, unfortunately I've had to made certain arrangements and we had to assume that we could leave at 4 o'clock.

CHAIRPERSON: I assume you still have some way to go, Mr Lamey.

MR LAMEY: I'll have to unfortunately clarify certain aspects. It's for various reasons important.

CHAIRPERSON: Yes, yes. No, you must deal with the matter as you're instructed to. Now we're going to adjourn at this stage, but we have another matter on the role and that's the Mbali matter, where an interested party and the applicant, one of the applicants had to travel over some distance and had to go to some expense in order to attend.

This particular matter that we're hearing now is taking much, much longer than we had anticipated. We had worked on the assumption that we would be able to deal with the Mbali matter. We intend to do that in fact. We have one of the applicants who came up from Cape Town, we've got an interested party who came from Umtata.

We would like to deal with that matter tomorrow, as soon as it's convenient to do so. We have been informed that it is something that we in all likelihood would be able to dispose of in the course of the

TP

day tomorrow, and we would like to accommodate those parties in regard to that particular matter.

We will adjourn at this stage and we'll reconvene at 09H30 tomorrow morning.

COMMITTEE ADJOURNS

TP

TN 23

364

Report for the Office of the National Director of Public Prosecutions

Since the meeting with the above office in early February 1999, the Commission has begun a process of establishing mechanisms for identifying potential cases. The following is a report on progress thus far.

A: Categories of violations

In discussing possible prosecutions, we have identified a range of categories and/or issues around which we believe prosecutions can be considered. We would recommend that there be some discussion around these categories to determine viability as well as prioritisation.

1. **Torture:**
   Much of the Commission's data on torture is to be found in HRV statements. However, the 'private' nature of torture and absence of witnesses frequently makes corroboration difficult. Bearing this in mind, the Commission has begun to draw up an initial list of all security force members implicated in torturing more than three victims. This list is extensive and includes many rural cases.

   Another possible approach is to look at amnesty applications and hearings where torture was conceded and to identify the names of co-perpetrators who have not applied for amnesty. Such a list could then be checked against our HRV statements for further evidence. This figure would considerably reduce the potential number of cases. It would however be more difficult to extract as few security force members applied specifically for torture. Rather, evidence of torture often only emerges during amnesty hearings and is thus embedded in transcripts rather than on the TRC database.

2. **Post-Caprivi hitsquads:**
   The Commission has a fairly rich seam of data and information on this category. It is also one which we believe would be relatively easy to proceed on immediately given that at least one case was previously prepared by the ITU but not prosecuted [also see KZN report].

3. **Cases involving a cover-up by the security forces:**
   There are a number of potential cases in KZN including the cover-up by senior policemen of the Trust Feeds massacre. Another potential case would be the cover up of the Ribeiro killings by senior military personnel, but this may already be an AG case.

4. **Destruction of Documents**
   The Commission conducted a lengthy enquiry and investigation, assisted by the National Archives and the Human Rights Commission, into the destruction of literally scores of tons of documentation relating to state security in the early 1990s. Much of this destruction, authorised by the former government and overseen by the National Intelligence Service, clearly constituted unlawful destruction. In the course of this investigation, much documentation was collected and an overall report was drawn up, as well as comprehensive reports dealing with the SAP, the SADF and the NIS. Verne

TP 9

Harris of the National Archives was centrally involved in this investigation and would be prepared to provide assistance.

5. **Gun-running**
The Commission conducted an investigation into gun-running and received several amnesty applications in this regard. While the investigation was inconclusive, a comprehensive report and other documentation is available. This area is seen to be significant in its capacity to begin to unravel networks involved in fomenting violence in the 1990s.

6. **Assassinations**
The Commission has received amnesty applications in respect of several of the high profile assassinations. Not all implicated persons applied in all of these cases and thus possible prosecutions could arise. In other cases such as the assassination of Joe Gqabi in Zimbabwe and Victoria Mxenge, no amnesty applications were received. We are currently assembling information on the Gqabi case.

7. **Winnie Madikizela-Mandela**
Extensive documentation has been collected around Mrs Madikizela-Mandela and the MUFC and a comprehensive investigative report was compiled. [We need to establish whether this is currently being pursued by the AG's office]

8. **Samora Machel**
Also a possible AG matter.

9. **Target identification**
The Commission investigated the process whereby the security forces identified targets the purpose of which included, inter alia, physical elimination. This included a range of structures, sometimes involving more than one arm of the security forces/ intelligence structures. Such evidence is primarily contained in amnesty applications and section 29 hearings. While there was insufficient time to conclude this investigation, there is evidence regarding the establishment in the mid-1980s of a target identification centre within, firstly military intelligence and subsequently the project section of Special Forces.

However, much of the evidence given to the TRC, while acknowledging the existence and purpose of such target identification groups, refers to planned but subsequently cancelled operations. In other words the gaps in our evidence are in directly linking specific processes of target identification with specific killings. One possible exception would be cross-border raids which are discussed below.

10. **Cross-border raids**
While difficulties clearly exist in bringing charges for the execution of cross-border activities, there are no doubt possibilities of conspiracy to murder charges relating to the planning of such operations, which invariably took place on SA soil.

The Commission did receive several amnesty applications relating to cross border activities from former Security Branch members, but virtually none from the SADF, although SADF members are cited in a number of the Security Branch applications.

TPN

Clearly, the possibilities of extradition to a large degree influenced the willingness to disclose involvement in such activities and would presumably be a factor to be considered.

B: Other Regional Cases

In addition to the above, we have asked personnel in regions to identify possible cases for prosecution. This process is logistically difficult owing to the fact that regional offices have closed and documentation has been transferred to the national office in Cape Town. Further, regional staff except for those servicing the Amnesty Committee are no longer in the employ of the Commission. Despite this, we have received some feedback:

1. **KZN**
The KZN region has begun to identify cases where people who did not apply for amnesty have been implicated. The KZN region also has a number of HRV statements implicating perpetrators where such information was not previously disclosed during investigations due to perceived police partiality.

This is a mammoth task and needs to weighed up in relation to:

- The likely unwillingness, given the current climate in KZN, of amnesty applicants to testify against their leadership
- The capacity of Chris McAdam's office to deal with new cases considering his involvement in Richmond;
- The mooted Commission of Inquiry into political violence in KZN.

Nonetheless, some preliminary work has been done and a report is attached.

2. **Eastern Cape**
A former researcher in this region has been approached to identify potential cases. Her report is attached and deals primarily with cases in East London and the western part of the Eastern Cape. A further report is awaited dealing with the eastern side of the Eastern Cape (primarily Ciskei and Transkei regions).

It should be noted that the list of cases drawn up here differs from the KZN one in the sense that it takes as its starting point HRV statements where specific concerns were raised by deponents regarding the failure of the criminal justice system in investigating and successfully prosecuting such cases. Given pressure on resources, a policy of low level corroboration was adopted for most HRV cases and thus most of such cases were not comprehensively investigated by the Commission. This would mean that such cases would still require extensive ground work and investigation. However, such cases may well be important in ensuring that justice is seen to be done in cases that are not well known and do not involve profiled people.

There is a need for some discussion around such issues before proceeding as a different and lengthier modus operandi is required to identify such cases more broadly.

3. **Western Cape**

A very preliminary list is attached.

TPN

4. **Gauteng**

Former and current investigators have similarly been approached and a report is awaited.

5. **Free State**

The former Orange Free State fell under the Commission's KZN office. There are a number of potential cases here, but given the pressure on time, KZN personnel have requested assurance that some capacity exists (or will be established) to deal with such cases before they proceed.

C: Section 30 notices and S29 investigative enquiries

A preliminary spreadsheet of section 30 notices sent out is available. This list only reflects Section 30 notices sent out during the preparation of the TRC Report and does not include all S30 notices arising from individual HRV statements or those sent out by the Amnesty Committee following an amnesty hearing.

Also available is a table of all Section 29 investigative enquiries that were held, reflecting person, issue and whether amnesty applications were received.

D: Analysis of indemnity and amnesty applicants

We are also currently engaged in a process of identifying whether perpetrators implicated either via HRV statements or in amnesty applications previously applied for indemnity. In this regard our IT department has devised a programme whereby lists of those on the various indemnity lists in the 1990 to 1994 period have been correlated with amnesty data. This spreadsheet is currently being analysed. The IT department are engaged in a similar exercise in relation to HRV data.

E: Further issues

1. It needs to be emphasised that the Commission has very limited resources at present. The Commission itself is in suspension; the remaining HRV component consists of one Commissioner and one researcher; regional offices have closed and documentation transferred to the national office; and the Amnesty Committee is hard-pressed to complete the amnesty process on schedule.

   Further, it needs to be understood that our HRV material is currently archived according to victims and not perpetrators. Similarly, amnesty material is filed according to applicant and information regarding co-perpetrators is thus potentially scattered across numerous files or embedded in transcripts of amnesty hearings. While our database provides an initial tool for identifying cases to which individual perpetrators may be linked, the task of retrieving all statements and documentation is a lengthy and painstaking one.

   Given this, it is suggested that a fairly limited focus is worked out that would enable existing staff to begin feeding cases/ material through, without engaging in what would virtually mean copying the entire TRC archive.

   We further propose that in determining a more limited focus, the resources of the TRC Task of the NDPP is taken into consideration. Thus, for example, if the current capacity in KZN is already stretched, it is questionable as to how productive it would be to involve

TP 9

already over-burdened TRC staff in assembling numerous dossiers around KZN cases.

We recommend that a draft plan or framework that prioritises specific categories or regions is drawn up.

2. In view of the extremely limited resources, a line of communication needs to be developed that prevents potential duplication of tasks. Thus for instance, the request forwarded to Advocate Coetzee on 4 March 1999 in many respects duplicates work arising from the meeting in Cape Town.

3. We still urgently require a list of cases already being pursued by the various AG offices.

7 March 1999

TP

TN 24
369

VOLUME TWO

Truth and Reconciliation Commission of South Africa Report



TP 9

285 Other amnesty applicants disputed this version of events. The Port Elizabeth Security Branch applicants stated that Kondile was transferred to their region after interrogation in the Orange Free State. After two weeks of interrogation with assault at the Jeffrey's Bay police station, Kondile agreed to act as an informer. However, Major Du Plessis [AM4384/96] alleges that he then personally discovered a concealed note from Kondile to the ANC. Du Plessis realised that Kondile had deceived him. Kondile had been briefed about Du Plessis's informer network (including a person in the UNHCR who provided photographs of refugee applicants to the police) which would now be compromised. After discussions with his immediate superior Nick Janse van Rensburg and the Divisional Commander, then Colonel Gerrit Erasmus [AM4134/96], it was decided that Kondile should be killed.

286 Kondile was taken near Komatipoort where they met with Captain Dirk Coetzee. He was tied to a tree and shackled, given some food and cold drinks, after which he became unconscious. Sergeant Roy Otto (now deceased) then shot him through the head, after which his body was placed on a wood fire and burnt until morning.

Nokuthula Simelane

287 Acccording to amnesty applicant Lieutenant-Colonel Anton Pretorius [AM4389/96], the Soweto Intelligence Unit (SIU) had in 1983 succeeded in penetrating and infiltrating MK structures in Swaziland. Deep-cover agents RS269 and RS243 had succeeded in gaining information about arms caches, infiltration routes, lines of command and so on. Through a Soweto-based source, SWT 66, they had managed to establish the linkages between the Swaziland structures and MK's Transvaal military structures.

288 During 1983, they received information that a courier from Swaziland was expected in Johannesburg. The courier, Ms Nokuthula Aurelia Simelane (aka MK Sibongile), arrived in Johannesburg in September 1983 and was abducted by the SIU from the parking lot outside the Carlton Hotel where she had planned to meet her contact. She was initially taken to the Custodum police flats in Norwood and kept for several days in a tenth-floor storeroom. During this time she was intensively interrogated and, according to an amnesty applicant, badly beaten.

289 From Norwood, Simelane was taken to a farm near Thabazimbi, where she was apparently kept in an outbuilding for a month, possibly two.

290 According to amnesty applicants Anton Pretorius and Lieutenant Colonel Willem 'Timol' Coetzee, [AM4032/96] then head of the SIU, she agreed during her initial

TP 11

interrogation and torture to become an agent for the Security Branch and her removal to the farm had been organised to facilitate the necessary training. Coetzee claims that the arrangements surrounding this recruitment were discussed with his superior officer as well as with Section C at Security Branch headquarters. Pretorius and Coetzee said that, after three weeks, Simelane returned to Swaziland but that all subsequent pre-arranged contact and communication with her failed. These applicants said they believe that her defection was discovered by MK and that she was killed as a consequence.

291 A number of other members of the unit involved in her abduction also applied for amnesty. At least one of these, however, disputes the Coetzee/Pretorius version. According to this applicant, Simelane continued to be tortured at the farm in Thabazimbi. After about two months, she was put in the boot of the car, handcuffed and in leg-irons, and driven away. This was the last that black members of the unit saw of her. Her physical state at the time was such that returning her to Swaziland would not have been possible. "She was very beautiful. But by the time they were finished with her, she could not be recognised."

292 The applicant indicated that, after he was back in Soweto, he asked one of his superiors about Simelane and was told not to ask questions. He subsequently heard that she had been shot and buried in Rustenburg.

Japie Maponya

293 Mr Japie Maponya [JB02090/03WR] was abducted by Vlakplaas *askaris*, interrogated and subsequently killed. Amnesty applicants included General JH le Roux [AM4148/96]; Colonel Eugene de Kock [AM0066/96] head of C1/Vlakplaas, Warrant Officer Willie A Nortjé [AM3764/96]; Constable TJ Mbelo [AM3785/96] and Sergeant DJ van der Walt [AM3769/96].

294 According to applicants, a request for assistance was submitted to security headquarters by Colonel Johan le Roux, head of the Krugersdorp Security Branch (later a general who commanded the Security Branch). On instructions from Security Branch headquarters, a team under Warrant Officer Willie Nortjé, with which De Kock later linked up, was deployed to Krugersdorp. Japie Maponya, a security guard, was abducted from Krugersdorp by Mbelo and two other *askaris* and taken to Vlakplaas for questioning about the activities of his brother, MK operative Odirile Maponya (MK Mainstay), who was suspected of involvement in the death of an SAP member, Warrant Officer Tswane.

TP 11

TRC Final Report

Page Number (Original) 234

Paragraph Numbers 278 to 292

Volume 2

Chapter 3

Subsection 31

Previous Subsection

Next Subsection

Abduction, interrogation and killing

278 This section deals with a different category of killings – where the primary purpose was to obtain information, and death followed, apparently in order to protect the information received. Victims in almost all of these cases were suspected of having links with underground military structures or with networks that provided support for such structures. The purpose of interrogation was to gather intelligence on issues such as modi operandi, guerrilla infiltration routes and possible planned operations. This information was considered vital, not only to enable countermeasures to be taken, but for the ongoing and effective penetration of such structures by agents or askaris.

279 Amnesty applicants suggested that such intelligence had value only for as long as the 'enemy' was not aware that the information had been uncovered. Detainees – even those kept in solitary confinement – sometimes managed to smuggle out information about their detention and interrogation. Moreover, in the nature of clandestine work, once a detention was known about, old routines, codes and meeting places would be regarded as compromised and therefore changed. It was for this reason, the Security Branch argued, that it was preferable to abduct rather than officially detain, and to kill the abductee once information had been extracted. In some instances, the Security Branch attempted to 'turn' (recruit) the individual; where this proved unsuccessful, killing was regarded as necessary.

280 This modus operandi allowed for greater freedom to torture without fear of consequences. It should also be noted, as is evident in some of the cases below, that confessions and admissions were sometimes obtained only after brutal torture. The possibility that a number of people so targeted had no real link to underground military structures cannot be excluded.

Gcinisizwe Kondile

281 Eastern Cape political activist Gcinisizwe Kondile [EC0021/96STK] was killed by the security police in August 1981. Mr Kondile was first detained by the security police in 1980 while a student at Fort Hare University. After his release, he fled to Lesotho where he continued to be politically active. In June 1981, he was apprehended by the security police after entering the country in a car owned by Chris Hani.

TP 7

282 Amnesty applicants have presented two different versions of the circumstances leading to Kondile's death. Captain Dirk Coetzee [AM0063196] says that Kondile was transferred to Jeffrey's Bay in the eastern Cape where he was held for two months and severely tortured. So serious was his condition that the police feared he would die. Deciding they could not afford "another Biko", the upper management of the Security Branch decided he should be killed and all evidence of his existence destroyed. This version is confirmed by a Sergeant Danster who guarded Kondile at the Jeffrey's Bay police station. Danster referred to the use of torture, including 'tubing', electric shock and assault.

283 To cover their tracks, the security police officially released Kondile from custody on 11 August 1981 and then immediately re-arrested and held him secretly in the 'white' quarters of the Jeffrey's Bay police station.

284 C section head, Brigadier W Schoon, ordered Dirk Coetzee to meet with Major Archie Flemington from the local security police office at Komatipoort. The Port Elizabeth Security Branch arrived at Komatipoort with Kondile, who was then taken by a group of security police members – including Coetzee, Flemington, Nick Janse van Rensburg, Sergeant JG Raath [AM4397/96], Captain Paul van Dyk and two others from Ermelo – to an isolated spot near Komatipoort. Here he was drugged with "knock-out" drops acquired from General Lothar Neethling's police forensic laboratory, shot and cremated over a log fire for seven hours until all traces of his body had been destroyed. During the cremation, the group drank and cooked meat at a separate 'braai'. Coetzee related:

The burning of a body to ashes takes about seven hours, and whilst that happened we were drinking and even having a braai next to the fire. Now, I don't say that to show our braveness, I just tell it to the Commission to show our callousness and to what extremes we have gone in those days … the chunks of meat, and especially the buttocks and the upper part of the legs, had to be turned frequently during the night to make sure that everything burnt to ashes. And the next morning, after raking through the rubble to make sure that there were no pieces of meat or bone left at all, we departed and all went our own way.

285 Other amnesty applicants disputed this version of events. The Port Elizabeth Security Branch applicants stated that Kondile was transferred to their region after interrogation in the Orange Free State. After two weeks of interrogation with assault at the Jeffrey's Bay police station, Kondile agreed to act as an informer. However, Major Du Plessis [AM4384/96] alleges that he then personally discovered a concealed note from Kondile to the ANC. Du Plessis realised that Kondile had deceived him. Kondile had been briefed about Du Plessis's informer network (including a person in the UNHCR who provided photographs of refugee applicants to the police) which would now be compromised. After discussions with his immediate superior Nick Janse van Rensburg and the Divisional Commander, then Colonel Gerrit Erasmus [AM4134/96], it was decided that Kondile should be killed.

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TPN

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291 A number of other members of the unit involved in her abduction also applied for amnesty. At least one of these, however, disputes the Coetzee/Pretorius version. According to this applicant, **Simelane** continued to be tortured at the farm in Thabazimbi. After about two months, she was put in the boot of the car, handcuffed and in leg-irons, and driven away. This was the last that black members of the unit saw of her. Her physical state at the time was such that returning her to Swaziland would not have been possible. "She was very beautiful. But by the time they were finished with her, she could not be recognised."

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TP

TRC Final Report

Page Number (Original) 224

Paragraph Numbers 194 to 208

Volume 6

Section 3

Chapter 1

Subsection 19

Previous Subsection Next Subsection

Soweto Security Branch

194. A key component of the Soweto Security Branch was the SIU[75], which ran a number of covert agents and sources both inside and outside the country.

195. Twenty-two members of the Soweto Security Branch, including three divisional commanders and at least eleven members of the SIU, applied for amnesty for twenty-nine incidents committed between 1980 and 1992. These incidents involved at least twenty-two killings, two abductions/torture and approximately fourteen sabotage and/or credibility operations.

196. Four of the killings resulted from Soweto Security Branch operations. Soweto Security Branch members either provided intelligence for or participated directly in the other operations.

197. Most of the incidents applied for were so-called 'credibility operations', conducted by members of the SIU in order to build up the credibility of sources or to facilitate infiltration by deep-cover agents. These operations covered a range of activities such as the establishment of arms caches, the sabotage of offices and installations and attacks on homes and hostels.

74 With regard to target identification for the Gaborone Raid, applicants were granted amnesty for the targets in respect of which they specifically remembered supplying information. 75 Soweto Intelligence Unit.

198. Amnesty was granted in seventy-six instances, refused in four, conditionally granted in five and granted/refused in three. No decision was handed down in one instance, in which the applicant had died.

199. During the hearing concerning the abduction of Ms **Nokuthula Simelane**, aka Sibongile, a 23-year-old University of Swaziland student and member of MK's Transvaal Urban Machinery, sharp differences emerged between the various applicants as black members of the SIU challenged the version of white applicants.

TP 9

200. The Amnesty Committee heard evidence that, in the early 1980s, two deep cover agents of the SIU, RS269 (Sergeant Langa, aka Frank or Big) and RS243 (Sergeant 'Terror' Mkhonza, aka Scotch) infiltrated MK's Transvaal machinery with the help of an informer, SWT66 (Nompumelelo).

201. Early in September 1983, Mkhonza was instructed by his MK contact to meet Sibongile (Ms **Nokuthula Simelane**) at the Carlton Centre, Johannesburg. After the meeting, Mkhonza led her to the basement parking area where they were seized by waiting SIU members and bundled into the boot of a car. Ms **Simelane** was, according to all applicants, severely assaulted and brutally beaten.

202. She was subsequently transferred to a farm near Northam in the current North West. Here she was held in a room in an outside building for a period of approximately four to five weeks. Lieutenant Willem 'Timol' Coetzee, Warrant Officer Anton Pretorius and Sergeant Frederick Barnard Mong were tasked with interrogating and recruiting Ms **Simelane**. When she was not being interrogated , Ms **Simelane** was under constant guard by black members of the SIU. At night, she was cuffed and chained to her bed with leg irons. The black members, who were responsible for guarding her, slept either in or outside her room .

203. Black SIU applicants, Constables Veyi and Selamolela, testified that she was repeatedly and brutally tortured throughout her stay on the farm, finally becoming ' unrecognisable'. The white applicants denied this vehemently.

204. According to their evidence, the victim had been severely assaulted during the first week and had, on more than one occasion, been put in a dam after soiling herself while being tortured. However, they alleged that, after the first week, she agreed to work for them and that they spent the remaining weeks of her 'detention' preparing her for her work as an agent. Thereafter, they claimed that they returned her to Swaziland with the help of Sergeants Mothiba and Langa, both since deceased. After that they lost contact with her.

205. This testimony was challenged by Veyi and Selamolela, who testified that the victim's physical state made it extremely unlikely that she could have been in a fit state to be returned to Swaziland. Constable Veyi testified that he had last seen Ms **Simelane** bound and in the boot of Lieutenant Coetzee's car and that Sergeant Mothiba had told him that she had been killed.

206. In refusing amnesty to applicants Coetzee, Pretorius and Mong, the Amnesty Committee said of Ms **Simelane**:

During her detention for a period of approximately five weeks, she was continuously and very seriously assaulted by the group of Security Police, under the command of Coetzee, who held her captive. All attempts to extract inform a t i o n c o n cerning MK or its operations as well as attempts to recruit her to become a Security Police inform e r, were fruitless. Due to the prolonged and sustained assaults, Ms **Simelane**'s physical condition deteriorated to the extent that she was hardly recognisable and could barely walk. Ms **Simelane** was last seen w h e re she was lying with her hands and feet cuffed in the boot of Coetzee's vehicle. She never re turned to her familiar environment in Swaziland ... and has disappeared since. It is not necessary for the purpose of this matter to make a definitive finding on the eventual fate of Ms **Simelane**. [AC/2001/185.]

TP 9

TN 26

TRC Final Report

377

Page Number (Original) 623

Paragraph Numbers 50 to 71

Volume 6

Section 5

Chapter 2

Subsection 5

Previous Subsection

Next Subsection

Abductions

50. The Commission received fifty-seven amnesty applications for eighty incidents of abduction. The fifty-seven applications included the abduction of thirty-five Umkhonto we Sizwe (MK) operatives, eighteen of whom were abducted inside the country and seventeen outside South Africa.

51. Of the fifty-seven abductions, more than twenty-seven resulted in the death of the victim. This raises the possibility that targeted assassinations may have been the perpetrators' intention from the outset.

52. The Commission also received more than 1500 statements dealing with disappearances, including enforced disappearances.

53. The Commission stated in its Final Report that the former state's primary purpose in carrying out abductions was to obtain information. Abductees were often killed in a bid to protect the information that had been received.

54. The victims of these abductions either belonged to MK or supported the movement internally. Amnesty applicants testified that they found it preferable to abduct rather than detain officially. Once the information was obtained, the abducted person would be killed. In many other instances, applicants testified that they attempted to 'turn' or 'recruit' individuals into working for the state. The Commission also learnt that, where the attempt to turn the abductee failed, killing the individual became necessary – although many amnesty applicants denied this. However, in terms of international law, families merely have to prove that the abductee was last seen alive in the hands of an agent of the state for the obligation or onus to explain the deceased's whereabouts to fall on the state.

55. The Commission also stated in its Final Report that this modus operandi allowed for greater freedom to torture without fear of consequences. The testimony of many askaris at amnesty hearings was at odds with that of white members in their particular units. In their testimony, askaris highlighted the brutality of the torture and abuse that many abductees were

TP 17

subjected to. The cases of **Nokuthula Simelane**[32] and Moses Morodu[33] offer examples of this.

56. It is also possible that operatives lost all sense of reality when dealing with abductees and became totally enmeshed in the brutality of the moment. Had the abductee been released or the body found, the heinous behaviour of the abductors and torturers would have been revealed. This was possibly an even more powerful motive to conceal the truth.

57. In its findings on extrajudicial killings, the Commission noted that a particular pattern was established: that is, political opponents were abducted, interrogated and then killed. In evidence that emerged through the amnesty process, another pattern emerged: that of abduction followed by torture or undue pressure to inform and/or become an informer or askaris. Those who did not succumb in this way were killed. Information was then leaked to MK that those who had been captured had been turned and had become askaris. The most devastating effect of this practice was that those who were abducted did not come home and that families had to live with the political stigma that their loved ones were perceived to be traitors.

58. These abductions must be distinguished from those incidents where the intention of the perpetrators at the outset was to assassinate political opponents. In such operations, the abduction itself was merely a means to capturing the person, and the interrogation and torture that followed were secondary to the intention to kill.

59. Thus the cases of Griffiths Mxenge, Topsy Madaka and Siphiwe Mthimkulu, the 'Pebco Three', the 'Cradock Four' and the Ribeiros should be classified as political assassinations rather than abductions. Here the intention of the perpetrators was to eliminate the individuals concerned and to silence them forever.

60. In the KwaNdebele group of cases, abduction was followed by interrogation, torture and beatings and the abductee was then returned. The intention of these abductions was to intimidate and silence opposition.

61. The principle of customary international law is to hold the state responsible in instances such as these on a strict liability basis. Thus, the former state must be held strictly responsible for the abductions, disappearances and deaths of the abductees. The state is held responsible even in those instances where the perpetrator may not have intended that the final consequence of the abduction would be the death of the abductee. The intention of the perpetrator is irrelevant; the fact of the matter is that death ensued.

62. In those instances where the purpose of the abduction was killing, the state incurs responsibility for both the killing and the abduction. In terms of the accepted principle, even where the perpetrator responsible for the abduction or the disappearance has not been identified, it simply needs to be established that forced disappearance was committed by a police agent. In such an instance, the state is held responsible for accounting for the disappearance.

63. International human rights law places the burden on the state to account for the actions of its agents. Thus it is not sufficient for the state to allege (as it did in the cases of **Nokuthula Simelane**[34] and the four MK members abducted from Lesotho (namely Nomasonto Mashiya,

TP 17

Joyce Keokanyetswe 'Betty' Boom, Tax Sejamane and Mbulelo Ngono)[35] that they recruited or turned these agents and that were returned to exile in order to infiltrate the movement.

64. In all of these cases, using the strict liability test, it is likely that the state would be held criminally liable for their disappearances. In the case of *Kurt v Turkey*, the European court of human rights held that, once the applicant was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.

65. In terms of international law and a state's responsibility to guarantee human rights, a state can be held responsible for failing to prevent or respond to a violation. As early as the 1980s, the former state was aware of the fact that disappearances were taking place. Allegations were mounting against the security forces as being responsible.

66. The question is: what did the state do to investigate the allegations being made or what action did the state take against those alleged to be involved in such practices?

67. Although it has been shown that agents in the employ of the state were responsible for the abductions of many political activists, that a pattern had been established and that this had become part of an orchestrated grand plan, the leadership of the former state continued to deny its responsibility for these gross human rights violations. Indeed, in the light of the above, Mr de Klerk might want to reconsider his theory of 'bad apples and mavericks'[36]. There is no doubt that the apartheid state must be held responsible for the actions and deeds of its agents and that the state's failure to investigate or to take action created a climate of impunity and criminality in the security forces .

68. A key factor when deciding whether a state is responsible is whether the violation has taken place with the support or tolerance of the authority or the state has allowed the violation to go unpunished. In this instance, the state allowed the death squads to act with impunity and abduct, interrogate, torture and kill. Nothing was done to stop them, even when the disappearances became public.

69. Instead the state continued to claim innocence and chose rather to sully the reputations of those who had been abducted and killed. As a result, the minds and memories of family members and loved ones have been haunted by uncertainty, suspicion and mistrust as they continue to wonder whether the loved one was a spy and why the loved one has not returned home.

70. The amnesty cases and the evidence of the victims before the Commission have been sufficient to establish a pattern and an assumption that these victims must have died at the hands of the forces that abducted them. In this regard , efforts must be made to restore their dignity and true reputations as patriots who paid the price and were killed in the violence of the past.

71. The law must also take its course in dealing with those who came forward with half-truths and lies. Efforts must be made to integrate and ease the lot of those who became askaris. In most instances, their testimony was at considerable variance with that of their white colleagues and superiors. We may never know what pressure was placed on them to 'turn'. What we do know is that, in those instances where they did not succumb or refused to do so, they were killed horribly. The cases of **Simelane** and Masiya are examples of this.

TP 4

32 Amnesty hearings, Pretoria , 28–30 June 1999 and 29–30 May 2000; AC/2001/185. 33 Amnesty hearing, 26 October 1999; AC/2000/010. 34 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000. See also AC/2001/185. 35 See amnesty hearings, Johannesburg , 10–13 October 2000 and Bloemfontein 13–15 November 2000. 36 Evidence by Mr FW de Klerk on behalf of the National Party to the TRC, 14 May 1997.

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SIMAYILE, Code (46), was detained in Sasolburg, OFS, on 11 July 1986 and held for six months under emergency regulations. In detention, he was severely assaulted and tortured by members of the SAP. Mr Simayile had been involved in a protracted strike at Karbochem in Sasolburg, and police accused him of politicising a labour dispute.

SIMAYILE, David Nkosivumile (25), an ANC supporter, was shot and fatally wounded in the chest by KwaZulu Police members and Inkatha supporters in Durban North on 9 February 1986, allegedly in a targeted killing.

SIMBINE, Jeronimo V Icente (22), a Mozambican citizen, was abducted from his home in Namaacha, Mozambique, by SADF Special Forces members on 23 August 1982. He was taken to Phalaborwa army base where, after severe interrogation and torture, he agreed to become a member of the SADF. Prior to this abduction, the SADF had raided and bombed Namaacha because they suspected the village of housing ANC members in transit. During this raid, two Mozambican and one Portugese citizen were killed. Mr Simbine escaped after three years and, upon his return home, was detained by the Mozambican authorities for six months.

SIMELA, Namkoni Selinah (47), had her home burnt down on 16 June 1986 in Mathyzensloop, KwaNdebele, during a night vigil for 'comrades' killed by Imbokodo vigilantes and KwaNdebele Defence Force members. Mathyzensloop residents reportedly fled to the hills to escape the violence.

SIMELANE Sbusiso Carol (19), an ANC supporter, was stabbed and axed to death by unidentified people at a taxi rank in Pietermaritzburg during ongoing conflict between ANC and IFP supporters on 3 February 1993. Three others were killed; he was the only survivor.

SIMELANE, Alfison Msuvukela (42), an IFP supporter, was shot dead in an attack on his home in Ondondolo, KwaZulu, near Empangeni, Natal, on 10 July 1992, in ongoing conflict between ANC and IFP supporters. The attackers reportedly wanted guns, which they believed the family had received from Ulundi. His wife was severely beaten during the attack.

SIMELANE, Bheki (19), was shot dead in Katlehong, Tvl, on 2 February 1992 during conflict between hostel-dwellers and residents. Hostel-dwellers were allegedly coerced into IFP membership, and relations between residents and hostel-dwellers became increasingly strained.

SIMELANE, Bhekuyise Simon (29), an ANC supporter, was stoned and stabbed to death by IFP supporters in Ezakheni, KwaZulu, near Ladysmith, Natal, on 13 March 1994, in the run-up to the April 1994 elections.

SIMELANE, Buti Peter , was stabbed and shot to death by IFP supporters in Dube, Soweto, Johannesburg, on 8 September 1991. The perpetrators were returning from a funeral at the Jabulani stadium in Soweto.

SIMELANE, Eunice (53), an IFP supporter, was severely beaten in an attack on her home in Ondondolo, KwaZulu, near Empangeni, Natal, on 10 July 1992, in ongoing conflict between the ANC and IFP. The attackers reportedly wanted guns, which they believed the family had received from Ulundi. Her husband was killed in the attack.

SIMELANE, Gcinwayinkosi Petrus (27), an ANC supporter, was tortured, stabbed and shot dead by members of an ANC-aligned self-defence unit on 30 August 1993 in Katlehong, Tvl, because he refused to patrol with them.

SIMELANE, Gwete Enock (52), was shot and severely injured while travelling in a taxi in Meadowlands, Soweto, Johannesburg, on 3 June 1992 during conflict between IFP-aligned Mzimhlophe hostel-dwellers and residents.

SIMELANE, Jabulani Korn (42), lost his house in an arson attack in Ondondolo, KwaZulu, near Empangeni, Natal, on 6 August 1993 in continuing conflict between IFP and ANC supporters in the area.

SIMELANE, Joe Johannes (23), was shot and arrested by members of the SAP in May 1985 in Tsakane, Brakpan, Tvl, after he attended the funeral of someone killed by hostel-dwellers. A group of mourners attempted to storm the hostel and police intervened.

SIMELANE, Johannes Meleni (23), an ANC supporter, died after he was stabbed and shot by members of the IFP-aligned Khumalo gang on 4 August 1993 in Tokoza, Alberton, Tvl.

SIMELANE, Johannes Zwelibanzi (24), a member of the SAP, was injured in a limpet mine explosion at the Newcastle magistrate's court, Natal, on 23 November 1986. Two MK operatives were granted amnesty (AC/2001/139).

SIMELANE, Linah Silulezi (24), had her home damaged in an arson attack by Imbokodo vigilantes in Mathyzensloop, KwaNdebele, on 27 June 1986 during violent conflict over KwaNdebele independence.

SIMELANE, Miles Simon , an IFP supporter, was killed by members of an ANC self-defence unit (SDU) in Katlehong, Tvl, on 7 December 1993. Eleven people were killed, nine execution-style, during conflict between the local ANCYL and SDU members. Thirteen SDU members were refused amnesty (AC/1998/0013).

SIMELANE, Mpembe Amos (46), an IFP supporter, had his home in Inanda, near KwaMashu, Durban, destroyed in an arson attack by ANC supporters on 19 June 1991.

SIMELANE, Nokuthula Aurelia (aka 'Sibongile') (23), a courier for MK from Bethal, Tvl, was abducted from the Carlton Centre in Johannesburg by members of the Soweto Security Branch on 8 September 1983 and held initially at the Norwood Police flats. She was later taken to a farm near Thabazimbi, Tvl, and held for several weeks, during which time she was severely tortured. She subsequently disappeared and is presumed dead. Eight Soweto Security Branch operatives applied for amnesty for the detention and torture only. Three applications were refused and five were granted (AC/2001/185).

SIMELANE, Nonozana Anna (53), an ANC supporter, had her house burnt down by IFP supporters in Sonkombo, Ndwedwe, KwaZulu, near Durban, on 16 March 1994. See Sonkombo arson attacks.

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MINISTRY OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
CAPE TOWN
2003 -03- 25
KAAPSTAD
MINISTERIE VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING

PROCLAMATION
BY THE
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

No. ....., 2003

NATIONAL PROSECUTING AUTHORITY ACT, 1998

Determination of Powers, Duties and Functions of a Special Director of Public Prosecutions

Under section 13(1)(c) of the National Prosecuting Authority Act, 1998(Act No. 32 of 1998), I, hereby confer, impose and assign the following powers, duties and functions on or to Advocate ANTON ROSSOUW ACKERMAN SC, a Special Director of Public Prosecutions, appointed in terms of the said provisions:

To exercise the powers, carry out the duties and perform the functions necessary, within the Office of the National Director of Public Prosecutions as directed by the National Director and—

(a) in particular, to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982(Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director; and

(b) generally, giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.

Given under my Hand and the Seal of the Republic of South Africa at PRETORIA on this 24th day of MARCH Two Thousand and Three.

T. M. MBEKI
President

P. M. MADUNA
Minister of the Cabinet

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NW

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TN 29

383

29

PRIORITY CRIMES LITIGATION UNIT (PCLU)

1. INTRODUCTION

The Priority Crimes Litigation Unit (PCLU) was created by Presidential proclamation[1] on 23 March 2003 and is located in the office of the National Director of Public Prosecutions. This unit has no investigative capacity and is reliant on SAPS and the DSO in this regard.

Mandate:
To manage and direct investigations and prosecutions relating to the following matters:

- ***Criminal prosecutions arising from the Rome Statute***; [Implementation of the Rome Statute of the International Criminal Court Act, Act No 27 0f 2002] This relates to the serious crimes of:
  - ***a.*** Genocide,
  - ***b.*** Crimes against humanity and
  - ***c.*** War crimes.

- ***Crimes against the State, including national and international terrorism***; [Inter alia prosecutions under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No 33 of 2004 - the POCDATARA Act]

- Contraventions of:
  - ***The Regulation of Foreign Military Assistance Act***; [Act No 15 of 1998]
  - ***Non-Proliferation of Weapons of Mass Destruction*** Act (nuclear, chemical and biological warfare proliferation); [Act No 87 of 1993]
  - ***The National Conventional Arms Control Act***; [Act No 41 of 2002]
  - **The Nuclear Energy Act** [Act No 46 of 1999]
  - **The Intelligence Services Act** [Act No 65 of 2002]

- Matters emanating from the **TRC process**:
  - Prosecutions
  - Missing persons

- Any other priority crimes as determined by the National Director.

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[1] Cf attached copy of Presidential Mandate.
http://www.npa.gov.za/UploadedFiles/About PCLU signedoff.doc

TP 7

2. FOCUS AREAS

The unit's focus areas are:

(i) NUCLEAR NON-PROLIFERATION

(ii) NON-PROLIFERATION OF CHEMICAL AND BIOLOGICAL WARFARE AGENTS

The PCLU instituted a prosecution for this category of offence. The matter was finalized with a plea of guilty and a fine of R100 000 was imposed on the corporate entity prosecuted. Further dockets relating to controlled chemicals of Crest and Amla were decided by this Unit.

(iii) FOREIGN MILITARY ASSISTANCE

- In response to the arrest of South African citizens in Zimbabwe and Equatorial Guinea, the PCLU managed and directed an investigation into the involvement of other role players. This led to the arrest of three South African citizens and a UK citizen (Mark Thatcher). All four pleaded guilty in terms of section 105A of the Criminal Procedure Act.

- Following the release of the South African citizens detained in Zimbabwe in connection with the *coup* in Equatorial Guinea, eleven of them were arrested in South Africa and charged with contravention of section 3(b) of the Regulation of Foreign Military Assistance Act, No 15 of 1988. Two of the said accused pleaded guilty and were sentenced. The trial of the remaining nine accused is due to proceed in February 2007. It is anticipated that the outstanding prosecutions relating to the Equatorial Guinea attempted *coup d'etat* will be finalized in 2007.

- A matter of concern to Government was the participation of South African citizens acting as security guards in the conflict in Iraq. A number of enquiries conducted by SAPS were evaluated by the PCLU, but it was found that such conduct did not fall within the ambit of the existing FMA legislation. The PCLU prepared a detailed opinion recommending an amendment of the Act, which was submitted to all relevant role players.

TP 9

- Government accepted the need to amend the Foreign Military Assistance legislation in order to take effective action in Iraq. A revised Act was placed before the Defence Portfolio Committee. However, the Minister of Defence recognized that the Act still contained several shortcomings.

- It is hoped that the revised legislation will shortly come into effect, since the PCLU would like to address Government's concerns relating to the number of South Africans performing security services in Iraq.

(iv) NATIONAL AND INTERNATIONAL TERRORISM

The PCLU closely interacted with State departments having an interest in such affairs. In several matters, the PCLU furnished opinions to SAPS, NIA and DFA. Although no prosecutions arose from such interventions, the PCLU's involvement meant that the matters were properly attended to.

(v) STATUTE OF ROME

A number of enquiries were carried out at the request of the International Criminal Court and a complaint relating to the seizure of farms in Zimbabwe was investigated. No prosecutions arising from the Statute of Rome were instituted.

(vi) CONVENTIONAL ARMS

- After a lengthy trial in the Regional Court, Germiston, a former employee of an arms manufacturer was acquitted on charges of supplying his company's technology to a foreign state's military structure. The charges related to highly technical contraventions of the Armscor Act, the Protection of Information Act, the Copyright Act and theft. The court found that the instrumentation that was built, did not comply with a specific military standard (as required by the Act) and that the accused did not have the required knowledge of unlawfulness relating to these specialized legislation.

- A number of complex and intricate dockets pertaining to alleged irregularities committed at Armscor and the Directorate of Conventional Arms Control Committee were submitted to the unit for decision. A number of these matters are under investigation.

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(vii) MATTERS IMPACTING ON STATE SECURITY

- The PCLU offers opinions and other advice to various State departments on matters impacting on State security and other sensitive matters. The PCLU also addressed a standing committee of the United Nations' Security Council as far as the country's capacity to prosecute international terrorism.

(viii) TRC PROSECUTIONS

- The PCLU conducted an audit of around 300 cases which had been submitted by the DSO, DPP's and SAPS in 1999 in terms of a direction by the then NDPP. 167 of these cases were finalized on the basis that no prosecutions could be instituted.

- As a result of various representations received, the PCLU has identified five cases, which potentially can be prosecuted, as well as approximately 10 other cases warranting investigation. The following steps must be taken:

  (i) The representatives of the State departments which are required to assist the PCLU in the execution of its duties must be identified and involve themselves in the process;

  (ii) The issue of the investigations must be resolved with SAPS and the DSO and thereafter the necessary investigations completed;

  (iii) The close involvement of the process by Justice is necessary in cases where prosecutions are instituted where amnesty was refused, since the applicants may take the validity of the refusal to grant amnesty on review to the High Court;

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3. MISSING PERSONS

Due to the fact that the President had in 2003 directed the NDPP to give attention to the cases of some 500 persons who had been reported missing by the TRC, a small Task Team was established to evaluate the TRC report and to identify cases for investigation. Approximately 150 cases were identified for immediate investigation.

➢ Investigations and Exhumations

Investigations commenced into 150 missing persons that were identified as priority cases in an audit, with the aim of obtaining (a) information as to the fate of the missing person and (b) locating, exhuming and identifying human remains where possible.

Thus far the burial sites of thirty-two persons were located and these human remains were exhumed. Forensic analysis was conducted and identities confirmed in twelve cases. The remaining twenty are still undergoing DNA testing.

➢ Handover of remains and reburials

Five identified remains were handed to the affected families at a special national ceremony in July 2005 at Freedom Park. Reburials have taken place in all of these cases, with these families receiving assistance from the Department of Justice and Constitutional Development towards reburial costs. Further handovers will take place during 2006.

➢ Memorialisation

A key component of the work on Missing Persons is ensuring the necessary connection with existing structures engaged in memorialisation processes. Liaison with structures such as the South African Heritage Resource Agency (SAHRA), Freedom Park, and the SANDF was established to address matters such as tombstones for those exhumed and reburied. The outcome of Missing Persons investigations will be closely coordinated with other related bodies working on memorialisation, monuments and tombstones.

➢ International expertise

A partnership was built with the Argentine Forensic Anthropology Team (EAAF), the world leaders in this work, in order to ensure that missing persons' work in South Africa is in line with best international practices as developed by *inter alia* the UN and International Committee of the Red Cross (ICRC) in such human rights cases.

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- Local capacity building

  Local South African experts and several post-graduate students in the fields of archaeology, anthropology and anatomy were also drawn into the work on a collaborative basis with the Argentine team, building local capacity.

- DNA analysis

  A partnership was established with the Human Identification Laboratory (HID) at the University of the Western Cape (UWC) for DNA analysis work. This lab is developing specialization in "ancient DNA" work, which works with difficult cases of old and damaged bone material, as is the norm in missing persons' exhumations. The development of the capacity to conduct mitochondrial DNA tests (as opposed to only nuclear DNA tests) will be an important contribution to capacity building in Africa.

- Partnerships with civil society

  The Missing Persons Task Team developed excellent working relationships with civil society groups and NGO's working in the field of missing persons and disappearances, including the Center for the Study of Violence and Reconciliation (CSVR) and Khulumani Support Group (KSG).

- Namibia

  After the November 2005 discoveries of mass graves in Namibia, the Namibian President requested the assistance of South African expertise. The Missing Persons Task Team sent a delegation to review the situation and make recommendations accordingly. The Namibian authorities warmly received the delegation's report and recommendations. The report included the offer of assistance to Namibia in the form of establishing a national co-ordination structure, as well as research, investigation and DNA analysis support. As a key role player in the past Namibian conflict, South Africa has a particular historical responsibility in this regard.

  Assistance to the Namibian authorities will form a key component of the work of the Missing Persons Task Team in future. This will take the form of research, investigation and co-ordination assistance, pending the approval of the relevant South African government structures.

- Cases outside the South African borders

  While thus far investigations and exhumations have focused on cases inside South Africa's borders, groundwork will be laid for the examining of cases of South African persons missing outside the countries borders.

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- Integration with the new TRC Unit established in the Department of Justice and Constitutional Development

  As these missing persons investigations are the result of the TRC's recommendations, the Missing Persons' Task Team serves on the Steering committee of this new TRC Unit.

- Co-operation with other Government Departments

  Missing Persons investigations require the co-operation of other Departments such as Home Affairs, Foreign Affairs and Health. Protocols with these Departments will be required via the Minister of Justice and Constitutional Development. In particular, the initial collaboration with certain SAPS investigations will be strengthened and formalized.

The PCLU strives to maintain a high standard of efficiency in dealing with complex matters emanating from its mandate and which impact on the Rome Statute and State security.

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TN 30

390

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

   (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

   (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

   (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

   (b) The constitutional right to life.

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8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

9. CONCLUSION

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

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(c) The non-prescriptivity of the crime of murder.

(d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

(e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See ***Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC***).

(f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See ***The State v Wouter Basson CCT 30/03.)***.

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

TP 67

trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

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B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Service.

   (c) The Department of Justice & Constitutional Development.

   (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

TP 07

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

TP 07

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

   (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

   (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

      (i) The motive of the person who committed the act, commission or offence.

      (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

      (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

      (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

         (aa) for personal gain; or

         (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

TP 97

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

TP 17

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398

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LEGAL RESOURCES CENTRE

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31

Your Ref:

Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291; and
By hand

31 July 2013

Dear Advocate Nomgcobo Jiba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We act for Thembisile Phumelele Nkadimeng, the sister of the late Nokuthula Aurelia Simelane (Simelane), who was kidnapped and tortured by the former Security Police of the South African Police in 1983 and disappeared while in their hands.

2. We refer to the earlier correspondence in this matter between our client and your office. We also refer to the various communications and meetings held with your Advocate Chris Macadam from the Priority Crimes Litigation Unit (PCLU) earlier this year and in previous years. We attach for your easy reference a copy of our client's letter dated 29 January 2013 addressed to your colleague, Dr Silas Ramaite, the then Acting National Director of Public Prosecutions. This letter sets out the background to the case of our client's late sister.

3. Our client and her family have been seeking justice, truth and accountability for nearly 30 years. September this year will be the 30th anniversary of the disappearance of Simelane. It has been some 17 years since an investigation docket was opened into her disappearance. Simelane's case was one of the cases referred to National Prosecuting Authority (NPA) by the erstwhile Truth and Reconciliation Commission (TRC) in 2001 and was in turn referred to the PCLU

National Office: J Love (National Director), K Reinecke (Director: Finance)
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Johannesburg: N Fakir (Director), T Mbhense, Y van Leeve
Constitutional Litigation Unit: T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Ndidi, B Sibiya, W Wicomb

TP 17

in 2003. This matter has been in the hands of the NPA for 13 years and has been with the PCLU for more than 10 years.

4. Most of the responsible perpetrators have received amnesty for the kidnapping of Simelane, while some also received amnesty for her torture. The crimes of assault and assault GBH have prescribed in terms of section 18 of Act 51 of 1977. No explanation has been provided for the failure to charge those perpetrators who were denied amnesty for the brutal torture of Simelane. None of the perpetrators applied for amnesty for her murder and some did not even apply for her kidnapping, even though the evidence firmly implicates them. In terms of section 18 of the said Act the crimes of kidnapping and murder never prescribe.

5. As appears from the correspondence, my client has engaged in extensive and strenuous endeavours to persuade the authorities to take action over many years. Her pleas have fallen on deaf ears. Ultimately an undertaking was provided by your Adv Macadam to make a final decision on whether to prosecute or refer this matter to an inquest by no later than the end of May 2013. At the end of May no such decision was taken and Adv Macadam advised that he required more time to finalize his investigations. Towards the end of June the said Macadam indicated that he could provide no date on when the investigations would be completed.

6. Our client has understandably lost all faith in the ability and/ or willingness of the NPA to ever conclude its investigations. Our client is of the view that if the suspects in this matter could not be prosecuted, it should have been referred to a judicial inquest years ago, if not decades ago.

7. Should your Adv Macadam be of the view that there are still outstanding lines of investigation that are critical and necessary for purposes of making a decision whether to prosecute or refer to an inquest, and that such investigation cannot be completed within the month of August he is invited to advise us per return. Should no such advice be forthcoming we will assume that there is no further inquiry that cannot be concluded within the next four weeks for purposes

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of making the said decision and we will act in accordance with our instructions as set out below.

8. Our instructions are as follows:

8.1 The National Prosecuting Authority (NPA) has had more than sufficient time to complete its investigations;

8.2 There is more than sufficient evidence upon which to take a decision to prosecute or to refer to an inquest;

8.3 Even if there are unresolved lines of inquiry, the nature thereof are unlikely to be resolved by further investigation; and can in any event be concluded prior to the launch of a prosecution; or prior to, or during the course of an inquest;

8.4 The excessive delay in finalizing this investigation has severely prejudiced the right of my client and her family to justice and violated their constitutional right to human dignity; and

8.5 The prolonged delay constitutes disgraceful neglect by the criminal justice system; is deeply offensive to the rule of law and is contemptuous of the sacrifices made by Simelane in her struggle for the freedom of South Africa.

9. We are accordingly instructed to demand that you make a decision to charge the perpetrators responsible for Ms Simelane's kidnapping and / or murder and / or other offences by no later than close of business on Friday, 30 August 2013, alternatively; should you decline to prosecute anyone that you refer this matter to a formal judicial inquest. Should you decline or fail to make such a decision our instructions are to apply to the High Court for an order that the matter be referred to a judicial inquest.

TP

Yours sincerely

PP M Mowane.

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Bongumusa Sibiya

COPY TO: **Minister for Justice and Constitutional Development**
By fax: 012 406 4680

AND TO: Advocate Chris Macadam
Priority Crimes Litigation Unit
By fax: 012 845 6337; and
By email: cmacadam@npa.gov.za or hzwart@npa.gov.za

AND TO: Captain Masegela,
South African Police Service
By hand

TP

THEMBISILE PHUMELELE NKADIMENG

OFFICE OF THE NATIONAL DIRECTOR
2013 -01- 30
NATIONAL PROSECUTING AUTHORITY

698 Umhlanga Street
Wingate Park
PRETORIA 0181

Tel: 012 421 3500
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Cell: 082 553 6680
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29 January 2013

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

BY HAND

Fax: (012) 845 6337

Dear Dr Silas Ramaife,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I am the sister of Nokuthula Aurelia Simelane ("Nokuthula"). My identity number is 730210 0329 088. On behalf of my family, I seek the holding of a formal inquest in terms of Act 58 of 1959 in respect of the circumstances surrounding the murder and other offences perpetrated by members of the former South African Police Security Branch against Nokuthula.

Background

Nokuthula was the first child of Ernestina and the late Matthews Simelane. She was a member of Umkhonto we Sizwe (MK), the military wing of the African National Congress (ANC). My sister was a student at the University of Swaziland in the early 1980s. During this time, she acted as a go-between for the ANC and exiled leaders in

TPN

Swaziland. In September 1983 shortly after completing her university studies, and whilst on an MK mission to South Africa, she was kidnapped by the Security Branch from the Carlton Centre in Johannesburg. She was then brutally tortured over a period of several weeks and then disappeared.

Most of the policemen who kidnapped and tortured her and then caused her disappearance applied to the TRC for amnesty. They received amnesty for her kidnapping even though they were found to have been untruthful about their treatment of my sister.[1] The senior officers were denied amnesty for her vicious assault. None of the police officers applied for amnesty for the murder of Nokuthula. The senior police officers, in whose presence she was last seen, have refused to disclose the whereabouts of the remains of Nokuthula. To this day her remains have not been found for a burial with dignity.

My family and I have constantly searched for the truth about what happened to my sister. Shortly after her disappearance we spoke with ANC members. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her. We even made inquiries in neighbouring countries such as Botswana. Nokhuthula's disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.

All these efforts proved fruitless until early 1996 when the Sowetan newspaper published a story about Nokuthula's disappearance. The newspaper article appeared to finally spur the police into action. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. During July 1998 one of the senior officers was warned of his rights in terms of section 35 of the Constitution in respect of the "murder" of Nokuthula Simelane. He declined to make a statement.

[1] Decision (AC/2001/185) of the Amnesty Committee of the Truth and Reconciliation Commission.

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We raised her disappearance with the TRC. We have pleaded with prosecutors to take the case forward. I have even appointed private detectives. A documentary was made and screened on TV ("Betrayal", 2006). A statue was erected in her memory in Bethal. However we are still without answers.

We know from the TRC hearings that my sister suffered terribly at the hands of the South African security branch. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price. My father died in 2001, without knowing what happened to his daughter. I refuse to give up the search for the truth and justice.

Attempts to seek justice

I have met police officers as well as prosecutors from the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA) on a few occasions. On each occasion various excuses were provided as to why this case could not go forward.

Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised us that they were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977.

The PCLU also advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. They were not permitted to proceed until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. Together with the wives of the Cradock 4 I applied to court to have this policy set aside as unconstitutional. The Pretoria High Court struck down the policy in the case of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD

TP 07

case no 32709/07). In this matter the NPA had argued that the amended policy survived constitutional scrutiny as families could still bring private prosecutions in matters where the NDPP declined to prosecute. The court rejected this contention stating that it was the primary responsibility of the NPA to prosecute. The NPA was denied leave to appeal.

Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations.

During the course of 2006 one of my legal representatives presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokhuthula constituted the international crime of torture. Torture was, by 1983, a prohibited and unlawful act in terms of customary international law. South Africa was obliged to investigate and prosecute transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

My legal representatives also proposed that those suspects who did not apply for amnesty be prosecuted for kidnapping. I am advised that kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. Notwithstanding that there was no legal impediment to the preferring of such charges this proposal was rejected. My legal representatives also proposed that charges of defeating the ends of justice be brought against two of the senior officers for intimidating a junior officer into making a false statement and for attempting to coach a witness into making a false statement. The PCLU declined to pursue such charges.

Other excuses include an apparent lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is without merit. It is based on an erroneous reading of section 31 of the Promotion of

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National Unity and Reconciliation Act 34 of 1995 which, in any event, was not invoked in these particular proceedings before the TRC.

The need for a formal inquest

This matter is now urgent. Nearly 30 years has passed since Nokuthula's disappearance. Some 17 years has lapsed since the more recent police docket was opened. My mother is now elderly and sickly. Witnesses are also getting old. Some have died in suspicious circumstances.

The PCLU had previously suggested that an inquest be held in this matter. At that time my family and I preferred to see a prosecution taking place. Indeed we have been trying to launch a private prosecution, but we have been unable to raise sufficient funds to pay the security for costs, which we are advised will be a substantial sum of money. In the circumstances we now wish to have formal inquest held as speedily as possible.

If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution.

Last week I met with the investigating officer, Captain Masehela. He advised me that he submitted his report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act. I then spoke with Advocate Macadam who advised me to approach Madeleine Fullard, the Head of the Missing Persons Task Team at the National Prosecuting Authority of South Africa.

I met with Ms Fullard who advised that her Task Team had not been able to locate the remains of Nokuthula. She suggested that I approach the suspects and offer not to

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prosecute them if they disclose the location of Nokuthula's remains. I have discussed this suggestion with my family and we have decided not to do a deal with the suspects. The suspects have had more than ample time to come forward and disclose the whereabouts of the remains. They have chosen rather to cause me and my family untold pain and anguish by maintaining a wall of lies and deceit.

Please advise me per return whether the statements and relevant documents have been submitted to a magistrate or judicial officer in terms of section 5 of the Inquest Act. If not, please advise why not. If the documents have been submitted, please advise which magistrate or judicial officer is dealing with this matter. I am advised that I am entitled to be given reasonable notice of the holding of an inquest in terms of section 7 of the Inquest Act. I further request that steps be taken to ensure that the inquest is a formal public inquest which includes the giving of oral evidence. Given the sensitivities of this matter I request that this inquest be held in the High Court of South Africa.

Should you at any point choose to institute criminal proceedings in this matter I request that you appoint a special prosecutor to lead the prosecution, in consultation with me and my family.

I accordingly ask that you treat this request with great urgency and advise me at your earliest convenience.

Yours sincerely,

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit

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32

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Your Ref:
Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291; and
By hand

5 August 2013

Dear Advocate Nomgcobo Jiba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION; JV PLEIN: 1469/02/1996)

1. We refer to your Advocate Macadam's email dated 31 July 2013.

2. Our letter invited Advocate Macadam to identity lines of inquiry that he believed could not be completed during the next 4 weeks. In the abovementioned email, besides a general claim that he has further lines of inquiry he did not identify any specific outstanding investigations nor did he state that these are unlikely to be finalized during August. We again invite Advocate Macadam to indicate what the outstanding investigations are and why he is of the view that 4 weeks is insufficient. Should such an explanation be forthcoming our client is prepared to review her instructions.

3. We note that Advocate Macadam advised our Adv Palmer during April this year that a number of key aspects had been dealt with and that the remaining investigations would be "finalised within a reasonable period of time." We are of the respectful view that an end of August deadline, which amounts to an additional 4 months, constitutes more than a reasonable period of time. This is particularly so when seen in the light of the fact that the docket has been open for some 17 years and has been in the hands of the PCLU for more than 10 years.

National Office:
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MR Chetty (Director), ED Broster, FB Mahomed, AJ Richard
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, Y van Leeve
T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Ndidi, B Sibiya, W Wicomb

TPM

4. In respect of the alleged communications between Advocate Macadam and members of our team we note that this amounted to a meeting held on 18 February 2013, three or four subsequent telephone discussions and a few email exchanges. We are advised that virtually all these communications were initiated by our client's representatives. This is notwithstanding his undertaking made at the 18 February meeting to provide our client's representatives with regular updates following his weekly updates from the investigation team. We are further advised that in none of these communications was any indication provided; approximate or otherwise, as to when the investigations would be concluded.

5. Our client declined the proposal for a meeting towards the end of August, which she viewed as further delaying the finalizing of the investigation. In the circumstances if there are matters for Advocate Macadam to report we request that he does so now.

6. Our client was advised not to take any action when the agreed deadline for completing the investigation at the end of May expired. Two more months have now passed since that deadline. We are now providing Advocate Macadam with a further month to finalize his inquiries. We are instructed to advise that a general and vague claim as to why Advocate Macadam cannot complete his investigation by the end of August will not suffice. Unless he provide specifics, as referred to above, we must assume that there is no reasonable explanation for this untenable delay.

Yours sincerely

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Bongumusa Sibiya

COPY TO: Advocate Chris Macadam
Priority Crimes Litigation Unit
By fax: 012 845 6337; and
By email: cmacadam@npa.gov.za or hzwart@npa.gov.za

TP

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LEGAL RESOURCES CENTRE

Your Ref:
Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291; and
By hand

5 August 2013

Dear Advocate Nenqcabo Jiba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1483/07/1998)

1. We refer to your Advocate Macadam's email dated 31 July 2013.

2. Our letter invited Advocate Macadam to identify lines of inquiry that he believed could not be completed during the next 4 weeks. In the abovementioned email, besides a general claim that he has further lines of inquiry he did not identify any specific outstanding investigations nor did he state that these are unlikely to be finalised during August. We again invite Advocate Macadam to indicate what the outstanding investigations are and why he is of the view that 4 weeks is insufficient. Should such an explanation be forthcoming our client is prepared to review her instructions.

3. We note that Advocate Macadam advised our Adv Pahner during April this year that a number of key aspects had been dealt with and that the remaining investigations would be "finalised within a reasonable period of time." We are of the respectful view that an end of August deadline, which amounts to an additional 4 months, constitutes more than a reasonable period of time. This is particularly so when seen in the light of the fact that the docket has been open for some 17 years and has been in the hands of the PCLU for more than 10 years.

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Johannesburg Office

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PBO No. 930003292
NPO No. 023-004

LRC
Legal Resources Centre

10 July 2014

The National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By Fax: (012) 845-7291

Dear Mr. Nxasana,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to our letter to you dated 14 January 2014, which was copied to Adv. S K Abrahams. Acting Director of the Priority Crimes Litigation Unit (PCLU) and Adv C Macadam.

2. We have received no response to this letter. After a lapse of some 6 months we must assume that you have no response to the contents of the aforesaid letter and that you are not willing to meet with our client and her legal representatives.

3. Contrary to earlier promises made by the PCLU we have received no monthly reports on progress, or the lack thereof. In the circumstances we must assume that no progress has been made.

4. Our client has only been contacted once by the investigating officer during the past 6 months. During the month of May, Captain Masegela phoned our client and indicated that she would soon be advised of the DNA test results. She then expected to hear from him or the PCLU but has regrettably been kept in the dark.

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
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N Fakir (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon , W Wicomb

TP

5. In the light of the continued inaction in this matter we must assume that there is no real intention to make a decision to prosecute or not; and moreover that there is no intention to refer this case to an inquest.

6. Our client's rights are accordingly reserved.

Yours faithfully,

LEGAL RESOURCES CENTRE
Per: CARIEN VAN DER LINDE

CC TO: **Adv S K Abrahams, Acting Head: Priority Crimes Litigation Unit --** **Fax: (012) 845 6337;**

Adv. C Macadam, Priority Crimes Litigation Unit: **Fax: (012) 845 6337 cmacadam@npa.gov.za / hzwart@npa.gov.za**

National Office:
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* * * COMMUNICATION RESULT REPORT (11. JUL. 2014 15:09) * * *

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PBO No. 930003293
NPO No. 023-004

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10 July 2014

The National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By Fax: (012) 845-7291

Dear Mr. Nxasana,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/03/1996)

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S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Nudelman, HJ Smith
FB Mahomed (Acting Director), A Turpin
S Seshan (Director), C McConnachie
N Fakir (Director), T Hlahlane, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wesdon, W Wicomb

TP

Carien van der Linde

From:	Carien van der Linde <carien@lrc.org.za>
Sent:	11 July 2014 03:06 PM
To:	'cmacadam@npa.gov.za'; 'hzwart@npa.gov.za'
Subject:	KIDNAPPING TORNTURE DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE / PRIORITY INVESTIGATION JV PLEIN 1469/1996
Attachments:	LETTER TO NPA 10 JULY 2014.pdf

Herewith correspondence for your kind further attention.

Carien van der Linde
Attorney

| Tel: 011 836 9831 | Fax: 011 836 8680 | Email: carien@lrc.org.za |
| Mobile: 060 346 9577 |
Physical : 15th Floor	Bram Fischer Towers	20 Albert street	Marshalltown
Johannesburg	South Africa
Postal: P.O Box 9495	Johannesburg 2000
Website: www.lrc.org.za
Johannesburg	Cape Town	Durban	Grahamstown

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Johannesburg Office

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Tel: (011) 836 9831 • Fax: (011) 836 8680 • Website www.lrc.org.za
PBO No. 930003292
NPO No. 023-004

LRC
Legal Resources Centre

Your ref: JB/ CAS:1469/02/1996
Our ref:

10 July 2014

Lieutenant-General A Dramat
National Head: Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

Attention: Brigadier Kadwa
By Fax: (012) 846-4400
Email: kadwaE@saps.gov.za

Dear General Dramat,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to our letter to you dated 24 February 2014.

2. We have received no response to this letter. After a lapse of some 5 months we must assume that you have no response to the contents of the aforesaid letter. In the circumstances, we must also assume also that no real progress has been made in this investigation.

3. Our client has only been contacted once by the investigating officer during the past 6 months. During the month of May, Captain Masegela phoned our client and indicated that she would soon be advised of the DNA test results. She has since then been kept in the dark.

4. If the DNA tests are available please advise when the test results were supplied. Please provide us with a copy of the said results and advise us what the test results reveal.

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
FB Mahomed (Acting Director), A Turpin
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon , W Wicomb

TP 97

5. In the light of the continued inaction in this matter we must assume that there is no real intention to finalise this matter expeditiously, or at all.

6. Our client's rights are accordingly reserved.

Yours faithfully,

LEGAL RESOURCES CENTRE
Per: CARIEN VAN DER LINDE

CC TO: **Adv S K Abrahams, Acting Head: Priority Crimes Litigation Unit --** **Fax: (012) 845 6337;**
Adv. C Macadam, Priority Crimes Litigation Unit: **Fax: (012) 845 6337**
cmacadam@npa.gov.za / hzwart@npa.gov.za

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
FB Mahomed (Acting Director), A Turpin
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon , W Wicomb

TPA

* * * COMMUNICATION RESULT REPORT (11. JUL. 2014 14:43) * * *

FAX HEADER: LEGAL RESOURCES CENTRE

TRANSMITTED/STORED : 11. JUL. 2014 14:42

FILE	MODE	OPTION	ADDRESS	RESULT	PAGE
044	MEMORY TX		0128464400	OK	2/2

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

Johannesburg Office
15th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown • Johannesburg 2001 • South Africa
PO Box 9495 • Johannesburg 2000 • South Africa
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PBO No. 930003292
NPO No. 023-004

LRC

Your ref: JB/ CAS:1469/02/1996
Our ref:

10 July 2014

Lieutenant-General A Dramat
National Head: Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

Attention: Brigadier Kadwa
By Faxi (012) 846-4400
Email: kadwaE@saps.gov.za

Dear General Dramat,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to our letter to you dated 24 February 2014.

2. We have received no response to this letter. After a lapse of some 5 months we must assume that you have no response to the contents of the aforesaid letter. In the circumstances, we must also assume also that no real progress has been made in this investigation.

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4. If the DNA tests are available please advise when the test results were supplied. Please provide us with a copy of the said results and advise us what the test results reveal.

National Office
Cape Town
Durban
Grahamstown
Johannesburg
Constitutional Litigation Unit

J Love (National Director), K Reineke (Director: Finance), ED Broster
S Magardie (Director), A Andrews, S Kabamovitz, WH Kerfoot, C May, M Mudarikwa, HJ Smith
FS Mahomed (Acting Director), A Turpin
S Saphion (Director), C McCormack
H Fikir (Director), T Mbulawa, C Van Der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon , W Wicomb

TP 17

* * * COMMUNICATION RESULT REPORT (11. JUL. 2014 14:44) * * * 413

FAX HEADER: LEGAL RESOURCES CENTRE

TRANSMITTED/STORED : 11. JUL. 2014 14:43

FILE MODE	OPTION	ADDRESS	RESULT	PAGE
045 MEMORY TX		0128456337	OK	2/2

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

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15th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown • Johannesburg 2001 • South Africa
PO Box 9495 • Johannesburg 2000 • South Africa
Tel: (011) 836 9831 • Fax (011) 838 6680 • Website www.lrc.org.za
PBO No. 930003282
NPO No. 023-004

LRC
Legal Resources Centre

Your ref: JB/ CAS:1469/02/1998
Our ref:

10 July 2014

Lieutenant-General A Dramat
National Head: Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

Attention: Brigadier Kadwa
By Fax: (012) 846-4400
Email: kadwaE@saps.gov.za

Dear General Dramat,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1998)

1. We refer to our letter to you dated 24 February 2014.

2. We have received no response to this letter. After a lapse of some 6 months we must assume that you have no response to the contents of the aforesaid letter. In the circumstances, we must also assume also that no real progress has been made in this investigation.

3. Our client has only been contacted once by the investigating officer during the past 6 months. During the month of May, Captain Masegela phoned our client and indicated that she would soon be advised of the DNA test results. She has since then been kept in the dark.

4. If the DNA tests are available please advise when the test results were supplied. Please provide us with a copy of the said results and advise us what the test results reveal.

National Office:
Cape Town
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Johannesburg
Constitutional Litigation Unit

J Love (National Director), K Reinecke (Director: Finance), EJ Broster,
B Mejerdis (Director), A Andrews, B Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
FB Mahomed (Acting Director), A Turpin
B Stephen (Director), C McConnachie
N Feltz (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, B Ntuli, M Wheeldon, W Wicomb

TP

TN 35 419
35

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag x1500 Silverton 0127

Verwysing Reference	JV Plein 1469/02/1996
Navrae Enquiries	Col N Xaba
Telefoon Telephone	012 401 3276 079 889 9582
Faksnommer Fax number	012 401 3235

THE COMMANDER
CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
SILVERTON
0127

2014-08-11

Legal Resources Centre
P O Box 9495
JOHANNESBURG
2000

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996

1. As you are aware, your client appointed a private investigator, Mr Frank Dutton, to investigate the disappearance of MS Simelane.

2. In fact, certain of the state witnesses have advised the Investigating Officer that they had been contacted by Mr Dutton.

3. It is imperative that the DPCI conduct a full investigation into this matter and the issue of what previous statements have been made at various stages by the State witnesses at various stages is of critical importance when assessing the credibility.

4. In this regard, you are kindly requested to arrange for Mr Dutton to provide the Investigating Officer with an affidavit, outlining what investigation he conducted, with whom he had contact and if in fact these persons were State witnesses and what was conveyed to him by them.

COLONEL
COMMANDER: CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
ORGANISED CRIME
N XABA
2014-08-11

Col Xaba/brlowe33(s)

TP

TN 36 420

Carien van der Linde

From: Carien van der Linde <carien@lrc.org.za>
Sent: 09 September 2014 10:01 AM
To: 'kadwaE@saps.gov.za'
Cc: 'cmacadam@npa.gov.za'; 'hzwart@npa.gov.za'
Subject: KIDNAPPING TORTURE DISAPPEARANCE AND MURDER OF NOKHUTHULA AURELIA SIMELANE / PRIORITY INVESTIGATION: JV PLEIN 1469/02/1996
Attachments: LETTER COL XABA 9 9 2014.pdf

Dear Col Xaba,

I attach correspondence for your attention.

Kind regards

Carien van der Linde
Attorney

| Tel: 011 836 9831 | Fax: 011 836 8680 | Email: carien@lrc.org.za |
| Mobile: 060 346 9577 |
Physical : 15th Floor	Bram Fischer Towers	20 Albert street	Marshalltown
Johannesburg	South Africa
Postal: P.O Box 9495	Johannesburg 2000
Website: www.lrc.org.za
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* * * COMMUNICATION RESULT REPORT (9. SEP. 2014 9:54) * * * 421

FAX HEADER: LEGAL RESOURCES CENTRE

TRANSMITTED/STORED : 9. SEP. 2014 9:53 FILE MODE	OPTION	ADDRESS	RESULT	PAGE
308 MEMORY TX		0128456337	OK	2/2

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
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PBO No. 930003292
NPO No. 023-004

LRC

Your ref: JB/ CAS: 1469/02/1998

9 September 2014

Colonel N Xaba
Commander: Crimes Against the State
Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

By Fax and email: (012) 401-3235/ kadwaE@saps.gov.za

Dear Colonel Xaba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1998)

1. We refer to your letter dated 11 August 2014.
2. We wish to advise you that the affidavit of Frank Dutton, the family's private investigator, is under preparation and will be filed in due course.
3. We should state at this stage that Mr. Dutton did not take any statements from any witness or person. There can accordingly be no credibility issues arising.
4. The real issue in relation to credibility will be the inordinate and extended time period that this investigation has taken. The only reason why Mr. Dutton was appointed by the family was because of the many years of inaction of the SAPS and the NPA. This step was entirely reasonable in the circumstances and was taken out of great frustration on the part of my clients.

National Office
Cape Town
Durban
Grahamstown
Johannesburg
Constitutional Litigation Unit

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Muderikwa, HJ Smith
FB Mahomed (Acting Director), A Turpin
S Sephton (Director), C McConnachie
N Feldr (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Ntsebeza, M Wheeldon, W Witcomb

* * * COMMUNICATION RESULT REPORT (9. SEP. 2014 9:49) * * *

FAX HEADER: LEGAL RESOURCES CENTRE

TRANSMITTED/STORED : 9. SEP. 2014 9:49 FILE MODE	OPTION	ADDRESS	RESULT	PAGE
306 MEMORY TX		0124013235	OK	2/2

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

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P O Box 9495 • Johannesburg 2000 • South Africa
Tel: (011) 836 9831 • Fax (011) 836 8680 • Website www.lrc.org.za
PBO No. 930003292
NPO No. 023-004

LRC

Your ref: JB/ CAS: 1469/02/1998

9 September 2014

Colonel N Xaba
Commander: Crimes Against the State
Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

By Fax and email: (012) 401-3238/ kadwaE@saps.gov.za

Dear Colonel Xaba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1998)

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National Office:
Cape Town
Durban
Grahamstown
Johannesburg
Constitutional Litigation Unit

J Love (National Director), K Reinecke (Director: Finance), EI Broster
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
FB Mahomed (Acting Director), A Turpin
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon, W Wicomb

Johannesburg Office

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LRC
Legal Resources Centre

Your ref: JB/ CAS: 1469/02/1996

9 September 2014

Colonel N Xaba
Commander: Crimes Against the State
Directorate for Priority Crimes Investigation
Private Bag X1500
SILVERTON
0127

By Fax and email: (012) 401-3235/ kadwaE@saps.gov.za

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KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

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National Office:
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Durban:
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Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
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FB Mahomed (Acting Director), A Turpin
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde,
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, M Wheeldon , W Wicomb

TPM

5. Since we have not heard from further you or the NPA we assume that you have not received any further communications or instructions from the PCLU.

Yours faithfully,

CARIEN VAN DER LINDE
LEGAL RESOURCES CENTRE

Copy to: Adv. S K Abrahams, Acting Head: Priority Crimes Litigation Unit -- Fax: (012) 845 6337;

Adv. C Macadam, Priority Crimes Litigation Unit: -- Fax: (012) 845 6337
Email: cmacadam@npa.gov.za / hzwart@npa.gov.za

TP

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag x1500 Silverton 0127

Verwysing Reference	JV Plein 1469/02/1996
Navrae Enquiries	Capt TP Masegela
Telefoon Telephone	012 401 3262 082 779 8543
Faksnommer Fax number	012 401 3235

THE COMMANDER
CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
SILVERTON
0127

2014-09-10

Legal Resources Centre
P O Box 9495
JOHANNESBURG
2000

Attention: Angela

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996

This office is still waiting response to our letter dated 2014/08/11.

The National Prosecution Authority could not make decision without the required affidavit.

COLONEL
COMMANDER: CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
ORGANISED CRIME
N XABA
2014-09-10

Capt Masegela/bricwe35(s)

TP M

TN38

3826

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag x1500 Silverton 0127

Verwysing Reference	JV Plein 1469/02/1996
Navrae Enquiries	Col N Xaba Capt TP Masegela
Telefoon	012 401 3276 012 401 3262
Telephone	079 889 9582 082 779 8543
Faksnommer Fax number	012 401 3235

THE COMMANDER
CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
SILVERTON
0127

2014-09-25

Legal Resources Centre
P O Box 9495
JOHANNESBURG
2000

Attention: Angela

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996

Please be informed that the docket has been returned to the investigating officer for further instructions to comply with emanating from Frank Dutton's affidavit.

Could Thembi furnish us with particulars of the family members who were studying with the deceased in the University of Swaziland.

Your office will be informed about the progress in this matter.

COLONEL
COMMANDER: CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
ORGANISED CRIME
N XABA
2014-09-25

Capt Masegela/briewe35(s)

TPM

TN 39

427
39

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag x1500 Silverton 0127

Verwysing Reference	JV Plein 1469/02/1996
Navrae Enquiries	Capt TP Masegela
Telefoon Telephone	012 401 3262 082 779 8543
Faksnommer Fax number	012 401 3235

THE COMMANDER
CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
SILVERTON
0127

2014-10-22

Legal Resources Centre
P O Box 9495
JOHANNESBURG
2000

Attention: Angela

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996

Firstly I would like to inform you that the investigation is still ongoing and statements of witnesses are obtained but not all of them have been traced.

Can your client, Mrs Thembi Nkadimeng provide us with the particulars of family members who were studying with Nokuthula at Swaziland University.

One of the outstanding statements is of your client, Mrs Thembi Nkadimeng.

Can she please provide us with a affidavit stating the following aspects:

- When did Nokuthula go to Swaziland to complete her studies
- When last did she made contact with Nokuthula prior to her disappearance
- Was she aware of any activities in the ANC and what were those activities
- It would also be relevant to indicate if she know any steps that the ANC took to locate Nokuthula

COLONEL
COMMANDER: CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
ORGANISED CRIME
N XABA

Capt Masegela/briewe l 1(s)

TPM

TN 40

40428

Carien van der Linde

From: DPCI:CATS Masegela Tlou - Captain <MasegelaT@saps.gov.za>
Sent: 26 February 2015 07:21 AM
To: carien@lrc.org.za
Cc: Angela Mudukuti; Xaba N - Colonel
Subject: KIDNAPING,TORTURE,DISAPPERRANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE

Good Morning.

Please be advised that the above matter is still under investigation and will soon be handed over to the National Prosecuting Authority for their decision.

The investigating officer must still obtain the last few statements from outstanding witnesses .

Kind regards.

Capt TP Masegela
Crimes Against the State
Organised Crime
Directorate for Priority Crime Investigation
Tel 012-4013262
082 779 8543
Fax 012-4013235

HAWKS

TP

TN 41 429

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag x1500 Silverton 0127

Verwysing Reference	JV Plein 1469/02/1996
Navrae Enquiries	Lt Col MS Mahlangu
Telefoon Telephone	012 401 3264
Faksnommer Fax number	012 401 3235

THE COMMANDER
CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
SILVERTON
0127

2015/04/09

Legal Resources Centre
P O Box 9495
JOHANNESBURG
2000

Attention: Carien

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996

Please be informed that the above mentioned case docket has been forwarded to the National Prosecution Authority for decision.

Your office will be informed about the progress in this matter.

Kind regards.

LIEUTENANT COLONEL
f/COMMANDER: CRIMES AGAINST THE STATE
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
ORGANISED CRIME
MS MAHLANGU

Capt Masegela/briewel 13(s)

TP 17

TN 42

SECRET

REPORT
AMNESTY TASK TEAM

SECRET

431

Secret

REPORT: AMNESTY TASK TEAM

1. Background

1.1 A Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

"1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.

2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

3. Bearing the above-mentioned in mind, whether legislative enactments are required.".

1.2 The Task Team comprises the following members:

Deon Rudman (Chairperson):		Department of Justice and Constitutional Development
Yvonne Mabule	:	National Intelligence Agency
Vincent Mogotloane	:	National Intelligence Agency
Gerhard Nel	:	National Prosecuting Authority
Lungisa Dyosi	:	National Prosecuting Authority
Ray Lalla	:	South African Police Service
Joy Rathebe	:	Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are—

- individuals who were misled by their leadership to treat the process with disdain;
- others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
- others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

TP 9

433

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(c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.".

(d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.".

(e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.".

(f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.".

(g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.".

(h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.".

(i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.".

(j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.".

(k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.".

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

(a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

(b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should be the following:

(a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.

(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

(i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;

(ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

(c) To—

- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
- gather intelligence information;
- investigate the matter;
- consult victims.

(d) To consider the following factors when carrying out its mandate:

(i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".

(ii) The following specific criteria:

- Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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- Whether a prosecution can be instituted on the strength of adequate evidence.
- Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- Whether the offence in question is serious.
- Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- Whether the prosecution will lead to the traumatisation of victims and conflicts in areas where reconciliation has already taken place.
- The degree of co-operation on the part of the alleged offender.
- The credibility of the alleged offender.
- The alleged offender's sensitivity to the need for restitution.
- The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation.
- The degree of indoctrination to which the alleged offender was subjected.
- The extent to which the alleged offender carried out instructions or perceived instructions.
- The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

- The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- Whether the alleged offender fully disclosed the alleged offences.
- The views of the NPA.
- If the accused is in custody, the views of the presiding judge or magistrate.
- Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- Any further criteria, which the Task Team might deem necessary.

(e) To consider—

(i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;

(ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;

(iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape; or the crime of genocide, crimes

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against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

(iv) the possibility of diversion in the case of juvenile offenders;

(v) possible arrangements settling the matter out of court;

(vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

(a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.

(b) The possibility of the institution of private prosecutions.

(c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

440 446

(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft Indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

TP 87

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

ANNEXURE "A"

GENERAL CRITERIA GOVERNING A DECISION TO PROSECUTE

1. General

(a) The process of establishing whether or not to prosecute usually starts when the investigating officer presents a docket to the prosecutor. The case needs to be studied carefully to make sure that it is properly investigated. In this regard the prosecutor may—

- request the police to investigate the case further;
- decide to institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

(b) The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

(c) Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

(d) In deciding whether or not to institute criminal proceedings against an accused person, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements. Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

(e) The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made. This may occur after having heard and considered the

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version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

2. **Factors to be considered when evaluating evidence**

When evaluating the evidence prosecutors should take into account all relevant factors, including—

(a) *How strong is the case for the State?*

- Is the evidence strong enough to prove all the elements of an offence?
- Is the evidential material sufficient to meet other issues in dispute?

(b) *Will the evidence be admissible?*

Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

(c) *Will the state witnesses be credible?*

- What sort of impression is the witness likely to make?
- Are there any matters that might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

(d) *Will the evidence be reliable?*

If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

(e) *Is the evidence available?*

Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

(f) *How strong is the case for the defence?*

Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

3. Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise. There is no rule in law, which states that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice. When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

(a) *The nature and seriousness of the offence:*

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

(b) *The interests of the victim and the broader community*

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

TP 97

(c) *The circumstances of the offender*

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).*
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The above factors and the weight to be attached to them will depend upon the particular circumstances of each case. It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

TN 43

EXTRACTS FROM THE AFFIDAVIT OF ADVOCATE VUSUMZI PATRICK PIKOLI BEFORE THE GINWALA COMMISSION OF INQUIRY

TP 11

shortly thereafter. The first time this alleged complaint was brought to my attention was in the original submission.

259. I am also surprised that the Minister has gone on oath to state that the NPA reflected in its annual report for 2006/2007 that a request was made to National Treasury for the separate listing of the NPA. It is clear from annexure "VP51" hereto that no such request for the listing of the NPA was made to National Treasury and I also attach as annexure **"VP52"**, a copy of the relevant extract from the NPA's annual report for 2006/7 from which it is clear that there is no reference to the listing of the NPA.

POST TRC LITIGATION

260. In this section I will deal with the allegations set out in paragraphs 114 to 124 of the Government's original submission as amplified by the Minister in paragraph 62 of her affidavit and in the affidavit of the DG (paragraphs 31 to 35) and the affidavit of Assistant Commissioner Jacobs. I have not considered there to be an "area of difference" between the Minister and me in regard to the handling of what is referred to as the post –TRC litigation. As will appear from what is stated below, the Minister was kept informed

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of relevant developments in regard to the process as it evolved and she provided her support as required from time to time. The only request for guidance not responded to was that flowing from the dispute relating to the implementation of the prosecution policy guidelines which arose between me and Mr Selebi and the Directors General of Justice and Constitutional Development and NIA. That request for guidance addressed to the Minister in February 2007 remained unanswered at the time of my suspension. I did not in any way regard the issues in respect of which guidance has been sought as any difference between the Minister and myself as she had not been involved in the matter at all.

261. I do not intend to restate my response to the Government's underlying contention that the effect of Section 179(6) of the Constitution is that the NDPP may not act without the concurrence of the Minister who:

> *"Exercises the final responsibility over the prosecuting authority"* (para 117 of the Government submission)

That proposition is dealt with fully earlier in this affidavit.

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262. A history of the problems encountered by the NPA in applying the ***"PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994"*** ("the Prosecution Policy") is set out in my memorandum to the Minister dated 15 February 2007 (annexure **TRC1**). This sets out my detailed analysis of the background which gave rise to the notion of inter-departmental collaboration in the form ultimately expressed in paragraph B6 of the Prosecution Policy – i.e. that the PCLU should be assisted in the execution of its duties (defined in B4 as overseeing investigations and instituting prosecutions) by a senior designated official from the following State departments or other components of the NPA:

262.1. The National Intelligence Agency;

262.2. The Detective Division of the South African Police Service;

262.3. The Department of Justice and Constitutional Development; and

262.4. The Directorate of Special Operations.

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263. It is not my intention to repeat the content of my memorandum in this affidavit and I ask that it be regarded as incorporated herein. I will expand on some aspects of the matter in the following paragraphs.

264. The foundation for the development of the Prosecution Policy is the statement by President Mbeki in April 2003 following receipt of the final TRC report. This is canvassed in paragraph 3 of TRC1. The President required that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA. As part of the "normal legal processes" the NPA, working with the National Intelligence Agency, was to be accessible to persons who were prepared to unearth the truth and who wished to enter into agreements that are standard in the normal execution of Justice and the prosecuting mandate, and are accommodated in existing legislation.

265. Prior to the adoption of the Prosecution Policy and in my then capacity as DG, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives. The matter is dealt with in paragraph 2 of TRC1. It is important to note that the recommendation of the

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establishment of an interdepartmental Task Team and of a two stage process including the requirement of a recommendation from such Task Team before the NDPP instituted any criminal proceedings in relevant matters was rejected. This was because of the view that such functions would be unconstitutional and against the concept of prosecutorial independence enshrined in Section 179 of the Constitution.

266. The rejection of this proposal led to the determination of the Prosecution Policy in agreement with the Minister and after consultation with the Directors of Public Prosecutions as required by the NPA Act. The policy was tabled in Parliament and became effective on 1 December 2005.

267. In January 2006 I wrote letters to Mr Selebi and the DGs of Justice and the NIA and to the DSO requesting them to nominate a senior official to assist the PCLU in accordance with the Prosecution Policy guidelines.

268. Almost from inception the process was bedevilled by the failure of SAPS to provide the necessary support to enable the PCLU to conduct its investigations. These difficulties are dealt with in

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paragraph 4 of TRC1.

269. I was advised by Mr Selebi that Advocate Ackermann should not participate in the process. The distrust between SAPS and Advocate Ackermann stemmed from allegations and counter-allegations in regard to the latter's supposed intention to launch criminal proceedings against the leadership of the ANC. These contentions had surfaced from time to time notwithstanding the issue of a press release by the NPA in 2004 confirming that a decision had been taken that no such prosecution would take place (annexure **TRC2**).

270. I informed Mr Selebi that Advocate Ackermann was the head of the PCLU by Presidential proclamation and that it was appointed not for SAPS to determine who should discharge the mandate given to the PCLU under the Guideline.

271. Faced with this lack of co-operation I sought the assistance of the Presidency in securing the collaboration necessary to apply the Prosecution Policy Guidelines.

272. In mid 2006 Reverend Chikane organised a meeting at the Presidency which was attended by himself, the DGs of Justice and

NIA, Mr Selebi, the Secretary of the Defence Secretariat, Mr Jafta from the Presidency and I. This first meeting dealt in general terms with the question of developing a spirit of co-operation amongst the agencies as contemplated in the guideline process. Reverend Chikane supported the notion that there should be collaboration in assisting the NPA to fulfil its functions. At this meeting there was again a complaint by Mr Selebi in regard to Advocate Ackermann's involvement in the process. My recollection is that there was no discussion of the formation of a working committee at this meeting.

273. Some time later a meeting was convened at the home of Minister Skweyiya, the Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr Jafta. The meeting was called by Acting Minister Didiza and I was told that it related to the prosecution in the Chikane matter. It was originally suggested that Advocate Ackermann accompany me to the meeting but I elected to go on my own in order to establish what the concerns were.

274. It transpired at the meeting that:

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274.1. The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to prosecute.

274.2. The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

274.3. The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

275. I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process

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particularly in view of the requirement that I report to parliament on these matters. My recollection is that there was no discussion about the formation of a working group or Task Team at this meeting. The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice.

276. It was following this meeting that a meeting took place at the office of the Presidency which is dealt with in paragraph 4.2 of my memo TRC1. My understanding and recollection of the meeting was that the role of the working group was that set out in paragraph 4.3 of TRC1 – i.e. the working committee or Task Team would not make recommendations on a decision as to whether to prosecute or not but would be responsible for ensuring that the NPA obtained the necessary information or such inputs as were appropriate from the various departments so as to assist and enable me to reach a well considered decision whether to institute proceedings or not. The Task Team would deal with all relevant matters identified by the PCLU and SAPS.

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277. I have no recollection whatsoever of any suggestion at this meeting of the establishment of a separate committee of DG's which would receive reports from the Task Team. Had there been any suggestion that the Task Team members would report back to the DG's who would in turn make recommendations to me in regard to the question of whether to prosecute or not, I would have objected to this as it would have amounted to falling back to the position originally suggested before the guidelines were established and which had been rejected by all parties as unconstitutional.

278. At this meeting I proposed that Dr Ramaite should chair the Task Team. I suggested this in order to deal with the complaints in regard to Advocate Ackermann's position and as a concession to get the Task Team working. The proposal was accepted by those at the meeting. Dr Ramaite is the Deputy National Director of Prosecutions to whom the PCLU reports.

279. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Mr Selebi, various DGs and Mr Jafta. The proposal for the

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establishment of a working group was put to the Ministers. It was agreed that the proposed working committee would proceed. Once again I have no recollection of any suggestion of a separate committee of Directors General or that the Task Team would be reporting to such a committee.

280. After this meeting letters were again written to the various Directors General, Mr Selebi and the DSO in early October 2006 inviting them to nominate a senior official to perform the functions set out in paragraph B6 of the guidelines. (An example of such letter appears as annexure A to the affidavit of Assistant Commissioner Jacobs). The letters were in the same format as those sent out in January 2006 at the time of my first attempt to secure assistance. The letters were drafted for me and referred to the appointment of Dr Ramaite to *"head and supervise the prosecution processes of all TRC-related matters"*.

281. The Task Team met for the first team on 12 October 2006. The minutes of the meetings of what became referred to as the "Task Team on TRC cases" are annexed to the affidavit of Commissioner Jacobs save for the minutes of its meeting on 8 August 2007, a copy of which is annexure **TRC3** hereto. As is commented on by

TP 91

various parties, the minutes of these meetings are not a full record of all of the issues canvassed. As the minutes reflect I attended the opening session of the first meeting together with Ms Pillay, the Directors General of the NIA and Justice and Mr Jafta from the Presidency. The details of my address to the Task Team are set out in paragraph 4.3 of TRC1. I recollect dealing expressly with a question by a representative of the NIA who raised the issue of whether it was the function of the team to make recommendations on a decision whether to prosecute or not. I indicated clearly that the decision as to whether to launch a prosecution rested with me and not with the committee.

282. I have noted the terms of the final sentence of paragraph 1 of the minutes of this meeting stipulating that:

> *"The role of the committee will be to make recommendations to the NDPP on each case".*

It was indeed the responsibility of the Task Team to assist in the process of obtaining the requisite information or assistance from the various departments so as to enable me to reach a decision as to whether to prosecute or not. There was, however, definitely not any

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suggestion that a recommendation by the Task Team on whether to prosecute was a pre-requisite for any decision that I might take. To the extent that the terminology referring to the making of recommendations by the Task Team in this and other TRC related documentation is interpreted to support that contention this is both regrettable and wrong.

283. I did not participate further in the activities of the Task Team which was conducted under the chairmanship of Dr Ramaite. I received reports from time to time on their activities. It was certainly my understanding that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing. I refer in this regard to the affidavit of Dr Ramaite.

284. In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors General" which would in turn make recommendations to me. The developments in this regard are dealt with in paragraphs 4.4.1 to 4.6 of TRC1. In essence the proposal made by Mr Selebi

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and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

285. It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government.

286. In the circumstances I informed Mr Selebi and the Directors General that there was this misunderstanding and I wrote my very detailed letter to the Minister on 15 February and requested her guidance. As at the date of my suspension I had received no response from the Minister. Pending such response the functioning of the Task Team was compromised by the uncertainty as to its mandate although it did meet again on 8 August as appears from the minutes being **TRC3** hereto.

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Reverend Chikane matter

287. The decision to prosecute those involved in the poisoning of Reverend Chikane became the central issue around which the dispute in regard to the functioning of the Task Team revolved. After I made the final decision to proceed with the prosecution on 25 January 2007 I prepared a report for the Minister which is dated 7 February but which was signed by me on 15 February 2007. A copy is annexure **TRC4**. I do not intend to repeat the content set out in that memorandum in this affidavit and I ask that it be regarded as incorporated herein. Once again I will expand on some aspects of the matter.

288. As appears from the history set out in paragraph 2 of TRC4, the decision to prosecute the three Security Branch members involved in the poisoning of Reverend Chikane (Otto, Smith and van Staden) was taken in November 2004, before my appointment as NDPP. Dr Ramaite SC, in his capacity as Acting National Director, however instructed that the matter hold over pending the development of the Prosecution Policy and the guidelines.

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289. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects which was, in my opinion, clearly sufficient to justify a prosecution. I therefore gave the initial instruction to proceed with the prosecution in February 2006. In response to this notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. The position was reviewed by a team within the NPA under the leadership of Advocate Pretorius who reported to me that the representation did not comply with the requirements set out in the guidelines. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

290. In response I received further representations contending that the suspects had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I caused an independent opinion to be obtained from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006.

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291. At its meeting on 25 October the Task Team had received an audit report on all cases in the possession of the PCLU. A copy of that report was forwarded to me by Dr Ramaite and this confirmed that in the prosecution of Otto and others my direction to Advocate Ackermann SC to proceed with the prosecution had been put on hold in early October pending receipt of an opinion from counsel.

292. The Chikane matter was discussed within the Task Team for the first time at its meeting on 6 November where Mr J Lekalakala of SAPS for the first time raised the contention that the recommendations of the Task Team are necessary because:

> *"The National Commissioner is of the view that Rev Chikane is not interested in prosecution of the matter. He suggested that contact has to be made with Rev Chikane to ascertain his attitude."*

The minutes record that:

> *"According to Adv Ackermann the complainant (Rev) indicated that he leaves the matter in the hands of the NPA. It was then decided that the latter's attitude be ascertained and the matter was therefore closed pending a feedback on*

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his attitude."

293. In early December I was informed of the renewed contention by Mr Selebi that Reverend Chikane had not been consulted.

294. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held a number of discussions with him during the course of the many meetings we held over an extended period. These were one on one meetings of which no particular record was kept. I did, however, discuss the decision to prosecute with him on several occasions. I was intimately involved in the establishment of the guidelines and was aware of the requirement that there should be a consultation with the victim before any prosecution proceeded.

295. Even before the guidelines had been published, I was aware of Reverend Chikane's general attitude towards the issue of a prosecution – namely that whilst he might have his own personal decisions in regard to whether he forgave the perpetrators or not, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

296. After the guidelines were published I had various meetings with Reverend Chikane. These were mostly at his office at the Presidency save for a meeting held in my office in December 2006 which had been called to discuss some draft cabinet memos in regard to the implementation of the findings of the Khampepe Commission. Because the matter had been raised by Mr Selebi, I again discussed the prosecution with Reverend Chikane and updated him on the current status of the prosecution of Messrs Otto, Smith and van Staden. His attitude to me remained unchanged.

297. In December and after the developments in regard to this matter within the Task Team were reported to me I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position. I knew that Ackermann had discussed the matter with him as far back as 2004.

298. Towards the end of January 2007 Advocate Ackermann and Advocate Mhaga reported to me that they had met with Reverend Chikane on 22 January and that he had reaffirmed his consistent attitude – namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this

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confirmation I wrote to the legal representatives of Messrs Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

299. As appears from TRC4 the decision at that time was to proceed against the three individuals against whom a prosecutable case had been established. As my report TRC4 indicates in paragraph 3 thereof, the former Minister of Police, Adriaan Vlok and the former head of SAPS, General van der Merwe, had both made representations to me as contemplated in the guidelines. In essence, they both admitted authorising the murder of Reverend Chikane and required of me not to prosecute them in the light of this disclosure. They would not make full disclosure in response to requests for information and I declined to accede to their request that they be given immunity from prosecution.

300. During the course of the next few months the legal representative of Messrs Otto, Smith and van Staden, who was also the representative of Messrs Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea bargain and sentencing agreement. These

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prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to kill Reverend Chikane by means of poisoning. It informed her of the fact that plea and sentencing agreements had been entered into. I signed this letter on 10 July 2007 and almost immediately thereafter I went off on compassionate leave because of the illness and the subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summonsed to a meeting with the Minister and reported to her as described in Dr Ramaite's affidavit. At the time of that meeting the Minister did not appear to have read my letter dated 6 July.

303. Because of the allegations relating to the attitude of Reverend Chikane it is perhaps illustrative to attach an article written by him and published in the City Press on 18 August 2007 immediately following the court hearing (annexure **TRC5**). He records, inter alia,:

> *"Yet I believe the Vlok trial is of national importance for reasons other than my personal interests.*

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The outcome of the court process gives practical expression to the spirit of the 2005 NPA guidelines that regulate the handling of outstanding TRC–related matters. ... also significant is the outcome of the court in re-affirming the importance of dealing with TRC-related matters within the confines of the law.

Hopefully, the outcome of the court will serve to renew our collective trust in the integrity of our legal system, particularly in its proven capacity to handle sensitive and complicated political matters in an unbiased manner.

The evidence that NPA guidelines can facilitate a win-win outcome is there for all to see. One can only hope that the wisdom of working within the law is recognised widely.

The uniqueness of our jurisprudence – however imperfect – to deal with conflicts of the past is a marvel for most of the world. I suspect the manner in which we have handled the case related to Vlok and others will have important lessons inside and outside our country.

This, I hope, will further serve correctly to project ours as a

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country of people who have demonstrated that it is possible to make the law advance national unity and reconciliation."

The article stressed that Chikane is Director General in the Presidency and Secretary of the Cabinet but that he was writing in his personal capacity.

304. In summary the successful prosecution of the parties involved in the poisoning of Reverend Chikane:

304.1. Was initiated prior to my appointment as NDPP and thereafter pursued on my instructions and in complete conformity with the Prosecution Policy and guidelines including the receiving of representations from the accused person.

304.2. The requirement of the consultation with the victim was fully discharged over an extended period and, in particular, in personal discussions which I had with Reverend Chikane and in discussions with members of the PCLU conducted in accordance with my express instruction.

304.3. I enclose as **TRC6** a media statement released by me

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following the conclusion of the proceedings and I adhere to the sentiments expressed in that.

KHAMPEPE COMMISSION

305. Government alleges that during the hearings of the Khampepe Commission of Enquiry ("Khampepe Commission") I made *"a false submission that the Ministerial Coordinating Committee ("MCC") established in terms of Section 31 of the NPA Act never met"*.

306. This complaint is not supported by affidavit and it is not clear who is alleging that I made a false submission to the Khampepe Commission. I do not recall that I made any such submission.

307. Pursuant to a letter written to Government's attorney, my attorneys were provided with copies of the transcripts of the evidence given at the Khampepe Commission. My attorneys have perused the transcripts and have been unable to find a reference to me saying that the MCC never met.

308. Consequently my attorneys requested, in writing (a copy of which is attached hereto as annexure **"VP53"**), the Minister to attach the relevant extracts from the transcripts that Government relies upon

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAAT SAK X67
PRETORIA 0001
2015 -05- 20
T. MALELE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

IN CAMERA FOUNDING AFFIDAVIT

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I, the undersigned

THEMBISILE PHUMELELE NKADIMENG

state under oath as follows:

INTRODUCTION

1. I am the applicant herein. In my founding affidavit I attach certain correspondence which should remain confidential at this stage. These include annexes **TN13** to **TN14** which are letters from the investigating officer to various officials. Under the heading "Attempts to seek justice" I set out a timeline which provided an overview of the steps taken so far, including some of the interactions between myself, my representatives and the authorities.

2. Since several of the documents referred to in the timeline include correspondence between my attorneys and the NPA and SAPS, as well as extracts from the police docket, I have not attached these annexes to my open court affidavit. They are attached to this affidavit. The investigative timeline is reproduced below. The documents which are attached to this affidavit are numbered **TN21.1** to **TN21.23**. They appear in the rows in the table below shaded grey.

3. This affidavit will only be served on the first respondent as it is already in possession of the documents attached to this affidavit. The registrar will be requested to hold this affidavit and its annexes as part of an *in camera* record, which is not to be released to the public, unless authorised by this Honourable Court.

Investigative Timeline

Date	Action	Reference
11 September 1983	Nokuthula Simelane is kidnapped by member of the Security Branch of the South African Police.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane. (Annex **TN10**)

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11 Sept. to about mid-October 1983	Nokuthula Simelane is secretly kept captive in a store room on a farm at Northam where she is persistently tortured by members of the Security Branch.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
About mid- October 1983	Nokuthula Simelane is secretly taken from the farm at Northam by members of the Security Branch and has not been seen again.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
27 January 1996	Sowetan newspaper published a story about Nokuthula's disappearance and made an appeal for information.	Sowetan newspaper dated 27 January 1996 (Annex **TN11**)
January/ February 1996	Former Security Branch policeman Sergeant M M Veyi provided evidence to the TRC Amnesty Committee about the abduction, torture and disappearance of Ms. Simelane	1. TRC Amnesty Hearing AC/2001/185 – 2. Evidence of former Sergeant Veyi. (Annex **TN22**) 3. Sowetan news report.
February 1996	In consequence to the disclosures by former Sergeant Veyi CAS1469/02/1996 Murder case docket was opened and investigated by "Priority Crimes Unit" based at John Vorster Square (now Johannesburg Central Police Station). The case was assigned to Captain Leask. Initial investigation made progress but before its conclusion the case was transferred to the D'Oliviera Team towards the end of 1996. Little or no further investigation is undertaken by the D'Oliviera Team until matter is taken over by the TRC.	1. Extracts from docket. (Annex **TN21.1**) 2. Letter from PCLU, 5 December 2013 (Para 5.1.6) (Annex **TN21.2**)
1996 - 1997	Police (D'Oliviera Team) investigation put on hold pending the TRC process.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 3. (Annex **TN21.3**)
3 June 1997	Commencement of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane. Following persons make applications for amnesty for abduction, torture and other related crimes. None of the applicants applied for amnesty in	TRC Amnesty Hearing AC/2001/185

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	respect of the murder of Ms Simelane. W H Coetzee (TRC ref. AM4122/96) A Pretorius (TRC ref. AM4389/96) J F Williams (TRC ref. AM4375/96) J E Ross (TRC ref. AM4377/96) F B Mong (TRC ref. AM4154/96) N L Mkhonza (TRC ref. AM5420/97) M M Veyi (TRC ref. AM5421/97) M L Selamolela (TRC ref. AM5419/97)	
1998	NDPP Ngcuka establishes TRC component within NPA Head Office to attend to prosecution matters arising from TRC.	Letter from PCLU, 5 December 2013. Para 5.1.6 (Annex **TN21.2**)
February 1999	Meeting between TRC and NPA to discuss a process of establishing mechanisms for identifying potential cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)
11 March 1999	TRC commences referrals for potential prosecution to NPA – alerting them to sources of evidence to crimes. Correspondence does not specify any particular cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)
30 June 2000	Final session of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane	TRC Amnesty Hearing AC/2001/185
23 May 2001	TRC Decision issued in this Simelane matter. All applicants are granted amnesty for the abduction of Ms Simelane; applicants W.H Coetzee, A Pretorius and F B Mong are refused amnesty for torture; applicants M M Veyi and M L Selamolela are granted amnesty for the torture of Ms Simelane.	TRC Amnesty Hearing Decision AC/2001/185 (Annex **TN10**)
29 August 2001	The TRC Amnesty Committee decision in the Simelane matter is gazetted.	Proc 31. Justice 29/08/2001
12 March 2003	Volumes 6 and 7 of the TRC Report are published.	TRC Report

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12 March 2003	Specific mention is made in the TRC Report on Nokuthula Simelane's abduction, torture and disappearance. Volume 2, Chapter 3 para 278 - 280; 287 – 292 Volume 6, Chapter 1 para 194 – 206 Volume 6, Chapter 2 para 50 – 71 Volume 7, Victims list	TRC report . (Extracts annexed as **TN24 - 27**)
23 March 2003	PCLU is created by Presidential Proclamation. Officials assume duty July/ August.	1. Presidential Proclamation (Annex **TN28**) 2. Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
2003	The South African President directed the NDPP to give attention to the cases of 500 persons who had been reported missing by the TRC. NPA established a Task Team to evaluate the TRC report and to identify cases for investigation. 150 cases were identified for immediate investigation.	About PCLU (Annex **TN29**)
2003	NPA TRC Unit is converted into Priority Crimes Litigation Unit (PCLU)	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
2003	The NDPP give attention to the cases of some 500 persons who had been reported missing by the TRC. A Task Team evaluates the TRC Report to identify cases for investigation. Approximately 150 cases were identified for immediate investigation. The disappearance of Nokuthula Simelane is one of these cases.	About PCLU (Annex **TN29**)
2003	The PCLU requests all outstanding cases to be referred to it.	Letter from PCLU, 5 December 2013 (Annex **TN21.2**)
2003	NPA and PCLU place TRC cases "on hold" awaiting formation of policy on the TRC cases.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 6. ((Annex **TN21.3**)
November 2004	Foundation for Human Rights make submission on behalf of family re prosecutions of persons refused amnesty.	Letter from PCLU, 5 December 2013, para 5.1.4. (Annex **TN21.2**)

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2004 and 2005	Several discussions between FHR and PCLU (Advocate Anton Ackerman) about charges arising from the alleged torture of Ms Simelane (in terms of International Law); the prosecution of Sergeant Radebe on kidnapping charges and the possibility of holding an Inquest into this matter.	Letter from PCLU, 5 December 2013, para 5.1.5. (Annex **TN21.2**)
1 December 2005	NPA issues Guidelines for TRC cases in terms of National Prosecution Policy sec.179(5) of the Constitution	Appendix A, National Prosecution Policy dated 1 December 2005. (Annex **TN30**)
23rd September 2007	Establishment of Ginwala Enquiry into the fitness of Advocate Pikoli to hold the office of NDPP	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2007/8	Decision by the SAPS not to investigate TRC cases pending conclusion of Ginwala Commission.	Letter from Dr. Ramaite, Acting NDPP, 31 January 2013, para 8. (Annex **TN21.3**)
4 November 2008	Ginwala Enquiry into NDPP finalised and issues report.	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2 December 2008	Amendments to Prosecution Policy struck down	Judgment, Nkadimeng & Others v The National Director of Public Prosecutions & Others, T.P.D. Case no. 32709/07. (Available on request)
Early 2010	Advocate Macadam appointed by Acting NDPP to take over TRC matters and to liaise with the General Dramat Commander of DPCI.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 10. (Annex **TN21.3**)
March 2010	Duplicate Docket and TRC material requested from State Archives and made available to PCLU.	Letter from Acting NDPP, Adv Jiba, 13 August 2013, p3 (Annex **TN21.4**)
25 March 2010	1. Duplicate Case Docket forwarded to Superintendent Bester of DPCI by PCLU requesting investigation to determine availability of witnesses; confirmation of statements; and to determine the position of Timothy Radebe	1. Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010

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	(whether he is a witness or a suspect) 2. Police Captain Masegela of DPCI was appointed to investigate matter	(Annex **TN21.5**) 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)
October 2010	Captain Masegela of DPCI returns duplicate docket and other files and material to Advocate Macadam	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)
27 October 2010	Letter from Advocate Macadam to Captain Masegela (together with duplicate case docket; other files and material) with a directive for extensive further investigations. These are inter alia: • Various administrative tasks related to case files. • Checking the alibi of Sergeant Radebe and circumstances of his original statement. • Investigation concerning an undercover operation involving a tape recording. • Statements from identified witnesses. • Establish circumstances of deaths of certain witnesses. • Draw crime scene maps and plot points of relevance. • Establish the circumstances of the arrests of the 18 MK Operatives. • Establish the circumstances and facts of the "false flag" operations. • Trace and interview Brigadier Schoon. • Identify members of Eastern Transvaal Security Branch at relevant time. • Interview Siphiwe Nyanda – MK Commander in Swaziland. • Establish whether there is any relevant information from the Swaziland authorities.	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU dated 27 October 2010 (Annex **TN21.6**)

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	• Investigations concerning Motsoanyame Commission and its findings. • Explore the possibility of an exhumation at Northam farm. • Investigations concerning safe houses and other properties with a view to conducting exhumations. • Witnesses who have already made statements to confirm these and be re-interviewed.	
October 2010 (date not specified)	Missing Persons Task Team (MPTT) requested to explore the farm at Northam for possible exhumation and to check mortuary records for possible leads in respect of remains of Ms Simelane.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.3 (Annex **TN21.3**)
Late 2010 (date not specified)	Original docket located	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 page 3 sub paragraph vii. (Annex **TN21.4**)
July 2011	The investigating officer, Captain Masehela, submitted his report to Adv Macadam recommending an inquest.	Thembi Nkadimeng discussion with Captain Masegela
October 2012 (date not specified)	Exploration by MPTT of farm at Northam completed and they conclude there is no possibility of an exhumation in the absence of specific evidence of a burial site. MPTT report issued on 25 January 2013.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.5 (Annex **TN21.3**)
22 January 2013	1. Captain Masegela returns docket and provides report in terms of Sec. 4 of the Inquest Act to Adv. Macadam 2. NPA denies that the docket was returned with the required certificate for an Inquest and claims that docket was returned with a substantial amount of the original investigations incomplete, and no evidence establishing that Ms. Simelane had been murdered.	1. Information supplied by Captain Masegela to Thembi at a meeting 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, para 16 (Annex **TN21.3**).

25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing. MPTT report made available to PCLU on exploration of Northam farm and finding that exhumation is not possible unless there is specific evidence of the precise burial place.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)
29 January 2013	The holding of an inquest is requested by family as authorities are not making progress in their investigation into determining circumstances of death.	Inquest Request – letter from T.P. Nkadimeng to NPA dated 29 January 2013 (Annex **TN20**)
31 January 2013	NDPP says that Macadam is perusing docket and resubmit to investigating officer.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 (Annex **TN21.3**)
11 February 2013	Letter from the applicant pointing out that this matter has not been diligently attended to and calling for a prosecution or an inquest. To this end a meeting has been arranged between family representatives and Adv. Macadam to discuss and determine how the investigation can be completed and to set a reasonable deadline for this work to be completed.	Inquest Request – copy of letter from T.P. Nkadimeng to NPA dated 11 February 2013 (Annex **TN21.7**)
12 February 2013	NDPP reasserts that a decision can only be taken once investigation has been completed and refers to the upcoming meeting on 18 February 2013 between members of his staff and families representatives to discuss the investigative steps that are being taken.	Letter from Dr. Ramaite Acting NDPP dated 12 February 2013 (Annex **TN21.8**)
13 February 2013	Macadam of PCLU instructs Col Xaba of DPCI to undertake following investigations: • Trace and interview Nompumelelo Zakade who was a SB informant. • Locate "safe houses" to determine if exhumations are feasible.	Letter from Adv. Macadam to Colonel Xaba of DPCI dated 13 February 2013 (Annex **TN21.9**)

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	• Locate safe house that was used by Strongman Bambo to determine if exhumations are feasible. • Interview Siphiwe Nyanda	
18 February 2013	Meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC) (the last two mentioned representing family). Agreement that investigative tasks as set out in PCLU letter to DPCI dated 27 October 2010 is incomplete but there will be an endeavour to conclude investigation by end of May 2013.	1. Letter from NPA, 13 August 2013 (Annex **TN21.4**) 2. Minutes of Meeting (Annex **TN21.10**)
6 March 2013	Again pointing out the considerable delays that have occurred in this matter by providing a timeline; raising concerns about some of the investigative tasks mentioned at the meeting of 18 February 2013 and in the letter to Colonel Xaba – also that not all tasks agreed to at the meeting have been included in the letter. Emphasizing those outstanding investigations are concluded as agreed by 30 May 2013.	Letter from Thembi Nkadimeng to NPA dated 6 March 2013 (Annex **TN21.11**)
13 March 2013	Adv. Macadam notes concerns about serious inaccuracies and unreasonable demands made in the letter of 6 March 2013 from Thembi Nkadimeng. He undertakes to do his best to finalise investigation by 30 May 2013.	Email from Adv. Macadam to Adv. Robin Palmer dated 13 March 2013. (Annex **TN21.12**)
27 March 2013	Captain Masegela informs Thembi Nkadimeng telephonically that the skeletal remain of a young woman has recently been found by construction workers at the site of new mall in Brits.	
6 April 2013	Response by Adv. Palmer to Adv. Macadam concerning the issues he raised in his email of 13 March 2013.	Email from Adv. Robin Palmer to Adv. Macadam dated 6 April 2013. (Annex **TN21.13**)

TP 17

15 April 2013	Raising concern that the contents of some communications between the family's legal representatives and NPA have been disclosed to the Sunday Times. Investigation into Sergeant Radebe's alibi is continuing. Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.	Email from Adv. Macadam to Adv. Robin Palmer dated 15 April 2013. (Annex **TN21.14**)
2 May 2013	Adv. Palmer asked for an update on the current status of the investigation to which Adv. Macadam replied that there were no new developments.	Email from Adv. Macadam to Adv. Palmer dated 2 May 2013. (Annex **TN21.15**)
17 May 2013	Adv. Macadam informs Adv. Palmer that investigation will not be concluded by end of May 2013 and reports: • The safe houses in use by the Soweto Security Branch have all been identified and been eliminated as having exhumation potential, except for the smallholding at Westonaria where consideration is being given to the feasibility of a probe • Radebe's alibi investigation concluded and it has been determined that he was a member of the SB at relevant time and not at Vehicle staff as he had claimed. • Mortuary checks are on-going; • The tracing of 18 MK members which is central to the defence of the white SB members is on-going. The case file relating to the arrest of Justice Ngidi has been found.	Emails between Adv. Macadam and Adv. Palmer 17 May 2013 (Annex **TN21.16**)

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26 June 2013	Canvasses the following issues: • Whereas it was indicated that a decision would be made by the end of May 2013 on this matter -this date has now passed and there is still no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute, or to refer the matter for a formal inquest. • The emotional toll the delays are having on the family and friends of Nokuthula Simelane • Request specific indications of remaining investigative steps together with target dates.	Letter attached to email from Adv. Robin Palmer to Adv. Macadam dated 26 June 2013. (Annex **TN21.17**)
13 August 2013	Skeletal remains have been found and DNA testing is being conducted. • Mortuaries records have been checked and four records have been found that could be relevant. These records are illegible and efforts are being made to obtain photos of the deceased. • MPTT have identified several "safe houses" that were in use by Security Branch and all of these except for a plot at Westonaria having been excluded as possible burial sites. An exploration to see whether an exclamation is feasible at the Westonaria plot is to be undertaken. • The key aspect of the 18 MK Operatives is on-going.	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 page 3 sub paragraph vii. (Annex **TN21.4**)
31 July 2013	This letter expresses frustration at the lengthy delay in completing the investigation and demands that this matter be urgently resolved by means of a prosecution or an inquest.	Letter from Legal Resource Centre (LRC) (representing family) to NPA dated 31 July 2013 (Annex **TN31**)

5 August 2013	Letter from LRC to Acting NDPP disputing further reasons for delay	Letter dated 5 August 2013 responding to Adv Macadam email dated 31 July (Annex **TN32**)
5 December 2013	• DNA sample from Brits skeletal remains did not contain sufficient material for DNA extraction. A second sample to be obtained and sent to a specialist DNA Laboratory in Bosnia. • Facial reconstruction is being done in an effort to identify the remains. • The plot at Westonaria to be inspected by an anthropologist to determine feasibility of exhumations. • Four mortuary entries fit the criteria set these entries are however illegible. SAP Recovery Unit has been directed to find these graves and obtain a DNA sample from each for comparison purposes. • Plan and map to be submitted. • Additional TRC statements found and these need to be investigated. • 18 MK Operatives to be traced and interviewed.	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
16 January 2014	The family feels no closer to resolution despite the elapse of yet another year. The protracted delays with no action prior to 2010 are again pointed out. Family not satisfied with investigation progress since 2010 either. DNA and Exhumations – queries link between skeletal and other remains with Ms. Simelane and requests specifically what the links are to exclude "shots in the dark" as delaying tactics. Westonaria Plot- a possible exhumation of this plot should not cause delays in finalisation - unless there is specific evidence of a burial	Letter from Legal Resources Centre (representing family) to NPA dated 16 January 2014 (Annex **TN21.18**)

	site. Requests a meeting with the acting NDPP to discuss these issues	
16 January 2014	Acknowledges letter dated 25 September 2013 and will provide a comprehensive report on investigations into DNA of skeletal remains found at Brits by end of January 2014.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)
10 February 2014	In respect of DNA comparisons of skeletal remain found at Brits the testing has to be done at a specialist laboratory abroad which is expensive – procurement policies have to be followed for the authorisation of the expense. Such authorisation is awaited before proceeding with further sampling and testing. An expert in craniofacial superimposition was unable to make an identification. The Forensic Science Laboratory will follow up on the four remains identified in mortuary records and with a determination of possible exhumations at the Westonaria plot. Pending forensic results the investigator will continue the investigations identified by Adv. Macadam.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)
26 February 2014	Family is concerned to note that DPCI do not accept responsibility of investigation delays over the past four years. It is also noted that investigation has not been prioritised by DPCI and the end of investigation is not yet in sight. The nexus between the skeletal remains and mortuary remains are queried and do not provide a reason to delay finalisation of case. Two questions are posed: 1. Have investigation been conducted diligently? 2. Did the discovery of the skeletal remains halt or delay investigations?	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI dated 26 February 2014 (Annex **TN21.20**)
February to July 2014	No responses received to LRC letters to NPA dated 16 January 2014 and to the DPCI dated 26 February 2014. No other reports received.	

TP

10 July 2014	Letter from LRC to the NDPP (copied to Adv. Abrahams and Macadam) noting that: • No response had been received to LRC's letter of 14 January 2014 and assuming that the NDPP did not wish to meet with the applicant and her legal representatives; • No monthly progress reports had been supplied by the PCLU as previously promised; • Applicant had not been advised of the DNA test results. The letter assumed that there was no real intention to make a decision to prosecute or not; and moreover that there is no intention to refer this case to an inquest. It accordingly reserved the rights of the applicant. No response was received from the NDPP.	Letter from LRC to the NDPP dated 10 July 2014 (Annex **TN33**)
10 July 2014	Letter from LRC to Lt-Gen. A Dramat, National Head: Directorate for Priority Crimes Investigation (DPCI), SAPS noting that: • No response had been received to LRC's letter of 24 February 2014 and assuming that the DPCI has no response and that no progress has been made in this investigation; • Applicant had been promised notification of the DNA test results but heard nothing; • There was no intention to finalize this matter expeditiously or at all and reserving rights of the applicant.	Letter from LRC to National Head: DPCI dated 10 July 2014 (Annex **TN34**)

17 July 2014	Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 and: • alleging contact between applicant and investigating officer (IO); • notifying that the laboratory in Bosnia had completed the DNA tests and that the IO had been advised on 14 July 2014 that the results were negative; • alleging that extensive investigations had been conducted and the docket had been submitted to the NDPP for consideration and further instructions, if necessary; • Suggesting a meeting with the investigating officer's commanding officer Col Xaba to resolve any outstanding issues.	Letter of 17 July 2014 from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 (Annex **TN21.21**)
31 July 2014	Meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre). The meeting followed mostly a question and answer format with Frank Dutton asking for details about the investigation. The docket was handed to the PCLU of the NPA on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.	Minutes of meeting dated 31 July 2014 (Annex **TN21.22**)
11 August 2014	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC seeking an affidavit from the family's private investigator affidavit setting out what investigation he had conducted.	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC dated 11 August 2014. (Annex **TN35**)

TP

9 September 2014	In a letter dated 9 September 2014 the LRC advised Col Xaba that Frank Dutton took no statements.	Letter from the LRC to Col Xaba dated 9 September 2014 (Annex **TN36**)
10 September 2014	Col Xaba indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit from Frank Dutton.	Letter from Col Xaba to the LRC dated 10 September 2014 (Annex **TN37**)
16 September 2014	Frank Dutton supplied the requested affidavit to Col Xaba	Email with attachment from LRC (on behalf of Frank Dutton) to Col Xaba (Annex **TN21.23**)
25 September 2014	Col Xaba requests information on Thembi's family members who were studying in Swaziland	Letter from Col Xaba to the LRC dated 25 September 2014 (Annex **TN38**)
22 October 2014	Col Xaba requested further information and an affidavit from the applicant	Email from Col Xaba to the LRC (Annex **TN39**)
20 January 2015	The applicant hands her affidavit to Captain Masegela	Email from the applicant
26 February 2015	Col Xaba indicated that investigations are ongoing.	Email sent from Col Xaba to the LRC and SALC (Annex **TN40**)

THEMBISILE PHUMELELE NKADIMENG

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at JOHANNESBURG on this the 18TH day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

TREVOR BAILEY ATTORNEY
82 KILKENNY ROAD
PARKVIEW 2193
JOHANNESBURG
RSA.

ANNEXURES to IN CAMERA AFFIDAVIT

TN #	Description of Annexure	Paragraph(s) Cited
21.1	Extracts from of Police docket	Investigative Timeline
21.2	Letter from PCLU, dated 5 December 2013	Investigative Timeline
21.3	Letter from Dr. Ramaite, Acting NDPP, dated 31 January 2013	Investigative Timeline
21.4	Letter from NPA, Acting NDPP, Advocate Jiba re: PCLU's request for Duplicate Docket and TRC material, dated 13 August 2013	Investigative Timeline
21.5	Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010	Investigative Timeline
21.6	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU, to Captain Masegela, dated 27 October 2010	Investigative Timeline
21.7	Inquest Request – letter from T.P. Nkadimeng to NPA dated 11 February 2013	Investigative Timeline
21.8	Letter from Dr. Ramaite, Acting NDPP to T.P. Nkadimeng , dated 12 February 2013	Investigative Timeline
21.9	Letter from Adv. Macadam to Colonel Xaba of DPCI, dated 13 February 2013	Investigative Timeline
21.10	Minutes of meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC), dated 18 February 2013	Investigative Timeline
21.11	Letter from Thembi Nkadimeng to NPA, dated 6 March 2013	Investigative Timeline
21.12	Email from Adv. Macadam to Adv. Robin Palmer, dated 13 March 2013	Investigative Timeline
21.13	Email from Adv. Robin Palmer to Adv. Macadam, dated 6 April	Investigative Timeline
21.14	Email from Adv. Macadam to Adv. Robin Palmer, dated 15 April 2013	Investigative Timeline
21.15	Email between Adv. Macadam and Adv. Palmer, dated 2 May 2013	Investigative Timeline
21.16	Emails between Adv. Macadam and Adv. Palmer, dated 17 May 2013	Investigative Timeline
21.17	Email from Adv. Robin Palmer to Adv. Macadam, dated 26 June	Investigative Timeline
21.18	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI, dated 16 January 2014	Investigative Timeline
21.19	Fax from General Dramat of DPCI to LRC dated 16 January 2014	Investigative Timeline
21.20	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI, dated 26 February 2014	Investigative Timeline

TP

TN #	Description of Annexure	Paragraph(s) Cited
21.21	Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014, dated 17 July 2014	Investigative Timeline
21.22	Minutes of meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre)	Investigative Timeline
21.23	Email dated 16 September 2014 with attachment – Frank Dutton affidavit from LRC to Col Xaba	Investigative Timeline

John Vorster Square CAS 1469/02/96 TN 13

South African Police Service Suid-Afrikaanse Polisiediens

Private Bag 5
Privaatsak

Your reference / U verwysing

My reference / My verwysing 29/36/2

Enquiries / Navrae Direct Thoms / Capt Leask

Tel (011) 407-0152

Fax / Faks (011) 407-0150

HEAD NATIONAL CRIME INVESTIGATION SERVICE
HOOF NASIONALE MISDAADONDERSOEKDIENS

GAUTENG

JOHANNESBURG

2000

1996-02-19

A. The Secretariat for
Safety and Security
Mr A Cachalia
Private Bag X463
PRETORIA

B. The National Head
Priority Crime
PRETORIA

INVESTIGATION INTO THE ALLEGED KIDNAPPING AND MURDER OF NOKUTHULA SIMELANE DURING SEPTEMBER 1983 - MEMBERS OF THE SECURITY POLICE PROTEA, SOWETO - HEAD OFFICE REFERENCE 54/1/2(668) REFERS

1. The investigation into this matter has received priority attention and the necessary statements obtained where possible.

2. The following persons have given sworn statements:

2.1 Mrs Simelane - Mother of missing person Nokuthula Simelane.

2.2 Sgt Mzimkulu Nimrod Veyi - Members of the South African Police Service and source of revelations made to Sowetan and published on 1995-02-06.

TP

2.3 Constable Malosela Patrick Kobe - Member of the South African Police Service and ex member of the Security Police.

2.4 Constable Mokone Matsebetse Edward Sefuthi - ex member of Security Police, now retired.

2.5 Mr Petrus Cornelius Welthagen - owner of farm at Northarn where part of alledged crimes were to have taken place.

2.6 Sgt Moleke Peter Lengene - member of the South African Police Service and presently still working under the direct command of Superintendent Anton Pretorius.

2.7 Mr Norman Lungile Mkhonza, alias "Scotch" - ex covert agent for security Police, Protea, Soweto.

2.8 Inspector Mokapi Lazarus Selamolela - member of the South African Police Service and ex-member of the Security Police, Protea Soweto.

3. Very briefly, the persons interviewed scretch the facts leading to the disappearance of Nokuthula Simelane as follows:

3.1 She was an MK agent for the ANC and conducted courier services from Swaziland to South Africa and visa versa.

3.2 She worked under the command of a "Mpho" who during September 1983 sent her to South Africa where she was to meet agent "Scotch".

3.3 Before meeting "Scotch" she stopped over at an ANC Safehouse where Mr Duma Nkosi assisted her with directions to get to the Carlton Centre.

3.4 Nokuthula Simelane met with Scotch (covert agent) who had already informed the then Warrant Officer W H J Coetzee and Sgt A Pretorius who organised the arrest of Nokuthula Simelane in a basement at the Carlton Centre.

TP 9

3.5 After her arrest she was taken to a room in the married quarters of the SAPS Norwood where she was detained and tortured for about one to two weeks. Hereafter she was taken to a farm at Northarn in the Northen Transvaal, where she was further detained, tortured and interrogated. This lasted up and until the festive season, December 1983. It was at this stage that she was last seen by the witnesses interviewed.

4. The actual interrogators are alleged to be

W H J Coetzee now Superintendent
A Pretorius do
F B Mong now Inspector
P Lengene now Sergeant
Radebe now retired

5. Witnesses/suspect that are alleged to be deceased are Sgt Mathuba and ex covert agent Frank Langa "Big Boy"!

6. On 1996-02-15 an interview was held with Mr D Nkosi in Cape Town.

6.1 He knew about the meeting which was to take place, also that he had provided safety for Nokuthula in Soweto and after giving directions to her to reach the Carlton Centre, Nokuthula was never seen again.

6.2 Upon his return from Cape Town Mr Nkosi will assist and facilitate a meeting where "Mpho" will also then be interviewed and their full statements obtained.

7. On 1996-02-17 on the request of Sgt Lengene I re-interviewed him in which he passed on the following information:

7.1 He had not told the truth on the day he gave me his statement for the following reasons:

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7.1.1 He is presently serving under the command of Superintendent A Pretorius who also brought him for the interview on the day of him giving his statement.

7.1.2 He had been told that it was up to him and Norman "Scotch" to save their skins.

7.1.3 That Director Thoms would reveal all that he had said to them after taking his statement.

7.1.4 The Captain Leask would not be able to prove any charges as he had no proof of a body,

7.2 After the interview the following took place:

7.2.1 He was taken to Superintendent Coetzee's office where he was asked what had been said during the interview.

7.2.2 He was led into an argument because he had mentioned Scotch's name.

7.2.3 He was told to rewrite a statement which Superintendent Pretorius then first read and after okaying it, told him to keep it in a safe place so that it could later be handed to their attorney as they were busy arranging this through the Police.

8. On 1996-02-07 Superintendent Coetzee promised Captain Leask, the investigating officer to make available the witness/suspect "scotch" which up and until now has not been honoured.

8.1 The investigating officer however on 1996-02-09 found Scotch, on own accord and obtained his statement.

8.2 On 1995-02-10 Superintendent Pretorius and Coetzee secretly met with Scotch and coached him into what his version and manner should be if Captain Leask was to approach him. This discussion was secretly taped by the investigation team.

TP

9. It has become further very clear from the meeting with Sgt Lengene on 1996-02-17 that the incident regarding Nokuthala was not a once off incident but part of an extensive conduct which has lead directly to the planting of bombs, kidnapping of and murdering of numerous other persons.

9.1 Lengene confesses his own part in the murder of a person whom he had shot with an AK 47 rifle given to him by Superintendent Pretorius/Coetzee after the person had been told to plant a limpet bomb in Soweto.

10. A detailed statement will be obtained from Sgt Lengene on 1996-02-19 at a secret rendevouz upon which he has firmly stated he wishes to reveal all the "dirty tricks" which had taken place during his career in the Security Police as of 1982 up and until now.

11. It is of great concern to this office that both Superintendent Coetzee and Pretorius are presently employed in positions where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could also lead to the elimination of witnesses.

12. The investigating team has to go to great lenghts to keep the investigation, witnesses and information from the very persons attached to the priority crimes division of Gauteng. It is suggested that they be re-transferred to a post in the Uniform Pro-active division.

13. All further information will be brought to your attention.

14. An offical murder and kidnapping investigation has been launched under registered case docket John Vorster Square CAS 1469/02/96.

DIRECTOR
HEAD : PRIORITY CRIME : GAUTENG
N W THOMS

/MH/LIB/1/108

TP

John Vorster Square CAS 1469/02/96 IN 14

14

South African Police Service Suid-Afrikaanse Polisiediens

Private Bag 5
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My reference / My verwysing 29/36/2

Enquiries / Navrae Direct Thoms / Capt Leask

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HEAD NATIONAL CRIME INVESTIGATION SERVICE
HOOF NASIONALE MISDAADONDERSOEKDIENS

GAUTENG

JOHANNESBURG

2000

1996-02-26

A. The Divisional Chief
National Crime Investigation Services
PRETORIA

B. The Head
National Priority Crime Investigation Services
PRETORIA

INVESTIGATION INTO THE ALLEGED KIDNAPPING AND MURDER OF NOKUTHULA SIMELANE DURING SEPTEMBER 1983 - MEMBERS OF THE SECURITY POLICE PROTEA, SOWETO - HEAD OFFICE REFERENCE 54/1/2(668) REFERS

1. The investigation into this matter has received priority attention and the necessary statements obtained where possible.

2. The following persons have given sworn statements:

2.1 Mrs Simelane - Mother of missing person Nokuthula Simelane.

2.1.1 She states that Nokulhula was last seen in June 1983 - she was always travelling between S.A. and Swaziland as she was working for the ANC. Her disappearance was strange as she was to have graduated during October 1983 - Her personal belongings were found at Duma's place in Soweto as he was the last person of the ANC to see her.

TP

John Vorster Square CAS 469/02/96 26 B1

2.2 Sgt Mzimkulu Nimrod Veyi - Member of the South African Police Service and source of revelations made to Sowetan and published on 1995-02-06.

2.2.1 He states that he guarded Nokuthula as he worked under the command of Nokuthula's captors Superintendent Coetzee en Pretorius - His guard duties took place at the farm in Northam - he witnessed torture of Nokuthula - last saw her alive in the boot of Superintendent Coetzee's state vehicle on Potch/Johannesburg road near Fochville.

2.3 Constable Malosela Patrick Kobe - Member of the South African Police Service and ex member of the Security Police.

2.3.1 He states entirely hearsay evidence - he never knew or saw Nokuthula - he worked covertly on the AZAPO line - only heard numours that Superintendent Pretorius, Coetzee and Inspector Mong were responsible for the alleged murder of Nokuthula.

2.4 Constable Mokone Matsebetse Edward Sefuthi - ex member of Security Police, now retired.

2.4.1 He states that he was a guard who on instructions of Superintendent Coetzee and Pretorius assisted in arresting Nokuthula at the Carlton Centre, taking her then to Norwood SAPS flats where she was detained for ± one to two weeks, then taken to Northam where she was kept for ± 2 months - he also witnessed torturing and last saw her at the farm.

2.5 Mr Petrus Cornelius Welthagen - owner of the farm at Northam where part of alledged crimes were to have taken place.

2.5.1 He states that Superintendent Coetzee a family member had requested the use of the outbuilding for training of police recruits - he cannot identify Nokuthula but states that two women were brought to the farm over a period of two months.

2.6 Sgt Moleke Peter Lengene - member of the South African Police Service and presently still working under the direct command of Superintendent Anton Pretorius.

TP

John Vorster Square CAS 469/02/96 27 By

2.6.1 He in his first statement corroborates Sefuthi but denies ever having seen any torture taking place - he further states that Superintendent Coetzee and Pretorius gave Nokuthula clothing and money during December and released her to return to Swaziland.

2.6.2 In his second statement he alleges his first statement was made under duress from Superintendent Pretorius and Coetzee - he was told to rewrite a statement which he did and Superintendent Pretorius first checked it (Now as exhibit with Investigating officer) - he further states and corroborates the other witnesses that Nokuthula was trapped, tortured and adds that she was taken to Westonaria where she was further detained by Superintendent Coetzee and Pretorius at the private dwelling of Coetzee's brother - he then also states that he was part of a force under Coetzee and Pretorius in which he and other security Policemen and/or Askaris murdered ANC recruits after letting them place limpet bombs at railway points in Soweto - further that they also blew up and threw handgranades at councillers houses and municipal buildings in Soweto - he also has exposed the names of the other members involved.

2.7 Mr Norman Lungile Mkhonza, alias "Scotch" - ex covert agent for security Police, Protea, Soweto.

2.7.1 He states that he was a covert agent and set up the trap for Superintendnet Coetzee and Pretorius to capture Nokuthula - he was taken to a clinic after her arrest where he was placed in plaster of paris and a false message was sent to Swaziland by covert agent Frank Langa, that he had never met Nokuthula because he was involved in a car accident.

2.8 Inspector Mokapi Lazarus Selamolela - member of the South African Police Service and ex-member of the Security Police, Protea Soweto.

2.8.1 He corroborates all the other witnesses with regards to the trap, detaining and torture of Nokuthula - he however does not corroborate Veyi in that they were together when Veyi alleges he last saw Nokuthula alive in the boot of Coetzee's vehicle.

TP 07

2.9 Gilbert Thwala alias "Mpho" - Nokuthula's Commander in Swaziland.

2.9.1 He states she was sent to meet Scotch and Frank at the Carlton Centre - she was last seen or heard of after this meeting - she was expected back because she had to graduate - complete denial that the ANC had killed her as she was very valuable to them.

2.10 Duma Nkosi - owner of ANC Safehouse in Senoane Soweto.

2.10.1 He states that she stayed at his place whilst in Johannesburg 1983 - he gave her directions to get to the Carlton Centre on her request - she never returned - her personal belongings were removed from his place by her parents.

3. The actual interrogators are alleged to be

W H J Coetzee now Superintendent
A Pretorius do
F B Mong now Inspector
P Lengene now Sergeant
Radebe now retired

4. Witnesses/suspect that are alleged to be deceased are Sgt Mathuba and ex covert agent Frank Langa "Big Boy"!

5. On 1996-02-07 Superintendent Coetzee promised Captain Leask, the investigating officer to make available the witness/suspect "scotch" which up and until now has not been honoured.

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TP

John Vorster Square CAS 1469/02/96.

6. It has become further very clear from the meeting with Sgt Lengene on 1996-02-17 that the incident regarding Nokuthula was not a once off incident but part of an extensive conduct which has lead directly to the planting of bombs, kidnapping of and murdering of numerous other persons.

6.1 Lengene confesses his own part in the murder of a person whom he had shot with an AK 47 rifle given to him by Superintendent Pretorius/Coetzee after the person had been told to plant a limpet bomb in Soweto.

7. It is of great concern to this office that both Superintendent Coetzee and Pretorius are presently employed in positions where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could also lead to the ellumination of witnesses.

8. The investigating team has to go to great lenghts to keep the investigation, witnesses and information from the very persons attached to the priority crimes division of Gauteng. It is suggested that they be re-transferred to a post in the Uniform Pro-active division.

9. An offical murder and kidnapping investigation has been launched under registered case docket John Vorster Square CAS 1469/02/96.

****

B.1. For your information

DIRECTOR
HEAD : PRIORITY CRIME : GAUTENG
N W THOMS

/MH/LB11/118

TP 17

POLICE DOCKET:

PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996

Complainant: Sizakele Ernestinah Simelane

Offences: Murder: Method: unknown: Injuries: unknown
Kidnapping: falsely arrested during September 1983 at Carlton Centre.

Record of documentary and other exhibits: JVR(A)197/96: Cassette tape

STATEMENTS

SIZAKELE ERNESTINAH SIMELANE: Krugersdorp CAS 1263/01/96 – A3

A2 – Photograph of Nokhuthula

Press Clippings: Sowetan articles by Sharon Chetty – 27/1/95 and 6/2/95

MZIMKULU NIMROD VEYI: Krugersdorp CAS 1263\01\96 – A3
Sergeant in SAPS, Vehicle Theft Unit, Soweto

Wishes to make statement even though it may incriminate me. In 1981 joined SB at Protea in Soweto. Served in SB until 1985. On 27/1/95 read an article in the Sowetan in relation to Nokuthula Simelane who was reported missing as of 8/9/83. Approached Sharon Chetty and gave her story which was published on 6/2/95.

Duties: act as conveyer of information between handler and informer. Also had to recruit informers.

Scotch: Norman Mkhonza, covert policeman of security branch at Protea. Joined the ANC undercover and worked in Swaziland where he infiltrated the ANC. He reported to his handler: Warrant Officer WHJ Coetzee (now a Colonel with SAPS in Braamfontein). He advised Coetzee of the rendezvous at the Carlton. Arranged for her to be arrested. Both arrested so that cover of Scotch would not be blown. Policemen who went to Carlton included:

W/O Coetzee, Sgt Anton Pretorius (Col in Midrand), Sgt Radebe (discharged), Constable Lazarus Selamolela (Sgt at Sanab, Sandton), Late Sgt Mathiba.

Taken to a farm at Northam. The day after arrest he was posted to the farm to guard her. Persons who guarded her were:

TP 17

Constable Lazarus Selamolela, Const Edmond Sefuthi, Sgt Radebe, Sgt Mathiba, Adriaan Bambo (a recruit from Mozambique who is deceased), Manual from Mozambique, Const Patrick Kobe (taxi unit, Heidelberg).

Assault
She was kept in an outbuilding. She was interrogated by Coetzee, Pretorius and Mong. (Mong is in Soweto). Kept there for more than a month. Hands and feet were cuffed. Sleep was kept to a minimum. She was kicked and slapped. Bag was pulled over her head. At times she could no longer stand. "I was present and did what was expected of me".

Disappearance
One day myself and Lazarus were instructed to go to the SB at Potchefstroom and meet with Coetzee. We drove 1982 beige Honda Ballade. Close to 4 way stop of Fochville and Carltonville with the Joburg/ Potch road we saw a XR6 flashing lights. It was WO Coetzee. Coetzee who was on his own opened the boot and I saw Nokhuthula lying there with her hands (behind her back) and feet cuffed. She was alive. Coetzee told us to return to Soweto.

A few days later I asked Sgt Pretorius where she was as all the guards had been withdrawn. His response: "Moenie baie vrae vrag nie". Spoke to Mathibe who said that Coetzee and Pretorius had shot, killed and buried her at Rustenburg.

Signed at Jhb on 96/02/02 at 14:30
Before Capt Leask, Krugersdorp

MALOSELA PATRIC KOBE: Krugersdorp CAS 1263/01/96 – A7

Detective Constable with National Crime Investigation Unit, Priority crimes, Taxi Conflict – Heidelberg.

During 1982 I joined the SAP I was deployed by Internal Security covertly against Azapo.

Knows nothing of the Simelane woman. Did not see her at the farm and denies meeting her. In 95 Const Veyi telephoned me about this woman. Said I did not know her but heard that she had been arrested **and she had been seriously assaulted.** Got the info from Sgt Mathibe. He is however dead.

Everything I know is hearsay. I heard that Sgt Anton Pretorius, WO Coetzee, and Sgt Mong killed her Although I was handled by these people I did not see anything.

Signed at Jhb on 96.02.05 at 13.30 before N W Thomas.

TP 9

MOKONE MATSEBETSEBE EDWARD SEFUTHI: Krugersdorp CAS 1263/01/96 – A8

Was a SA Policeman. Presently medically unfit. Handed a copy of his **life history** to the investigation team. Started duties with SB, Protea, Soweto in 1982. First gave driving lessons then did covert work which included transport of members to border posts. Recognized photo of deceased. Aware that SP under handling by WO Coetzee made use of Scotch to lure her to the Carlton. Scotch is Norman Mthanza, a covert policman.

Persons present at time of arrest included: Coetzee, Sgt Pretorius, Sgt Mong, Lazerus Selapomela, Scotch. He himself was not present. Got the information through Scotch. After the arrest I know that she was taken to the Block B Flats at Norwood Police Station.

I had to guard her in the room on the roof of the building. She was kept there for about 3 weeks. One of the residents in the flats, a child, "discovered us detaining her there **after she had been screaming from assaults**".

We then took her to a farm in Northam in a cream white E20 Panelvan. The farm belonged to "Oom Piet". His house was very close to the building in which she was kept. She was held here for about 2 months. During this time she was interrogated by Coetzee, Pretorius and Mong. **She was hand and foot cuffed, severely beaten and tortured. At one stage she was unrecognizable.** At the farm she was guarded by myself, Peter Lengene and Veyi.

I was at the farm for at least one month. At a stage I asked Pretorius what happened to her and he said to me that "**I would never see her again**". Coetzee and Mong were present when this was said.

At one stage during the detention of the woman at the farm I had wanted to release her. **"She was however too badly injured and could not walk".**

"I strongly suspect that Nokhuthula has been murdered by Coetzee, Pretorius and Mong. They continuously threatened her with death during the interrogation. I had told Nokuthula never to give the information as they would then kill her".

96/02/06 Before Leask

MOKONE MATSEBETSEBE EDWARD SEFUTHI: Life History – A8

…I was transferred to SA Intelligence in Soweto Protea that is where I was completely exploited. ….i saw injustice ….ANC members were captured, tortured brutally both men and women ..

See para 44: Attempted murder of black policeman, Sefuthi: Sefuthi says summonded by AG in Jhb who says strong case but cannot allow it to proceed attackers were state members acting under cover and he cannot hamper the image of the state

TP

PETRUS CORNELIUS WELTHAGEN: Krugersdorp CAS 1263/01/96 – A9

Lives on farm in east Northam. In early 95 his farm was visited by Sowetan reporters who took photos. A family member, Willem Coetzee, who was in the SAP asked if he could use the outside building for training of persons in the underground. I agreed.

They stayed on the farm for about 3 months. While they were there I did not go to the building. I was aware that 2 black women received training. One followed the other. They were young about 18 years. I will not recognise them.

There was no noise or screaming. The building is about 300 m from my house.

Have not seen Willem Coetzee in 3 years.

96-02-08 - Leask

MOLEKE PETER LENGENE: Made under duress. Krugersdorp CAS 1263/01/96 - A10

Sergeant in SAPS attached to Crime Intelligence Unit, Jhb. He was a "returned exile" and in 1983 was stationed with the Security Police at Protea in Soweto. His task was to train new recruits. His commanders were Capt Coetzee and Lt Pretorius.

In relation to Nokuthula his task was to explain to her "how we worked". This was when she was detained in "a room at the back of the farm". He does not know how she got there.

One morning, Capt Coetzee, Lt Pretorius and Sgt Mony arrived at the farm with new clothing for her. She was told that she was being taken back to Swaziland. They took her away in Ford XR6. I never saw her again. Other policemen involved "with this lady" were Sgt Sefuthi and Norman Mkhonza.

"When I last saw her she was in good health". Denies assaulting her. When he saw her for the first time she was in "good health", **"however she did have some bruises on her face"** There were also bruises on her hands. She explained to him that this was because of the handcuffs.

96/02/09 at 10.03 at Jhb before Leask

NORMAN LUNGILE MKHONZA – A11 (also known as Scotch) - Krugersdorp CAS 1263/01/96 – A11

Employed by Old Mutual. Claims he is bound by the Secrecy Act and cannot give information to anyone.

TP

During 83 was stationed at Protea Security Branch. Task was to work as an undercover agent in Swaziland. He had infiltrated the ANC. Commander was "Willem Coetzee 'Mkhize'".

He passed on information to Coetzee that an MK agent female was to meet with him at the Carlton Centre. The instruction from Swaziland was to wear a yellow shirt and brown trousers. She found me sting at a table at the "Fun Foods Restaurant".

Coetzee, Pretorius and Mony were present. One was taking photographs. On the way to car we were both arrested. We were taken in separate cars and I did not see her again. I was released the same day.

My code name was Dan. I was taken to East Rand where I had plaster of paris applied to my leg and arm. This was my cover why I did not meet her. "Big boy" Frank Langa took this message back to Swaziland. He worked at the security police. Protea.

About 2 weeks later I asked Coetzee where the lady was and he replied: "Moenie baire vrae vra nie". A few months later I asked the same question and he gave the same answer.

Coetzee gave me money to entertain her so that she could be photographed. It was about R100. I has signed for the money at Norwood where Coetzee was staying.

PETRUS MOKEBE MADIBO: Krugersdorp CAS 1263/01/96 – A12

Sergeant in SAP and attached to the West Rand Murder and Robbery Unit, Krugersdorp. On 96/02/10 upon the request of Capt Leask I proceeded to Vereneeging where I handed over to "Scotch" a tape recording device with a clean tape in it.

This device was hidden on the body of Scotch and we monitored Scotch in the presence of 2 white men at the Wimpy in Vereeniging. After the meeting I recovered the device from Scotch which I then gave to Capt Leask. I do not know what was said during this discussion. The white men drove in a white Opel Kadet CA 553 781.

MOHAPI LAZARUS SELHMOLELA: Krugersdorp CAS 1263/01/96 – A13

Inspector in the SAPS and attached to the Organised Crime Investigation Unit, Gauteng. In 1983 Coetzee was my commander. He instructed me to accompany him to the Carlton Centre. Those present included Coetzee, Pretorius, Sgt Mathuba, Sgt Radebe. It is possible that Sefuthi and Mong were also there.

Scotch was followed by our team to the Juicy Luicy in the Carlton Centre. We followed them to the basement where they were arrested and split up. Radebe was in the back of

TP

Coetzee's car with the lady. We followed them to the Norwood married quarters of the SAP. At the top of the building was a room used by the security police. She was interrogated there by Coetzee and Pretorius. The team was all present.

She was kept there for about a week. She was guarded 24 hours by the team. Sgt Vezi also joined us during this period. Whilst in my presence at the married quarters nobody assaulted her. **It was however clear to me that she had been assaulted. Her face was badly swollen.**

When she was originally arrested she was wearing jeans. During her detention she wore overalls. I did not see her other injuries.

After a while we were instructed by Coetzee to follow them to a farm in Northam. I was driving with Vezi. She was put in a small outbuilding at the back of the farm. We erected a tent behind the room where we slept. She was kept on the farm for more than a month. She was interrogated here which was done by Coetzee, Pretorius and Mong. Mathiba was also present.

She was assaulted by use of a bag over her head, use of electrical shocks. She became very weak and could no longer walk. Us black members always tried our best to nurse her but had to be careful not to be caught by our superiors.

During her detention, the assaults were the cause of her changing her physical appearance. She was treated very badly for a woman.

One night this same lady was taken to the zinc dam where Radebe threw her in. She was thrown into the dam after interrogation bouts.

At the farm, Peter Lengene was also present.

She at this stage could no longer walk and we had to even take her to the toilet.

One day we were all withdrawn from the farm. That is the last time I saw her. I do remember Pretorius saying he was just going to lock her up. I thought they were going to take her to a police station.

I do not know who took her away from the farm as I was one of the first to leave. Coetzee, Pretorius and Radebe were still with her when we left.

I never asked questions after last seeing the body.

96.02.11 at 12.08 before Leask

TP

Interview of Sgt PETER LENGENE at Grasmere 1 Stop N1 at 19:24 – 21:45 on 96/02/19 by Leask, Madibo and Badirwang: John Vorster Square CAS 1469/02/96 – A14

In 1982 I was in exile in Gaberone, Botswana where I was kidnapped by Coetzee and Pretorius. I was beaten and tied during the kidnap. I was taken to a house in Rustenberg. This house belonged to Coetzee's in-laws.

Under duress I worked for the security police. My work was to train their recruits about politics and life in exile. I would go to Durban and elsewhere to assist in recruiting people. I was made a policeman but I never went to college.

First I wish to state that my original statement was not the whole truth. The reasons are:

1. I was taken to the interview by Supt Pretorius. We first met with Supt Coetzee.
2. Pretorius told that I should not worry as Director Thoms was going to help us in this matter.
3. That Director Thoms would later show them the files. I was therefore feeling uncomfortable to make a statement as I knew they would be reading it later.

After making the original statement the following took place:

1. I was told to report to Coetzee's office.
2. I was asked to tell them what I had said in my statement. I told them and they questioned me .. for talking to Scotch. They insisted he was not there. The same about Sgt Sefuthi. They said Mathiba was present.
3. Pretorius told me that I must rethink my statement and bring it to him so that he can file it and later show it to our lawyers. I did this.
4. Pretorius was given my statement which he read and gave it back to me. He told me to keep it safe because if he it they could say he was interfering with witnesses. He said that him and Coetzee were the accused.
5. Pretorius asked me if I was shown the photo in the file. He asked me if it was the same woman and I said yes.

Before I made my original statement, Pretorius had told me that the case could not be proved because there is no proof. They suspected Veyi of giving the information to the press.

I fear Supt Coetzee and Pretorius very much and at no cost must they become aware of my statement to you.

Gives an account of abduction and removal to Norwood. The first time I saw her when I went to guard her. **She was already beaten up.**

She had bruises on her face, hands and feet. She was wearing a brown overall. Her hands and legs were cuffed. I was never present when she was interrogated at the flats.

TP 9

She was transferred one or 2 weeks later to Northam Farm near Thabazimbi. I went to the farm in December 1983 with Sgt Sefuthi. **He was in possession of the keys for the cuffs. This was so he could untie her if she wished to relieve herself.**

During my stay Coetzee and Pretorius never came. **On my arrival at the farm this lady was in a bad condition. She told me that she was very afraid of Coetzee as he was very hard on her during interrogation.** She told me she had been promised to be taken to back to Swaziland.

On New Year's eve, Pretorius came with Coetzee and Mong. They had brought new clothes with them for her. Coetzee told her to wash and put the new clothes on. They said they were taking her to Swaziland. The lady was put into the back of our panel van and we followed Coetzee and the others to Westonaria. Here we took her to a certain house where she was placed in the servant's quarters.

Here she was left in the company of Sefuthi, Pretorius and Coetzee. Mong was instructed to take me back to Jhb, which he did. This was the last time I saw this woman. One day after this Sefuthi, Mong and myself were in a vehicle. Sefuthi asked what had happened to her and he said that if we wished to survive in this department you should not ask questions.

I wish to give details on other activities I had taken part in on instruction from Pretorius and Coetzee starting with a murder I was directly involved in.

Not sure of exact year, I think it was 1988. We had a source who had infiltrated the ANC youth in Soweto. This was Max Maukhanzane. He is now a policeman at Jabulani SAP. Then proceeds to explain his role in booby trapping limpet mines and his shooting of a recruit at the behest of Pretorius; and the burning of the bodies, Also gives accounts of involvement of attacks on house of a councilor, and the rector of Vista College, and the bombing of municipal offices in White City and Mzimhlophe Hostel.

96/02/17 before Leask

GILBERT ZAKHELE THWALA: John Vorster Square CAS 1469/02/96 – A15

Inspector General, SA Airforce, HQ Pretoria.

During 1983 I was a commander in the ANC armed wing based in Mbabane. I knew Nokhuthla from 1977. During 1983 she was under my direct command. She was a courier for the units serving in SA. During August or September I instructed her to go to Jhb to meet members of another unit. She was to stay at Duma's place in Soweto. The persons she was to meet were known to me as Frank and Scotch.

TP

She reported her safe arrival. After her meeting she was supposed to return to Duma's place with the communications then proceed to her parents in Bethal and then return to Swaziland.

She never reported back to me. Duma said she never returned. Her parents had no information. The very same weekend of her disappearance either Frank or Scotch was in Swaziland. This was against strict instructions of the ANC that they were never to come to Swaziland. He claimed he had come to Swaziland cos he was scared.

Scotch and Frank had instructions to attack a substation in Randburg. I had confirmation of such an attack in the news.

After this incident neither Frank nor Scotch ever came back to us. I received a visit from the parents of Nokhuthula and I explained to them.

The persons under my command who had specifically spoken to Scotch or Frank in Swaziland would have been Mafa Ngidi Hlonuka (Mayor of Alex/ Sandton) or John June, staying in Phefeni, Soweto. My codename in 83 was Mpho.

She was not kidnapped or murdered by my men. She was of great value to my unit.

96/02/24 before Leask.

DUMA NKHOSI: John Vorster Square CAS 1469/02/96 – A16

In August and September 1983 was attached to a MK unit operating from Swaziland and working in Soweto. Mr Mpho, based in Swaziland, was his commander and would send him instructions.

Was advised that a courier, the late Simelane, would visit and to give her assistance and residence. She stayed with me and I directed her to the Carlton. She left and never returned. Reported this to Mpho who said she never arrived back in Swaziland. Her parents came to investigate.

96/02/24 at Braamfontein before Thoms

THEMBI VILAKATI: John Vorster Square CAS 1469/02/96 –A17

Aunt of the deceased. During 1983 Nokhuthula stayed with deponent. She had just completed her degree and was about to graduate in October 1983. In September she said she was going home to get clothes for her graduation. She never returned. Nokhuthula normally kept in close contact with me and her family. She never made contact.

06/02/29 at Manzini before Leask

TP

JAN STEFANUS FOURIE : John Vorster Square MAS 1469/02/96 - A18

Forensic analyst in the SAPS. Leask gave him "mikrokassetband" to examine. "Daar is n poging aangewend om die spraak verstaanbaarheid op die heropname te verbeter. Ek het geen byvoegings gemaak tot, of geen deel verwyder vanaf die oorsponklike opname nie."

1996 -03 -05 at Silverton

J VAN ZYL – A19

During 1982 -83 he was a member of the SAP stationed at Norwood and served as caretaker (opstigter) of the Police Flats in Norwood.

One Coetzee, a member of the old security branch, together with his staff members, used a storeroom on the 10th floor of the building as an office for interrogation. I cannot remember who gave permission for this use.

96/03/28 before Leask

JOHAN HENDRIK PRETORIUS: Krugersdorp CAS 1263/01/96: PR NO: 107/96 – A20

Inspector in official photography service of the SAPS stationed at the Criminal Record Centre in Rustenberg. On 96-02-08 at 12:15 I photographed points at the farm Uitsig as pointed out by Sgt Weyi. Photos attached.

JUSTICE MAFA HLOMUKA NGIDI: John Vorster Square CAS 1469/02/96 - A21

Mayor of Sandton City. In response to claim by Gilbert (A15) that I spoke to Scotch or Frank I deny this. Instructions were clear that after training Mpho would give instructions to Scotch and Frank so I did not have communications with them.

96/7/03

MSEBENZI TIMOTHY RADEBE –A22 (untruthful statement)

Detective Inspector with the Kwa Mhlanga Motor Vehicle Theft Unit, Mpumalanga.

In 1982 I was transferred from Murder and Robbery to Soweto Internal Security Services. I worked under Superintendent Willem Coetzee, who was a warrant officer and Senior Superintendent Pretorius who was a sergeant at the time.

TP

One Saturday, Coetzee told me there was work to do at the Carlton Centre. He asked me to meet him at the Norwood barracks and told me to proceed to a certain restaurant to meet an informer by the name of Scotch who was on observation.

While in the restaurant I noticed a certain lady come to the informer and sat with him for about 20 minutes. She was in a chicken licken uniform. They left the restaurant and Scotch signaled us by taking out a white handkerchief.

Outside the restaurant I introduced myself and I told her that I was arresting her. She was very co-operative and we went to the basement where our car was parked. I proceeded with Coetzee and Lazrus.

She was kept at Norwood barracks for about a week. Myself, Lazrus and N.... and a certain female guarded her.

I last saw her the day I guarded her. I then asked for a transfer. I asked Coetzee why I should guard a person for 24 hours and he did not give me an answer. He said that in the security branch you must no complain you must comply with instructions. I was then transferred to John Vorster Vehicle Branch.

96-07-26 before Capt Ndlovu

WARNING AGAINST W H J COETZEE ITO S35 OF THE CONSTITUTION: at 14h30 on 6-07-1998 at Pretoria – A23

In the case of murder of Nokhuthula Simelane – during September 1983 at about Carlton Jhb. Declined to make a statement.

3 PHOTOGRAPHS OF THE WELTHAGEN FARM

CORRESPONDENCE

LETTER FROM N W THOMS, HEAD PRIORITY CRIMES, GAUTENG TO A CACHALIA, SECRETIRIAT FOR SAFETY & SECURITY AND NATIONAL HEAD, PRIORITY CRIMES DATED 96-02-19 – B1

Reference 29/36/2 Director Thoms/ Capt Leask

Investigation has received priority attention. Listed people who have given statements.

Pointed out that Sgt Moleke Peter Lengene still works under direct command of Superintendent Anton Pretorius.

TP

Sketched the facts as given by the persons interviewed.

In paragraph 3.5 she was taken to a room in the married quarters of SAPS Norwood where she was detained and tortured for about 2 weeks. Then taken to a farm at Northham where she was further detained, tortured and interrogated. This lasted till the festive season, December 1983. This was the last time she was seen by the witnesses.

Par 4: the actual interrogators are alleged to be: Coetzee, Pretorius, Mong, Lengene and Radebe.

Par 5: Witnesess/ suspects believed to be deceased are Sgt Mathuba and Frank Langa "Big Boy".

Par 7: On 1996-02-17 on the request of Sgt Lengene I (Capt Leask) re-interviewed him. He said his first statement was not truthful. Because he was serving under Pretorius. Pretorius told him that "it was up to him and Norman "Scotch" to save their skins". That Director Thoms would reveal all that he said in his statement. That Capt Leask would not be able to prove any charges as he had no proof of a body.

After the interview he was taken to the Coetzee who wanted to know what had been said in the interview. He was led into an argument because he had mentioned the name of Scotch. He was told to rewrite a statement which Pretorius okayed and told him to keep it in a safe place so that it could later be handed to their attorney as they were busy arranging this through the police.

On 96-02-07 Coetzee promised Leask to make the suspect Scotch available which he never did. Leask however found him.

Par 8.2: On 95-02-10 Pretorius and Coetzee secretly met with Scotch and coached him into what his version should be if Capt Leask approached him. This discussion was secretly taped by the investigation team.

Par 9: It has become very clear from the meeting with Sgt Lengene on 96-02-17 that Nokhuthula's incident was not a one off event but part of an extensive programme involving bombings, kidnapping and murder of numerous persons.

Lengene confesses his own part in a murder in which he shot someone with an AK47 given to him by Pretorius and Coetzee.

A detailed statement will be obtained from Sgt Lengene on 96-02-19 at a secret rendezvous at which he will reveal all the dirty tricks he was involved in.

Par11: It is of great concern that Coetzee and Pretorius are still in positions in the police where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could lead to the elimination of members. It is suggested that they be transferred to the Uniform pro-active division.

TP

An official murder and kidnapping investigation has been launched - John Vorster Square CAS 1469/02/96.

TELEFAX FROM CAPT LEASK TO MINISTER MUFAMADI, DATED 96/02/22 –B2

LETTER FROM CAPT LEASK TO CO, ELECTRONICS UNIT, FORENSIC LAB, DATED 96-02-26 – B3

Attached one micro cassette tape properly sealed with no 224. Conversation with three parties in a busy restaurant. As a result of background noise this impaired to a certain extent the proper hearing of the discussion.

Seeks assistance to diminish background noise but to maintain authenticity.

LETTER FROM N W THOMS, HEAD PRIORITY CRIMES, GAUTENG TO DIVISIONAL CHIEF, NATIONAL CRIME INVESTIGATION SERVICES AND HEAD, NATIONAL PRIORITY CRIMES DATED 96-02-19 – B4

Same letter as B1

TELEFAX TO DUMA NKOSI FROM CAPT LEASK DATED 96/03/05 – B5

Attached statement of Duma. Advised that he (Leask) had made contact with Steven Markowitz and believe that we will be getting all the necessary assistance. States that the Director and myself have already been to Swaziland and all went well there.

LETTER FROM J S FOURIE, FORENSIC SCIENCES LAB TO CO SAP, JOHN VORSTER SQUARE DATED 96-03-04 – B6

Returns evidential items to Capt Leask with seal number 1815

RESULT OF TRIAL: INVESTIGATION BY FORENSIC SCIENCE LAB. REF NO: 8625/96 (T1759)

Nothing stated in the document.

LETTER FROM ASST COMMISSIONER L VAN DER WESTHUIZEN, NCIS, GAUTENG TO PROVINCIAL COMMISSIONERS – NORTHERN PROVINCE, NORTH WEST, MPUMALANGA, GAUTENG, FREE STATE, EASTERN CAPE, WESTERN CAPE, KWAZULU NATAL, NORTHERN CAPE DATED 96-03-06 – B7

TP

Re: Missing persons period 1980 to 1996. Unidentified bodies recovered by the SAPS. Requests assistance of all SAPS Govt mortuaries to supply list of all unidentified bodies removed by the SAPS, race and sex, place of discovery and cause of death, case or inquest number, fingerprints or photos on record.

INVESTIGATION DIARY

INVESTIGATION DIARY: Krugersdorp 1263/01/96: 96/01/30 – 98/02/10: C1 –12

Selected extracts: 96/02/07: 16.00 Const Selomolela interviewed. Knows the woman but wishes to first seek advice and clear his thoughts before making statements. Appointment made for the next day at Nandos Krugersdorp.

96/02/08: 08.30: he is willing to give a statement as he fully intends to approach the TRC. He will first approach his attorney and then make a new appointment.

96/02/14: meeting with Thoms at office Azar Cachalia.

96/02/26 Case discussed with Deputy Attorney General Adv Kevin Attwell and Adv De Vries on 96/02/23. Recommendation that the matter be discussed with Dr De Oliviera of the 3rd Force Investigations. Discussion was held with de Oliviera. All possible evidence must be gathered and investigation must proceed.

96/02/28: Linda Moni contacted at his home. Represented by Wynand Louw of Joubert & Cornelius. Wished to consult with client before statements.

96/08/05: correspondence forwarded to Duma Nkosi as per B5. Mr Steve Markowitz of New Vision productions was interviewed.

96-10-22: Saak word vir afwagting van PG terruggehou. Adv Ebrahim lees die stukke. Open n Ondersoek dag we..eus (?) boek - NW Thoms

96/10/23 Noted. Investigation notes are filed in respective files – Leask

98/02/10 – amnesty hearings o/s.

TP 07

Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
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5 December 2013

Your Ref: B Sibiya

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Dear Sir/Madam

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA SIMELANE

1. I acknowledge receipt of your letter, addressed to the Acting National Director, dated 28 November 2013, which was brought to my attention on 4 December 2013.

2. I must however apologise to you for not forwarding a reply to you in response to your letter of 20 September 2013. A reply and a progress report were prepared, but due to other pressing commitments, were not forwarded to you prior to the arrival of your latest letter.

3. Due to the contents of your latest letter, I deem it unnecessary to respond to the issues raised in the letter of 20 September 2013, but my failure to respond should not be construed as an admission of any of the facts stated therein.

4. I wish to correct your claim that the police docket was referred to the PCLU in 2001. The PCLU was only created by Presidential Proclamation in March 2003 and officials only assumed duty in either July or August of that year. The investigation initiated by then Captain Leask was not referred by SAPS to the PCLU. It is also not correct that little or no action was taken in this matter

until earlier this year. This issue was comprehensively dealt with by Dr Ramaite SC in his communications with your client earlier this year.

5. I respond to your queries raised in para 4 of your letter as follows:

5.1 Ad para 4.1: Failure to hold an inquest between 2001 and 2010

5.1.1 Shortly after his appointment in late 1998, Mr Ngcuka, the then National Director, established a TRC component within his Head Office to attend to prosecution-related matters arising from the TRC. The majority of the amnesty judgments had not been delivered at that time (including the case of your client) and the unit was disbanded in 2001. Captain Leask was instructed by his superiors to suspend his investigation and surrender his docket to Captain Holmes so that the matter could be investigated as part of a larger case against former SAPS General Engelbrecht. Captain Holmes appears not to have investigated your client's case further and his unit was thereafter disbanded and he subsequently died of cancer.

5.1.2 In 2003, the work of the TRC Amnesty Committee was concluded and once the PCLU had become operational, Mr Ngcuka referred the TRC cases to it.

5.1.3 Your client's case was not referred to the PCLU by the authorities who had previously been responsible for the investigation and prosecution of TRC matters, despite a request by the PCLU that all outstanding cases requiring decisions whether or not to prosecute should be referred to it.

5.1.4 It would appear that this matter was brought to the attention of the PCLU in November 2004 when a submission was made by the Foundation for Human Rights (who at that stage represented your client) that the persons who were refused amnesty should be prosecuted. This was taken forward by way of a recommendation in March 2006 that consideration be given to the customary international law crime of torture.

TP 07

5.1.5 I have been advised that several discussions took place between Adv Ackermann SC, the then Head of the PCLU and representatives of the Foundation. In this regard I have been further advised that although at one stage Adv Ackermann SC raised the issue of holding an inquest, this was resisted by the Foundation who then proposed that Sergeant Radebe be prosecuted for kidnapping.

5.1.6 Obviously, consideration to the institution of a prosecution could only be conducted on the basis of a fully investigated police docket. It is clear that Captain Leask had not concluded his investigation and that no further investigations were conducted thereafter. The NPA had no role to play in these decisions. Dr Ramaite SC has explained in his letters to your client why the necessary investigations were not conducted by the relevant law enforcement agencies once the PCLU had become seized with the matter.

5.1.7 As is clear from the instructions given by Adv Macadam when he became seized with the matter, he required the matter to be properly investigated, including the issue of Sergeant Radebe's role in the kidnapping. These investigations have been in progress since October 2010. The holding of an inquest would only be appropriate once a decision whether or not to prosecute had first been taken.

5.2 Ad para 4.2: DNA analysis

A DNA sample was retrieved from the skeletal remains found in the Brits area in April 2013 for comparison with the sample provided by your client. In June 2013, the SAPS laboratory indicated that the sample retrieved from the remains contained inadequate DNA material for comparison purposes. The Head of the SAPS laboratory has however indicated that a second sample will be obtained and submitted to a specialist DNA laboratory in Bosnia, which specialises in DNA analysis relating to bones which are of archaeological significance. The results of the second analysis are still awaited.

5.3 Ad para 4.3: Exhumation-related issues

During the course of a routine excavation in the Brits area, the skeletal remains were found by contractors. In the opinion of

TP

the investigating officer and his commander, the remains could be those of Nokuthula Simelane due to the proximity of the site to the farm where she was detained and tortured. The remains were submitted to an anthropologist who made certain findings which may be consistent with the missing person. However, SAPS has been requested to provide a more comprehensive case history in order to establish whether the anthropologist can make more specific findings. In addition, photographs of Nokuthula Simelane taken shortly before her disappearance have been provided to a facial reconstruction expert for forensic investigation. The PCLU has requested a meeting with the Head of the SAPS Forensic Laboratory in order to determine when all the outstanding examinations may be concluded.

5.4 Ad paras 4.5 and 4.6: Westonaria Plot

The plot in question was pointed out by a former police under-cover agent, who was involved in your client's case. Certain investigations were conducted by the NPA's Missing Persons' Task Team (MPTT). A recommendation has been made that the plot be inspected by a specialist anthropologist to determine the feasibility of an exhumation. This aspect must be taken up further by the SAPS Victim Recovery Unit and the necessary direction given to SAPS in this regard.

5.5 Ad para 4.7: Mortuary Records

The MPTT was requested to peruse the records of all mortuaries in areas which have relevance to your client's case. The criteria applied were unidentified females (corresponding with the race, gender and age of the missing person) who had been admitted to the mortuaries during the period of her disappearance and detention. Only the Krugersdorp mortuary (located midway between other key areas, e.g. Westonaria, Soweto, Northam, etc) revealed entries consistent with the criteria set. The records however do not have police reference numbers and the post mortems are illegible. An enquiry directed to the Police Photographic Units established that no photographs were taken at that mortuary at that time. A request has however been made to the SAPS Victim Recovery Unit to canvas the possibility of being able to locate the graves in question and if this is possible, to take a DNA sample from each grave. If a positive connection was made with the sample provided by your client, then obviously that grave will be exhumed.

TP

5.6 Ad para 4.8: Monthly reports

I have already explained why the October report was not provided. I have no record of Legal Resources Centre acting on behalf of your client from February 2013. Adv Macadam was contacted by Adv Palmer, who informed him that he represented your client. From that date, there were ongoing meetings, email communications and telecoms between the two advocates where progress with your client's case was reported on and discussed.

5.7 Ad para 4.9: Reasons for not holding an inquest

I will respond to these issues hereunder.

6. I am prepared to meet with you and would request you to provide me with proposed dates so as to enable me to decide when I can accommodate you. My view is that the outstanding investigations should be concluded in early 2014 and that the holding of an inquest should be held over until the decision whether to prosecute or not has been taken. In terms of the Inquests Act, an inquest is only held when a prosecution on a charge relating to the death of a person is not instituted. I am of the view that the following factors would indicate the inappropriateness of holding an inquest prior to the conclusion of the investigations and the decision being taken:

6.1 A judicial officer would not be inclined to hold an inquest in the absence of a decision not to prosecute and on the basis of an affidavit by the investigating officer that there are key outstanding investigations. Section 4 of the Inquests Act in any event requires that a prosecutor request further information if he/she is not satisfied with the police investigation.

6.2 All the persons (including those who submitted witness statements), who were involved in the kidnapping and torture are entitled to legal representation and to decline to answer incriminating questions. It is only to be expected that their lawyers would object to the commencement of the inquest prior to the investigation being concluded.

6.3 The investigating officer would be seized with the inquest and be unable to continue with his investigations.

6.4 Were an inquest to commence, there would be frequent postponements due to all the outstanding issues.

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6.5 Were a prosecution to be instituted, the witnesses would be prejudiced, as they would then be subject to cross-examination in two *fora* on the same issues.

7. I provide the following further information by way of a progress report covering the period October to December 2013:

7.1 I have already dealt with the issues relating to the skeletal remains found in Brits, the mortuary entries and the Westonaria plot. The SAPS has been requested to address and expedite the outstanding issues relating to these matters. If positive, these investigations could establish that the missing person never returned to Swaziland and would have a serious impact on the version of certain of the amnesty applicants.

7.2 The archive records relating to the persons, whom certain of the applicants claim were arrested as a result of the information provided by the missing person, have been retrieved and carefully perused. The investigating officer has been requested to trace the relevant persons and to obtain comprehensive statements relating to this issue. Where the persons' versions can be verified by the authors of the State documentation retrieved, then those former State officials should also be traced and affidavits obtained from them.

7.3 Additional statements have been requested from certain of the State witnesses arising from material now obtained.

7.4 Photograph albums and maps of the relevant scenes have also been requested.

7.5 A proper search of the State Archives has revealed that documentation referred to during the course of the amnesty hearing cannot be located. However, additional statements taken either by the TRC or SAPS, which appear not to have been before the committee, have been found and the contents of those statements require investigation.

8. As indicated, key evidence relating to the amnesty hearing is no longer available. The records reflect that an Adv van den Berg represented your client at the hearing. If your client is in possession of any of the records relating to the amnesty hearing, it would be appreciated if these could be made available to the investigating officer in order to establish whether the missing

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documents can be traced. Further evidence available to the investigating officer is that your client's family collected Nokuthula Simelane's passport from Mr Duma after her disappearance. If the family is still in possession of the passport, it would be appreciated if this could be made available to the investigating officer, as it contains highly relevant information.

9. I therefore await your communication regarding a meeting.

Yours sincerely

9/12/2013

ADV SK ABRAHAMS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
AND ACTING HEAD: PRIORITY CRIMES LITIGATION UNIT
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

TPD

"TN 21.3"

51

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31 January 2013

Ms TP Nkadimeng
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Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 29 January 2013 and at the outset express my extreme sympathy for the suffering you and your family have experienced due to the unresolved disappearance of your sister. The purpose of my communicating with you is to explain fully all the relevant facts relating to your sister's disappearance so as to allay your criticisms levelled at the PCLU. Your case has and will continue to receive diligent attention by the NPA. As will be explained hereunder, it is not possible to hold an inquest prior to the conclusion of the outstanding investigations, which must be conducted by the DPCI.

2. Although your sister disappeared in September 1983, the first information identifying suspects was only received by SAPS in 1996.

3. When the TRC was established, SAPS elected to put on hold all investigations where amnesty application had been lodged. Your sister's matter was one such case.

4. The judgment of the Amnesty Committee was only released in May 2001.

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5. When the PCLU was established in 2003, the National Director referred all TRC cases to it.

6. It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases.

7. Your application to have the provisions (which you state constituted a second amnesty process) set aside, resulted in the Court declaring the whole guidelines unconstitutional, including the mechanisms creating structures for the investigation of such cases.

8. When the President established the Ginwala Commission, SAPS declined to further investigate the matters, pending the conclusion of the Commission. One of the matters falling within the terms of reference of the Commission was the manner in which TRC cases were dealt with by the NPA.

9. The dissolution of the DSO, the establishment of the DPCI and the redefining of the mandate of the detective service did unfortunately hamper efforts to have your case investigated.

10. In early 2010, Adv Macadam was appointed by the Acting National Director to take over all the matters and to liaise directly with the DPCI, following an agreement reached between the NPA and General Dramat.

11. I enclose a copy of Adv Macadam's letter of 25 March 2010, addressed to the Unit Commander of the DPCI, who had been mandated to investigate TRC cases. As emerges from the letter, Adv Macadam did specifically request that the issue of prosecuting Detective Inspector Radebe be investigated. As is also clear from the letter, the NPA at that stage merely had a duplicate docket and it was obviously essential that the original docket and other evidence be located.

12. Captain Masegela was appointed to investigate the matter and in late 2010 submitted a docket to Adv Macadam. I enclose a copy of a letter, dated 27 October 2010, written by Adv Macadam to Captain Masegela, requesting an extensive number of all-embracing investigations. Yet again, the role of Detective Inspector Radebe was emphasised. As is evident from the investigations requested, your sister's case had obviously not been fully investigated, either by the TRC or by SAPS. It is also clear that it would not be possible to quickly finalise the investigation, because of the issues required to be canvassed.

13. It is correct that the PCLU declined to institute a prosecution on the Customary International Law crime of torture and on a

TP

charge of attempting to defeat the ends of justice. The two letters, written by Adv Macadam, however demonstrate that the request that consideration be given to the prosecution of Detective Inspector Radebe, was acceded to.

14. It is the view of John Dugard, one of the world's leading experts in the field of International Law, that international crimes require domestic legislation before they can become enforceable in South Africa. The Constitutional Court, in the *Wouter Basson* matter, also specifically refrained from directing that he be charged for Geneva Convention crimes and in fact limited his potential prosecution only to offences under the Riotous Assemblies Act. The domestic Rome Statute, which criminalises certain international crimes, specifically prohibits prosecutions for such offences committed prior to the enactment of the Statute. The Torture Convention Bill also makes no provision for retrospective criminalisation. The PCLU's decision not to institute a prosecution on a charge of torture was correct. Only a charge of assault with intent to do grievous bodily harm could have been considered, but such crime had prescribed in 2003.

15. The person who alleged that he had been influenced to change his version was deceased even prior to the amnesty hearing. The tape recordings were lost while in police custody. There could therefore be no basis for a prosecution and in addition, charges of defeating the ends of justice would have prescribed in 2006.

16. The docket was not submitted to the PCLU in July 2011 under cover of a report, let alone one as required in terms of Section 4 of the Inquests Act. In fact, the docket was re-submitted with a substantial number of the original investigations not having been conducted and no evidence establishing that your sister was murdered.

Report referred to in the letter

→ Which of those in the 2010 letter

17. Rather than requesting that the outstanding investigations be conducted at that stage, Adv Macadam explored a number of other options, aimed at trying to establish that your sister was in fact murdered by the Security Branch:

    17.1 In a statement, dated May 2011, the original investigating officer indicated that he had been instructed to hand over the docket to Captain Holmes so that it could be part of an investigation against General Engelbrecht. The original docket when located contained no statements taken by Captain Holmes and it was established that he had passed away many years previously. A perusal of the D'Oliveira material failed to reveal any record of investigations conducted by him into your sister's case. It was established that an investigation into General Engelbrecht was conducted, but that the Director of

TP 87

Public Prosecutions: Pretoria declined to prosecute and the National Director concurred with this decision. That investigation contained no evidence referring to your sister's disappearance and murder.

17.2 A matter completely overlooked by both the TRC and SAPS was the claim by three of the suspects that bombings of two power stations and a railway line and the arrest of Justice Ngidi confirmed their version. After an extensive search, the dockets relating to the bombings were located and in fact found to contain evidence which would have been materially relevant at the time of the amnesty application. It was however further established that a separate committee of the TRC granted the persons involved in the bombings amnesty. The docket relating to Justice Ngidi could not be located; however, other evidence was obtained which indicated that he was arrested at a different time as alleged by the suspects.

17.3 The discovery of this additional evidence led Adv Macadam to conclude that your sister may have been in fact murdered on the farm. He requested the Missing Persons' Task Team (MPTT) to look into the possibility of conducting an exhumation. A senior international forensic anthropologist however advised that an exploration of the farm should only take place in spring before the summer re-growth of vegetation, but when the ground was again moist after spring rains.

17.4 As an interim measure, the MPTT commenced inspecting mortuary records with the aim of locating cases which matched the description of your sister. This has led to a process of retrieving various inquest records relating to unidentified persons. Once all the records have been obtained, they will be placed before Adv Macadam in order for him to decide whether any of them relate to your sister.

17.5 Although the exploration of the farm was conducted in October 2012, the report from the MPTT was only made available on 25 January 2013. This was because the MPTT explored every possible option which could lead to the identification of the burial site. All these options however were too of no avail and the MPTT has concluded that no exhumation is feasible in the absence of clear evidence as to a specific burial site.

18. The docket was only resubmitted to the PCLU late last week, again containing no further statements, save for the report of the MPTT. The allegation that Ms Fullard advised you to approach the suspects is disputed by her. In any event, I would not

authorise any such conduct, as this would not be conducive to the interests of justice.

19. The docket has been carefully perused by Adv Macadam and a Senior State Advocate and is in the process of being re-submitted to the investigating officer with an instruction that all outstanding investigations be concluded without further delay.

20. Only after the matter has fully been investigated can Adv Macadam, in consultation with the relevant Directors of Public Prosecutions, make a properly informed recommendation as to whether a prosecution can be instituted or not. The decision rests with me.

21. The placing of the existing statements before a Magistrate would not serve any useful purpose, because the Magistrate would be constrained not to hold an inquest until the matter has been properly investigated

22. Insofar as you request that the inquest be held in the High Court is concerned, the Inquests Act requires that the Minister approach the Judge President of the relevant division to appoint a Judge. I cannot request the Minister to exercise these powers in the absence of a fully investigated case.

23. As the evidence currently stands, there is confusion as to where your sister was last seen alive and consequently, Section 6(3) of the Inquests Act may apply, which requires that the Minister appoint a specially designated Magistrate. This provision also could not be invoked in the absence of a fully investigated case.

24. Insofar as you also request the appointment of a special prosecutor in consultation with your family, I am of the view that this would impede on the independence of the NPA, because in certain cases, the Courts have set aside appointments of prosecutors where there is a connection to the complainant.

25. I trust that the above reassures you that the matter is receiving proper attention. You will be informed when the matter has been investigated and a decision taken. In the event of the decision being taken to hold an inquest, the various provisions of the Inquests Act will be invoked to ensure that it will be a formal one.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

56

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13 August 2013

Your Ref: B Sibiya

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Dear Sir/Madam

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA SIMELANE

Your letters dated 31 July 2013 and 5 August 2013 have reference.

I must at the outset express my understanding of your client's anguish and frustration at the unresolved investigation into the disappearance of her sister.

I am however constrained to respond to the issues raised in your letters.

In response to your client's letter of 29 January 2013, Dr Ramaite SC in detail on 31 January 2013 explained why, although regrettable, no investigations were conducted into the disappearance of your client's sister from 2001 until March 2010.

It must be emphasised that the National Prosecuting Authority (NPA) is not an investigative agency and the mandate of conducting investigations into your clients matter rests with the Directorate for Priority Crime Investigations (DPCI) of the South African Police Service (SAPS).

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Since its inception in March 2003, the Priority Crimes Litigation Unit (PCLU) in my office, in addition to conducting and managing prosecutions, has been mandated solely to manage and direct investigations which are conducted by other law enforcement agencies.

It is therefore not correct, as you claim in your letter of 31 July 2013, that it is the NPA (and more specifically the PCLU and/or Adv Macadam of my staff), which is conducting the instant investigation.

During a meeting on 18 February 2013 between your client's then legal representative (Adv Palmer), Adv Macadam, the investigating officer (Captain Ali Masigela) and his commander (Colonel Xaba), the latter endeavoured to conclude the investigation by the end of May 2013.

During May 2013 the DPCI advised the PCLU that its investigation into your client's sister's disappearance would not be concluded by the end of that month. As a result Adv Macadam informed Adv Palmer in writing, on 17 May 2013, that the investigations would not be finished by the end of May 2013, and requested him to indicate his availability for a meeting to discuss the issues as it had previously been agreed that the parties would have a progress meeting at the end of May 2013. Although Adv Palmer was unavailable to attend such a meeting as he was abroad, he was nevertheless informed in writing of what further investigations were being carried out by the DPCI.

On 27 June 2013, Adv Palmer was again provided with written feedback as to the status of the further investigations which had to be conducted. In this regard, he was specifically informed at the time that an exact date for the conclusion of such investigations could not be given.

I have been advised that in addition to the written communications between Adv Macadam and Adv Palmer, there were several telephonic communications where the issue of the progress and investigations was discussed.

Towards the end of July 2013 Adv Macadam was contacted telephonically by Adv Palmer, phoning from abroad, who requested a meeting which was consequently scheduled for 20 August 2013. This was the earliest date that Adv Palmer was available.

TP 07

Your client's contention that the investigation can be finalised by 30 August 2013 is unfortunately practically impossible and hence entirely misplaced. I am constrained to point out the following:

i. Ms Nokuthula Simelane disappeared in 1983.

ii. The first information relating to her disappearance came to light in 1996, resulting in a police docket being opened.

iii. The investigating officer at that time was instructed by his superiors not to continue with the investigation.

iv. An amnesty hearing of the Truth and Reconciliation Commission (TRC) produced a series of contradictory versions from the witnesses who testified.

v. The judgment of the Amnesty Committee was only handed down in May 2001.

vi. In March 2010 a duplicate docket as well as TRC material which had been requested from the State Archives was available.

vii. The original docket was only located later the same year, which resulted in the investigating officer being directed to conduct a number of extensive and complex investigations on 27 October 2010.

viii. What transpired further has been dealt with extensively in Dr Ramaite SC's letter referred to above.

I have been advised that the following aspects are under investigation by the DPCI:

i. Skeletal remains were found during the course of an exhumation, which are currently undergoing full forensic and DNA analysis. The DPCI has indicated that the outcome of these examinations will determine the nature of further investigations which are necessary. I have been advised that the results of the analysis are only expected within the next four to five months.

ii. The Missing Persons' Task Team (MPTT) has examined the mortuary records of all mortuaries which have relevance to the disappearance of your client's sister. Four mortuary entries have been shortlisted. However, the records do not

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contain legible post mortem reports and in certain instances the relevant police station and docket particulars are not reflected. As an interim measure enquiries are being conducted with the local fingerprint bureaus in order to establish whether photographs were taken prior to the post mortems and whether such albums are currently still in existence.

iii. The various safe houses in use by the Soweto Security Branch were inspected by the MPTT in order to establish whether human remains could have been buried there. The examinations produced negative results. However, in respect of a small holding in Westonaria, enquiries are being conducted to assess the feasibility of an exhumation. Obviously the outcome of all the other exhumation-related issues will determine whether an exhumation should be conducted at this site.

iv. It was a key submission by several of the amnesty applicants that the arrest of a number of MK operatives supported their version that Ms Simelane had not been tortured for a month, as alleged by other applicants. Extensive efforts are being made, via the SAPS, Justice and other State Archive systems, to locate the relevant dockets, court records and other relevant documentation so that not only properly informed consultations may be conducted with these persons, but also so that corroboration from former State officials may be forthcoming. It is an extremely time consuming process to request and retrieve such information which has to be followed up carefully.

In your letter of 31 July 2013, you demand that I make a decision to prosecute the alleged perpetrators or refer the matter for the holding of an inquest by no later than 30 August 2013. In your letter of 5 August 2013, you infer that your client would review her instruction should no decision be forthcoming on the premise that a reasonable explanation for the delay in the finalisation of the investigation is provided.

In light of the nature of the investigations, I am not persuaded that the DPCI would be able to conclude same by the end of August 2013.

In terms of the NPA Policy, a decision whether or not to prosecute must be carefully considered and may only be taken once all the relevant issues have been properly investigated. In the event that I decide to institute a prosecution, I must, *inter alia*, be satisfied that there are reasonable prospects of a successful prosecution.

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Similarly, an inquest may only be held once a case has been fully investigated and where a prosecutor has declined to prosecute. The holding of an inquest before the issues set out above have been investigated would in all probability result in the presiding officer declining to hold an inquest.

The amnesty hearing demonstrated serious legal challenges to the conflicting versions of witnesses and applicants. Any attempts made to hold an inquest without all the relevant issues having been investigated would result in objections from the lawyers representing the implicated parties causing an untenable delay.

Once the matter has been fully investigated, the evidence must be carefully evaluated by the PCLU, which must also canvas the views of the Directors of Prosecution of the South and North Gauteng High Courts where key elements of the offences were committed. I will thereafter be provided with a recommendation on whether or not to prosecute. I will thereafter advise you of my decision herein once I have fully applied my mind to the relevant material.

I wish to reassure your client that the PCLU is doing its level best to ensure the DPCI speedily and efficiently conclude the investigation into the kidnapping, torture, disappearance and murder of her sister, Ms Nokuthula Simelane.

The PCLU will also advise your client, through you, on any progress with the outstanding investigation on a monthly basis up until the finalisation of the investigation.

I therefore advise you to consult carefully with your client on the contents of this letter. Should you nevertheless proceed with a court application, same will be opposed and an appropriate order of cost sought.

I trust you find the above in order.

Yours sincerely

ADV N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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61

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25 March 2010

Senior Superintendent Louis Bester
Directorate for Priority Crimes Investigations
PRETORIA
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By hand

Dear Superintendent Bester

INVESTIGATION: NOKUTHULA SIMELANE; JOHN VORSTER PLEIN CR 1469/02/1998

In this case, the deceased disappeared from the Carlton Centre in 1983 and to date, her body has not been recovered.

An investigation by the D'Oliveira Unit obtained evidence to the effect that she was kidnapped from the Carlton Centre, taken to the Norwood Police Barracks and thereafter, to a farm in the North West Province, where she was assaulted by Security Branch members.

Several former Security Branch members, including Coetzee, Pretorius and Mong received amnesty for her kidnapping, but not for her assault. The assault crime prescribed in 2003 and consequently at this stage, consideration can only be given to an investigation into her murder. At present, there is no evidence indicating where and when she was killed and what was done with her body.

The family are represented by Adv Howard Varney (Cell: 0716720122 and 0832617062) and have requested that consideration by given to prosecuting former Detective Inspector Msebenzi Timothy Radebe, who was involved in the kidnapping at the Carlton Centre and Norwood Police Station. He had submitted a witness statement, "A22" in the docket.

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It must be established whether the witnesses are still available and whether they confirm their statements in the docket, as well as their testimony before the Truth Commission. They should also indicate whether there is anything in addition which they would like at this stage to indicate.

The version of Radebe differs from that of the other persons, who were State witnesses. The decision to treat Radebe as a witness and to obtain an affidavit from him rather than warning him, appears strange. The former investigating officer must be approached and requested to explain why a witness statement was taken from Radebe. If he was made a witness, it would be difficult at this stage to justify now charging him.

In the event of the National Director declining to prosecute in this matter, then an inquest would have to be held and it must be established in which Magisterial District the farm where the deceased was last seen alive is located.

The NPA was only provided with a duplicate docket. It is only to be anticipated that it may be difficult to locate the original, as this was opened by the D'Oliveira Unit, which closed down 10 years ago. However, the witnesses can confirm that the statements in the duplicate docket properly reflect their versions as provided to the D'Oliveira Investigation Unit.

The duplicate docket and four other files are attached herewith and must be returned once the investigation has been completed.

Kind regards

RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PRIORITY CRIMES LITIGATION UNIT

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63

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27 October 2010

Captain TP Masegela
Crimes Against the State
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Email: BesterL@saps.org.za

Dear Captain Masegela

NOKUTHULA SIMELANE
JOHN VORSTER SQUARE CAS 1469/02/96
CATS 01/082010

In this matter no person has as yet been arrested or prosecuted. No corpse has been found which matches that of the missing person. In the event of a prosecution not being conducted, an inquest would have to be held. Having regard to the facts of the case, were an inquest to be held, it would be desirable that a formal one be held.

The material placed before me consists of the following:

(a) A duplicate John Vorster Plein docket missing certain statements;

(b) An original investigation diary;

(c) Loose photographs;

(d) Extracts from the Amnesty application.

I have added the judgment of the Amnesty Committee to the TRC documents.

Both the initial investigation and the amnesty hearing require further investigations, which are set out hereunder. In the event of a

TP 07

prosecution, only the police investigation and the statements and evidence of the State witnesses, who applied for amnesty, may form part of the docket. The amnesty statements and evidence of the accused could not form part of the docket.

In the event of an inquest, all the relevant facts would have to be placed before the inquest Magistrate, in which case all the amnesty material would have to be included.

It is therefore recommended that the docket be compiled in three separate sections:

1. The police investigation and all investigations carried out thereon;
2. All the material which was placed before the Amnesty Committee;
3. All investigations carried out as a result of the evidence before the Amnesty Committee.

A complete set of all the evidential material (testimony applications and documents) placed before the Amnesty Committee must be obtained. A bundle would have been compiled by the TRC of all the relevant documentary evidence, placed before the Committee. (This may have included the police docket.)

The applicants completed application forms and attached thereto statements and other documents.

The applicants and witnesses then testified and the transcripts of their evidence are necessary, as well as any documents which may have been introduced during their testimony.

Documentation currently missing includes:

- The testimony of Duma Nkosi;
- Portions of the cross-examination of Veyi;
- Statement made by Veyi, which accompanied his amnesty application.

As far as the police investigation is concerned, the following further investigations are necessary:

TP 87

- ✓ Although the original "C"-clip is in the docket, the "B"-clip and the original "A"-clip are missing. There is a duplicate docket, but certain statements are missing, certain statements have not been allocated an "A"-clip number and certain statements have not been signed, nor commissioned.

- ✓ A portion of another docket Krugersdorp CAS 1263/01/96 has been included in the John Vorster docket, but the whole Krugersdorp docket is required.

- ✓ The original investigating officer is required to submit a statement, setting out all the steps taken in the investigation and indicating when last he had the original docket in his possession. He should also assist in reconstructing the docket and addressing issues relating to the unsigned statements, etc.

- ✓ According to the investigation diary, in 1996 the Rustenburg LCRC compiled a photograph album and sketch plan of the farm where the missing person was detained. This album and plan should be obtained, as at present, there are only loose photographs. If the original album cannot be located, then the farm must be revisited with the relevant witnesses and a new album and sketch plan compiled.

- ✓ It must be established whether all the original witnesses are available and if so, they must be requested to comment on whether they stand by their original statements and if they testified before the TRC, their TRC versions. Any contradictions or retractions should be properly explained.

- ✓ In several of the statements reference is made to persons who are claimed to be dead. Confirmation of these deaths must be obtained.

- ✓ The issue of "A22" (MT Radebe) is puzzling and must be clarified:

    - The first witness to come forward was Vayi, who indicated that Radebe participated in the torture at the farm. The statement of Radebe is however to the effect that he only guarded the missing person at the Norwood flat for a week and was then transferred to the John Vorster Vehicle Branch. Another witness, Selamolela, also alleges that Radebe was at the farm and in fact claims that the missing person was last seen in Radebe's company, together with two other persons, namely Coetzee and Pretorius. All the witnesses involved in the kidnapping and assault of the missing person made statements to Captain Leask, who warned them of their right against self-incrimination.

- In the case of Radebe, we only have an unsigned and unattested statement, purportedly taken by Captain Ndlovu of the Braamfontein Police. Radebe was not warned of his right against self-incrimination according to the statement. The circumstances under which the statement was obtained must be properly established and in particular, it must be established whether at any stage, Radebe signed an affidavit.

- If Veyi and Selamolela are telling the truth about Radebe's involvement at the farm, then his statement to the effect that he was never there must be a lie. Conversely, if in fact he was transferred to the Vehicle Branch, then a question mark hangs over the veracity and the reliability of Veyi and Selamolela as witnesses.

- Whether Radebe is being truthful or not could easily have been verified by establishing whether in fact he was transferred to the Vehicle Branch in early September 1983. The original investigating officer must indicate whether any investigations in this regard were conducted and if so, what the outcome thereof was. If this was not properly established at the time of the initial investigation, then this aspect must be now investigated. I assume that the SAPS personnel registers could provide relevant information. According to the private investigator, Radebe is still a serving member of SAPS.

- Radebe never applied for amnesty and the family of the missing person have made representations that he should be prosecuted. Whether he can at this stage be prosecuted would depend on whether he was given the status of a witness at the time of the initial investigation. The investigating officer must be requested to fully explain this issue.

- Once all of the above has been investigated, Radebe should be approached, warned of his rights and requested to indicate if he wishes to make a statement at this stage.

✓ Although it is alleged that Peter Lengene is dead, he made various statements in the docket. He alleges that there was an attempt by Pretorius and Coetzee involving Director Thoms, to induce him to make a false statement. The docket shows that the original investigators and other police officers were involved in arranging for the under-cover policeman, Norman Mkonza (Scotch) to have a taped conversation with either Pretorius or Coetzee. Various entries have been made in the investigation diary and reference is made to

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a tape being kept as an exhibit. The investigating officer must explain what the outcome of all of this was and Director Thoms must also be approached to indicate whether he has any knowledge of this matter.

- ✓ According to Patrick Kobe ("A7"), he heard that Coetzee, Pretorius and Mong had killed the missing person. He must indicate from whom he received this information.

- ✓ A further statement must be taken from Duma Nkosi, providing the further additional detail:

    - o Whether the missing person was known to him prior to her being sent to him by Mpho;
    - o How he received instructions from Mpho;
    - o What the missing person exactly was to do;
    - o To whom he made enquiries to trace the missing person's whereabouts;
    - o Whether he suspected that the missing person had been detained by the Security Branch and if so, whether he adopted any counter-measures.

- ✓ A further statement from Justice Ngidi must be obtained covering the following:

    - o What the nature of his dealings with the missing person were;
    - o When last he saw her before she disappeared;
    - o Whether he was aware of what duties she was performing on behalf of Mpho;
    - o What missions Mpho gave to Scotch and Frank;
    - o What training was given to these persons and how well were they known to Mpho;
    - o Since it appears that he was based in Swaziland at the time, he should comment on what structures were in place in Swaziland at the time. Lengene said that Coetzee and others were taking the missing person to Swaziland. The witness must be requested to indicate what structures would have

TP 87

been in place on the Swaziland side of the border post and what would have happened had the missing person presented herself at that point.

- ✓ It must be established how far from the Oshoek Border Post the University where the missing person was studying at, the premises from which Gilbert Twala operated and the home of Thembi Vilakatim are.
- ✓ The person referred to as John June in paragraph 9 of Gilbert Twala's affidavit must be traced and requested to submit a statement regarding his knowledge of the matter.
- ✓ According to Veyi, Manuel from Mozambique was also involved. Efforts should be made to identify him and obtain a statement from him.
- ✓ There is also reference to an Adrian Bambo, who is also referred to as "Strongman". It must be established whether in fact he is now deceased.
- ✓ According to the witness statements, the following premises and intersections have relevance:
    - The Norwood Flats;
    - The farm at Northam;
    - The Potchefstroom Security Branch office;
    - The intersection referred to by Veyi;

  A map should be obtained where all these points are marked and the distances between them indicated.
- ✓ At the end of the police investigation, the following emerges:
    - Veyi says that he was in the company of Selamolela when he saw the missing person in the boot of Coetzee's car after she had left the farm and at a four-way stop.
    - Selamolela however claims that he last saw her at the farm in the company of Coetzee, Pretorius and Radebe.

TP 07

- Lengene says that the missing person was told to wash and put on new clothes, because she was being taken to Swaziland. He claims he drove her in a van to the servants' quarters in a certain house in Westonaria where she was left in the company of Sefuthi, Pretorius and Coetzee.

- Sefuthi merely mentions being at the farm, does not indicate when he last saw her and in whose company she was, but claims that he suspects that she was killed by Coetzee, Pretorius and Mong, because they threatened her with death during the interrogation. He does not mention Radebe as being present at the farm.

- It would appear that Pretorius, Coetzee and Mong were not informed of the allegations and invited to respond.

✓ The versions referred to above are all contradictory and on the very points where corroboration should be obtained, the witnesses contradict each other, e.g. Selamolela makes no mention of being at the intersection with Veyi and Sefuthi makes no mention of being at the house in Westonaria. Lengene's version of the missing person being prepared to return to Swaziland and leaving in his van is not supported by the other witnesses. It must be established whether there are other members of the Security Branch Unit to which all these persons belonged, who could possibly at this stage shed light on the various allegations.

✓ The confusion continues at the amnesty application where for example Selamolela is emphatic that he did not accompany Veyi to the intersection and suggests that this was Sefuthi. Sefuthi never testified at the amnesty application and as is clear from his statement to the police, last saw the missing person at the farm.

✓ Coetzee, Pretorius and Mong all testified at the amnesty application and denied that the missing person was as severely assaulted as claimed by the other witnesses. They also claimed that she agreed to become a police informer and was handed over to two under-cover police officers (whom they claimed were now dead), who dropped her off at the Oshoek Border Post. This contradicts the version of the other witnesses to the effect that the missing person at no stage agreed to cooperate and being an informer.

✓ Coetzee was cross-examined on the basis of information which Lengene provided to Fanie Malapo. A statement must be obtained from Mr Malapo in which he sets out what he knows about this

TP

matter and what exactly was conveyed to him by Lengene and any other person whom he may have interviewed.

- ✓ It was a key feature of Mong, Pretorius and Coetzee's amnesty applications that they could not have participated in the protracted assaults as alleged, because at that time they were involved in the investigation of certain terrorist cases and carried out arrests. Efforts should be made to trace these cases in order to confirm whether there is objective proof that he was performing duties outside the farm at Northam at the relevant time. A Mr Brits was at one stage in charge of all the dockets opened by the Security Branch and I believe that these dockets are currently being stored at CATS.

- ✓ It was also a feature of the applications that they claimed that they planted certain explosive devices at power stations and a railway line in order to create the impression that these attacks had been carried out by MK. This was ostensibly to deceive the ANC into believing that these attacks had been carried out as a result of the missing person's information. Again with reference to the dockets and other records (e.g. Bomb Disposal Unit records) held by SAPS, it must be established whether these explosions in fact took place and whether there is evidence showing that it was these persons who carried out these attacks.

- ✓ Finally, it was also alleged that as a result of the information provided by the missing person that certain MK members were arrested and prosecuted. This issue also surfaced in the cross-examination of Gilbert Twala, who admitted that certain persons had been arrested, but alleged that this had taken place before the disappearance of the missing person and on the basis of the information of an informer. Again, efforts must be made to establish the relevant details regarding the arrest of these persons in order to establish which of the two versions is correct. In this regard, the Department of Justice & Constitutional Development still retains records relating to the detention of various people and these should also be checked.

- ✓ Coetzee, Mong and Pretorius place reliance on various people who they allege are now dead. In addition to the two under-cover police officers referred to above, reference is also made to Brigadier Muller, Coetzee's commanding officer, as well as to "Strongman" Mbombo. It must be established whether these persons did in fact hold the positions as alleged and when they died. This is important, because it will have to be decided whether they were implicated

TP

specifically because it was known that they were dead and could not refute the allegations.

✓ Coetzee claims that Brigadier Muller briefed Brigadier Schoon about the plan to use the missing person as an informer. It must be established whether Brigadier Schoon is alive and if he can comment on this allegation.

✓ Coetzee also claims that the Eastern Transvaal Security Branch had a file on the missing person, who had been identified as a MK member. Efforts should be made to identify the members of this branch at that time to see if anyone can confirm or deny this allegation.

✓ The version of how the missing person was tortured, became an informer, was dropped off at the border post and then no inquiries made when she disappeared, appears to me to be implausible. Efforts should be made to establish whether there is a reliable senior member of the Security Branch who could indicate whether the process followed by Coetzee was in fact appropriate in the light of the procedures and practices of the Security Branch of that time.

✓ According to Veyi, he met with the Divisional Head of the Security Branch at Potchefstroom after leaving the farm. (See pages 105 and 106.) It must be established who the Divisional Head was at the time and if he is available, a statement must be obtained from him.

✓ It was common cause that Veyi first approached The Sowetan and in particular a journalist, Sharon Chetty. Veyi was cross-examined about the fact that the journalist reported that he had decided to come forward, because Coetzee and the others had been promoted and not himself. He denied having said this. The journalist also reported that the ANC only contacted the missing person's family 10 years after she had disappeared, which was also disputed by Gilbert Twala. The journalist must be traced and asked to comment on these allegations.

✓ Selamolela alleges that there was only one entrance to the Norwood Flats, which was disputed by Coetzee. It must be established which version is true. If the building has been unaltered, then current photographs can be taken. If however it has subsequently changed, then efforts must be made to establish whether there are plans or photographs of it as it existed in 1983.

TP 97

- ✓ There were major disputes between the witnesses surrounding the dam, the outbuilding, the main farm house and the washing facilities available. If the premises have not been altered in the interim, they should be photographed to obtain clarity on all these issues.

- ✓ In his evidence, Gilbert Twala mentioned a number of persons who might have knowledge of the events, e.g. Wally and Wendy Mbana. Efforts must be made to trace these people to obtain statements from them.

- ✓ Gilbert Twala was called to refute the allegation that the missing person had returned to Swaziland and been murdered by the ANC. Under cross-examination he however alleged that he could not talk about ANC structures in Swaziland, but only knew about the Transvaal Unit located in Soweto. Efforts would have to be made to identify the relevant structures in Swaziland at the time, who can comment on the allegation made by Coetzee and others. Twala alleged that Siphiwe Nyanda, currently the Minister of Communications, may well be placed to assist in this regard. It was specifically alleged that the missing person had meetings with the current Minister. The Minister would have to be approached to provide a statement.

- ✓ Under cross-examination of Mr Twala, it was put to him that there was an intelligence unit which killed MK members, who were traitors. It was also alleged that the Motsoanyane Commission also made a finding concerning a person who had the same MK name as the missing person. These aspects would have to be investigated and if necessary, statements obtained.

- ✓ Swaziland is a SADC member and consequently, the SADC policing protocol applies. Contact should be made with the Swaziland authorities to establish whether it is at all feasible that records would exist showing that a body matching that of the missing person was ever found. It is highly unlikely that such a search of police dockets and inquests could be conducted, but it would have to be explained to a Court that this avenue was explored.

- ✓ It is clear that there are considerable disputes regarding how and under what circumstances the missing person left the farm. This raises the possibility as to whether she was not in fact killed and buried on the farm. A suitably qualified exhumation expert should be requested to visit the farm in order to establish whether any exhumation is at all possible. An exhumation under forensic procedures should be carried out if the response is positive.

TP 67

- ✓ According to Lengene, the missing person was taken to a private residence in Westonaria. Under cross-examination, Coetzee admitted that he had a brother who lived in Westonaria and worked on a mine. This avenue should be properly investigated.

- ✓ According to Veyi, he was told by a former police officer who subsequently died, that Coetzee and Pretorius had shot the missing person and buried her in Rustenburg. It should be established whether Coetzee and Pretorius had safe houses in the Rustenburg area or friends or relatives who had plots or farms in Rustenburg. If any premises are identified, consideration should be given to whether an exhumation is feasible.

- ✓ As I have already indicated, the witnesses who gave statements must be requested to confirm what has already been said. It would appear that Coetzee, Pretorius and Mong have never cooperated with the investigation and it would be appropriate, once all the investigations have been concluded, to approach them via their attorney, Mr Wagener, to comment on the allegations.

- ✓ As I have also already indicated, the situation relating to Radebe is strange. It may well be that he could hold the key to explaining what really happened on the farm and he should be approached in this light.

The duplicate docket and four blue files may be collected from my office, but must be returned to me once the investigations have been concluded.

Kind regards

RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PRIORITY CRIMES LITIGATION UNIT

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74

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11 February 2013

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BY HAND

Dear Dr Silas Ramaite,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I thank you for your letter dated 29 January 2013. The purpose of this letter is to respond to your letter and secondly to consider the most appropriate way forward.

I acknowledge and appreciate your expression of sympathy for me and my family. Regrettably, I am unable to accept your contention that the murder of my sister has received the "*diligent attention of the NPA*". Very little has happened in this matter since a docket was opened in the mid-1990s and not much more has transpired since the matter was referred to the PCLU in 2003. I find it very difficult to understand how a murder investigation can proceed for nearly 2 decades with no progress or conclusion one way or another. Either a prosecution or an inquest should have taken place by now. The failure to resolve this matter, and other outstanding cases from the past, has done a great disservice to me and my family, as well as many other families and communities, and indeed to the country.

I am also advised that an inquest may not be unreasonably delayed simply because every last aspect has not been completed. The holding of an inquest and even the making of an inquest finding does not prevent further investigation from taking place. If one had to wait until every last aspect of an investigation is completed a neglectful official or one acting in bad faith may delay or prevent a public inquiry into a death by never completing the investigation.

I note that in your paragraph 12 you state that by late 2010 the case had "*not been fully investigated by the TRC or by (the) SAPS*". I agree with this conclusion but would state further that more than 2 years later the same situation pertains. I would also suggest that the responsibility for this dire state of affairs cannot be laid exclusively at the door of the SAPS. The

TP

NPA must also bear some responsibility as it oversees and directs investigations of the police and as from 2003 was directly responsible for the "*TRC cases*", including this matter.

I have been advised to respond to certain matters raised in your letter. I do not intend to deal with every matter raised in your letter and the attached correspondence and such failure should not be construed as acceptance of the contentions made therein. For the moment I will confine my response to those matters which are simply incorrect and cannot stand uncontested.

At paragraph 2 of your letter you state that the first information identifying the suspects was only received by the SAPS in 1996. This assertion is not consistent with the facts. The culprits were the police themselves. My sister was kidnapped, tortured and murdered by the police. These crimes were authorized at the highest level of the organisation. Not only did the police know who the suspects were they also colluded in the cover-up of the crimes. It is possible that up to the present day elements in the police are still colluding in this cover-up.

I note that in paragraph 6 you concede that the "*TRC cases were temporarily put on hold pending the formulation of the guidelines*" since "*it was deemed important that special considerations*" applied to them. You do not state how long the TRC cases were put on hold or what special considerations warranted their holding back and differentiation from other cases. It is clear that this case, as well as other serious cases, were held back for several years. During this time many crimes that ought to have been prosecuted prescribed in terms of the statute of limitations. This, in my view, was unforgiveable. The formulation of the so-called guidelines in no way justified the suspension of investigations into murder and other serious crimes. Such suspension grossly undermined the rule of law as well as our rights to justice, equality and human dignity, In striking down the guidelines, (the amendments to the National Prosecution Policy dated 1 December 2005 made in terms of s 179(5) of the Constitution) ("the amendments") the High Court found that they amounted to a "*copy-cat*" of the TRC amnesty process.[1] Far from the guidelines constituting "*important*" or "*special considerations*" the High Court found such considerations to be irrelevant for purposes of taking prosecutorial decisions and that they were "*a recipe for conflict and absurdity*".[2]

In your paragraph 7 you state that the court case which struck down the amendments to the Prosecution Policy also disabled the "*structures for the investigation of such cases.*" Presumably this was stated in order to give the impression that the investigative capacity had to be rebuilt thereby causing further delay. I am advised that the striking down of the amendments had no such effect. In terms of paragraph B4 of the amendments responsibility for oversight of investigations and institution of prosecutions of such cases remained with the PCLU. Under paragraph B6 the PCLU was to be "*assisted*" by "*senior designated officials*" from the National Intelligence Agency, the Department of Justice, the SAPS and the then Directorate of Special Operations. This so-called assistance was presumably to advise the PCLU on who should receive immunity under the amendments. The then Director of the PCLU complained bitterly, in a meeting attended by my legal representatives, that the so called "*senior designated officials*" were never available to meet and as a result the process had ground to a halt. If anything the striking down of the amendments removed the investigatory constraints as well as the unlawful interference of other bodies in the constitutional duties of the NPA.

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[1] Judgment, par 15.4.3.1, *Thembisile Nkadimeng and Others vs. The National Director of Public Prosecutions and Another* (TPD case no 32709/07)

[2] Judgment, par 15.5.3

TP 9

I am advised that the content of your paragraph 14 is not a correct interpretation of the applicable international criminal law. The suggestion that the Constitutional Court in *S v Basson* '*specifically refrained from directly that he be charged for Geneva Conventions crimes*' because '*international crimes require domestic legislation before they can become enforceable in South Africa*' is wrong. In fact the Constitutional Court explicitly refrained from addressing the question of whether prosecutions can be brought directly under customary international law, noting: "*We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act.*"[3] On the question of whether South African law allows for prosecutions under customary international law *directly* through the common law (in the absence of implementing legislation) I am advised that section 232 of the Constitution supports such prosecutions. In any event Parliament has recently settled this question with the adoption of the *Implementation of the Geneva Conventions Act 8 of 2012,* which contains a provision stating:[4]

> "*Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect*".

In light of this, the references to a temporal limitation on the *Implementation of the Rome Statute Act 12 of 2002* and the *Torture Convention Bill* are misplaced, as specific legislation is not required in order to prosecute a crime that was "an offence under ... *international law* at the time it was committed ...".

The factual claim in your paragraph 15 that the person who alleged he had been influenced to change his version is deceased is incorrect. That person is Norman "Scotch" Mkhonza. He is not deceased as claimed. Moreover your assertion that the charge of 'defeating the ends of justice' would have prescribed in 2006 cannot be correct. The conversation in question took place on 10 February 1996. Section 18 of the Criminal Procedure Act provides for the lapsing of the right to prosecute after 20 years which means that such a charge would only prescribe in 2016.

The claim made in your paragraph 17.2 that the explosions at the power stations and railway lines on 10 September 1983 was "*completely overlooked*" by the TRC is not correct. Since those explosions occurred shortly before Nokuthula was kidnapped these facts were put before the TRC's Amnesty Commission as it established the falsity of the version of the white Security Branch officers. The officers claimed that the explosions were instigated as a result of information provided to them by Nokuthula. This version is false if the explosions occurred before Nokuthula's kidnapping on 11 September 1983. In relation to the arrest of Justice Ngidi, the former Mayor of Sandton, I am advised that there was nothing stopping the police from carrying out elementary inquiries that would have easily demonstrated that Ngidi's capture did not remotely coincide with the period that Nokuthula was held captive. Accordingly she could not have provided the information that led to Ngidi's arrest as the white officers so forcefully claimed. It took the NPA and the police some 10 years to establish this crucial evidence notwithstanding the fact that the obvious flaw in this version was conspicuously highlighted during the Amnesty proceedings in the late 1990s.

I am advised that the tasks referred to in your paragraphs 17.3 to 17.5 are not good reasons for the delay in the investigation. These are basic tasks that should have occurred many years previously.

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[3] Footnote 147.
[4] Section 7(4), ICC Act.

TP

I am advised that your assertion in paragraph 21 that it would be pointless placing existing information before an inquest court since the presiding officer would be "*constrained not to hold inquest until the matter has been properly investigated*" is not correct. In the first place this matter has never been properly investigated. Pursuing a few inquiries at the last moment is not going to remedy this state of affairs. An inquest has primarily an investigative function. Section 8(1) of the Inquests Act authorizes the presiding officer of an inquest court to, of his or her own accord, or at the request of any person with an interest, to subpoena any person to give evidence or produce any document or thing at the inquest. Accordingly an inquest is well placed to remedy shortcomings in an investigation, such as this one.

I assume in your paragraph 23 that the section you refer to in the Inquest Act is section 6(c) and not 6(3) which does not exist.

I now deal with the claim that it would be difficult to charge Radebe at this stage if he had been made a witness previously (PLCU Letter addressed to the Directorate of Priority Crimes dated 25 March 2010). I am advised that a person previously approached as a witness (presuming this was the case in respect of Radebe) can be subsequently charged and prosecuted. This is particularly the case where the statement made by such witness is patently false. Radebe has been blatantly untruthful in respect of his statement. He has not been given any express or implied immunity from prosecution. I am further advised that If Radebe agrees to be a cooperating state witness he can be warned in terms of s204 of the Criminal Procedure Act. He can be prosecuted subsequently if found to be mendacious; and indeed he can be charged directly if he refuses to fully cooperate at the outset. In any event the concern expressed appears to be an academic one since the letter dated 27 October 2010 from RC Macadam to Captain Masegela discloses that the Radebe's statement in the docket is "*unsigned and unattested*".

I note that Advocate Macadam is of the view that establishing whether Radebe was transferred to the Vehicle Branch in early September 2003 will determine whether he was being truthful about his presence at the farm. I am constrained to advise that mere evidence of a transfer to another unit does not in itself mean that he was not at the farm at the relevant time. Evidence of physical presence at another location will be required. I note that the 27 October 2010 letter is silent on Radebe's evidence of the actual kidnapping of Nokuthula where it is clear that he is lying.

In the circumstances I am of the firm view that there has been more than ample time to carry out these investigations, which ought to be in its final stages. I note that you state that this case is being attended to diligently in order to finalize the outstanding tasks. In this regard I am concerned that as recently as 4th and 8th February the investigating officer advised me that he had received no instructions to continue with the investigation.

I wish for a decision to be made one way or the other within the very near future. In view of the inordinately long delay I have sought legal advice from my legal team on how best to ensure that such decision is taken within a reasonable time. While they have advised that legal action is a real possibility they have also indicated that I should permit you and the police a reasonable time period within which to complete those investigations that are strictly necessary.

Your letter of 31 January 2013 does not disclose what these outstanding tasks are aside from the perusal of mortuary records. The letters of Advocate Macadam addressed to the investigating officers in March and October 2010 do disclose outstanding tasks. I would have thought that after more than 2 years these tasks would have been finalized by now. If they have not been attended I must insist on an explanation as to why not. The tasks include the tracing of missing documents and items, the drawing of a map and the taking of some 4 statements. I am entitled to know which

TP

of these tasks have been completed and which ones are outstanding. I further wish you to advise me approximately how much more time is required to finalize the investigation.

I wish to place on record that I will no longer accept inordinate delays and that my rights in this regard are reserved. I have requested some of my legal representatives to meet with Advocate Macadam and Captain Masegela on 18 February 2013 in order to discuss what outstanding tasks are strictly necessary for purposes of completing the investigation; what a reasonable deadline would be for such tasks; and the criteria that the NPA will employ for deciding whether to prosecute or refer to a formal inquest.

Yours sincerely,

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit
Captain Masegela, South African Police Service

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79

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12 February 2013

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Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 11 February 2013 and confirm that Adv Macadam of my staff will be meeting with your lawyers on Monday, 18 February 2013 to discuss all the issues relating to the investigation of the matter.

2. I trust that a number of issues raised in your letter will be addressed in this meeting and therefore I do not propose to respond to all the matters which you raise. Since however you have raised the possibility of instituting legal action, I confirm that my failure to respond paragraph-by-paragraph to your letter in no way constitutes an admission of the various complaints you have made.

3. I however reconfirm my view that the interests of justice require that the case be fully investigated before a decision to prosecute can be taken and if the decision is not to prosecute, to arrange for the holding of an inquest.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

TP 87

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Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
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13 February 2013

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Attention: Col N Xaba

Email: XabaN@saps.org.za

Dear Col Xaba

NOKUTHULA SIMELANE

Further to my earlier request for further investigations, the following also requires attention:

1. Efforts must be made to trace Nompumelelo Zakade, whom it is alleged supplied the information which led to the arrest of Justice Ngidi and not Nokuthula Simelane. It is alleged that this person is well known to Justice Ngidi and he should be able to assist in having her traced. A full statement should be obtained from her regarding all the issues relevant to the matter pertaining to Nokuthula Simelane.

2. At the amnesty hearing, Nimrod Veyi testified that he had knowledge of three houses in Klipspruit and one in Rustenburg. It must be

established whether he is in a position to point these safe houses out and if any houses are identified, then the Missing Persons' Task Team must be requested to do an assessment as to whether an exhumation should be carried out at any one of them.

3. Norman Mkhonza testified at the amnesty committee that there was a safe house in Klipspruit West, which was used by Strongman Bambo. Evidence was led at the amnesty hearing that Mr Bambo was also present on the farm. He must be requested to point this house out and again the Missing Persons' Task Team must be requested to conduct an assessment.

4. A Mr Gilbert Twala testified at the amnesty hearing that before the disappearance of Nokuthula Simelane, she attended meetings with himself and Simphiwe Nyanda. Mr Nyanda is the former Chief of the SANDF and is currently an adviser in the Office of the President. He should be approached and asked whether he has any information which could shed light on Nokuthula Simelane's disappearance. If so, an affidavit must be obtained.

Kind regards

ADV RC MACADAM
SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

TP 07

Simelane Meeting – 18 February 2013 – National Prosecuting Authority, Pretoria

Minutes

In attendance:

- Alan Wallis - SALC
- Robin Palmer - UKZN
- Chris McAdam (CM) – PCLU
- Susanne Bukau – PCLU
- Colonel Xaba (CX)– The Hawks
- Captain Masagela (M) – SAPS

- CM provided an overview of the case, emphasizing that he was only seized with the matter in 2010. He again mentioned tasks that he had identified for M (As outlined in the 2010 letter in our possession) to carry out and that of those tasks none had been properly carried out or carried out at all. Whilst he didn't explain why this case wasn't moved on before he was seized with it, he gave the impression that he is committed to ensuring that this matter be prioritized and investigated as fully as possible so that they can institute a prosecution or to request that in inquest be set up.

- We did not get the impression that they did not want to pursue this case or that they have attempted to cover the case up. The lack of action on their part appears to be due to it not being prioritized by the SAPS, and inadequate follow up on the part of the NPA.

- It was encouraging to see CX from the Hawks at the meeting, and he has been fully briefed on the matter. We hope that will provide oversight within the SAPS investigations.

- CM showed us the docket, which consists of one lever arch file.

- Whilst the tasks he identified in 2010 still need to be pursued CM identified a number of avenues that should be immediately undertaken which could render some of the identified tasks unnecessary. These tasks are aimed at determining course of events that led to the disappearance of Simelane and addressing inconsistencies. Specifically:

    - Further information was obtained by Captain Leask that there was another farm in Westonaria, near the farm that Simelane was held and that Simelane which have been taken to and buried there. A former police officer by the name of Sylvester has been identified as a person that may have knowledge of this farm.

    - Additional safe houses in and around Rustenburg have been identified.

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- In respect of Coetzee's, Pretorius' and Mong's alibi that they could not have been involved in Simelane's month long torture because they were involved in the planting of explosives at power stations, CM located and showed us two dockets on two explosions that occurred around Simelane's kidnapping. The explosions took place at two Eskom substations (Randburg – docket no: 387/09/83 and Fairlands – docket number 100/09/83) on 10 September 1983. A day before Simelane's kidnapping on 11 September 1983.

- CM located Justice Ngidi's detention files, and the dates of his incarceration and escape, in his view, raise questions about the veracity of his version of events.

- CM informed us that Radebe is a Johannesburg City Counselor.

- In light of this information CM has proposed the following:
-
  - Visit the 'new' farm and obtain a statement from Sylvester as well as visiting safe houses;
  - Re-interview Justice Ngidi and Radebe;
  - Approach Coetzee, Pretorius and Mong. Using the new bombing information regarding their alibi and statements made by Mong, CM believes that Mong should be approached to become a section 204 witness. This approach will have to be done carefully and may involve their lawyers. Robin mentioned that he would like to be present at any further communications with Mong or to discuss strategy before hand,

- CX agreed to make another investigating officer available to M.

- A follow up meeting has been tentatively set up for **30 May 2013**.

- CM agreed that if they are not able to take investigation further he agrees that there should be an inquest and that it should be presided over by the a judge and not a magistrate.

- Robin will provide research on inquests in respect of which jurisdiction could be used and whether it is possible to request a judge led inquest instead of magistrate led inquest.

- All involved are happy to be contacted regarding progress.

TP 07

TN 21.11

84

THEMBISILE PHUMELELE NKADIMENG

698 Umhlanga Street
Wingate Park
PRETORIA 0181

Tel: 012 421 3500
Fax: 012 4213516
Cell: 082 553 6680
Email: nkadimeng.thembi@gmail.com

6 March 2013

TO:

RC Macadam
Priority Crimes Litigation Unit
National Prosecuting Authority
Private Bag X752
Pretoria
0001

OFFICE OF THE NATIONAL DIRECTOR

- 8 MAR 2013

NATIONAL PROSECUTING AUTHORITY

AND

Dr. MS Ramaite
Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

Dear Adv. Macadam,

OUTSTANDING INVESTIGATIVE TASKS IN THE INVESTIGATION INTO THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I want to thank you, and Colonel Xaba and Captain Masegela, for meeting with Adv. Robin Palmer and Allan Wallis on Monday 18 February 2013 to discuss the investigation in the case of Nokuthula Simelane. They advised me that they were encouraged by your assurances that this matter will be prioritised and that it will receive the PCLU's immediate attention through the completion of specific tasks within an agreed upon timeframe.

TP

I note from your letter dated 13 February 2013 addressed to the Commander of the Directorate of Priority Crimes Investigations, which you forwarded to Adv. Palmer on 5 March 2013, that certain instructions were given to Col. Xaba. It however came as a surprise, following communications between Captain Masegela and I on 26 February and 5 March 2013 that Captain Masegela is yet to receive any instructions from your office regarding the investigative priorities that you outlined in the meeting. I am advised that Captain Masegela joined the meeting on 18 February late and you had indicated that you would appraise him of what tasks should be completed and how they were to be prioritised. I would be grateful for your explanation as to why the investigating officer has not been given any further instructions.

At our meeting you informed us of the following:

- The majority of tasks identified in your letter to Captain Masegela dated 27 October 2010 still need to be pursued.

- You identified a number of avenues that should be immediately pursued which could render some of the previously identified tasks unnecessary. These tasks are aimed at determining the course of events that led to the disappearance of Ms. Simelane and addressing the following issues and inconsistencies:

    - Further information was obtained by Captain Leask that there is another farm in Westonaria, near the farm that Ms. Simelane was held and that Ms. Simelane could have been taken to and buried there. A former police officer by the name of Sylvester has been identified as a person that may have knowledge of this farm.

    - Additional safe houses in and around Rustenburg and Westonaria have been identified.

    - In respect of Coetzee's, Pretorius's and Mong's alleged alibi that they could not have been involved in Ms. Simelane's torture and disappearance because they were involved in the planting of explosives at power stations you located and showed me two dockets relating to two explosions that occurred around the date of Ms. Simelane's kidnapping. The explosions took place at two Eskom substations (Randburg – docket no: 387/09/83 and Fairlands – docket number: 100/09/83) on 10 September 1983. These occurred a day before Ms. Simelane's kidnapping on or around 11 September 1983.

    - You indicated that Justice Ngidi's detention files had been located and the dates of his incarceration and escape and are of the view that this raises questions about the veracity of his version of events.

    - You disclosed that Radebe is a Johannesburg City Counselor.

In light of the above you identified the following tasks:

TP

- That the investigating officers will visit the 'new' farm and obtain a statement from Sylvester. The investigating officer will also visit the safe houses;
- The investigating officers will interview Justice Ngidi and Radebe again;
- The investigating officer or members of the PCLU will speak to Coetzee, Pretorius and Mong. You also recommended approaching Mong to become a section 204 witness.

Additionally:

- Colonel Xaba agreed to make an additional investigating officer available to assist Captain Masegela;
- 30 May 2013 was tentatively agreed upon as a date on which to hold a follow-up meeting.

I note that in your letter to Col. Xaba (dated 13 February 2013) you asked him to carry out some but not all of the abovementioned tasks:

- Trace one N Zakade who could help in tracing Justice Ngidi;
- Identify certain safe houses for purposes of establishing whether exhumations should take place there;
- Interview Simphiwe Nyanda.

Please advise who is to carry out the additional tasks.

I have a number of queries that warrant your consideration and response and which may assist the investigation:

- In respect of the 'new' farm identified, there is no evidence that a second farm featured or played a role. The Security Police used multiple farms in their operations. Whilst this lead should be followed, the investigation of this information can be quickly finalised and must not be allowed to cause further and unnecessary delays or divert resources from other priorities unless there is specific evidence as to the whereabouts of the mortal remains of Ms Simelane

- Proving the existence of safe houses that were used by Coetzee and his team of Security Policemen during 1983 will contradict versions of events given by officers who testified that they did not use or have safe houses in 1983. This investigation is therefore important and can be quickly accomplished.

- Justice Ngidi's detention files are relevant in respect of the dates of his incarceration. In this regard I would ask you to provide us with the exact dates contained in Justice Ngidi's detention files and the reason these files cause you to question the veracity of his version.

- The bombings orchestrated by Coetzee et al. and the case dockets you located do not represent new evidence as these bombings on 10 September 1983 were conceded in their amnesty hearings.

TP

- In respect of the intention to re-interview Radebe it should be clarified whether you intend to speak to Radebe as a witness or a suspect. This will have an important impact on the case and should be carefully considered.

- Re-interviewing Mong solely on the bombing dockets is not advisable as this has already been conceded by Coetzee et al. Mong can be approached to become a witness to avoid the risk of prosecution. However any approach to Mong or others implicated must be done with the utmost care so as to avoid negatively impacting the investigation.

- In respect of the proposed interview with Simphiwe Nyanda we believe that the only significant matter to canvass with him is whether, to his knowledge, Nokuthula ever returned to Swaziland as claimed by the suspects.

Please urgently consider my concerns and suggestions outlined above and let me have your responses per return.

I further wish to place on record the telephone conversation you held with Adv. Palmer on 5 March 2013. During this conversation you confirmed that:

- You are being updated on a weekly basis by the investigation team;
- You will keep us updated by email (supplied) on progress;
- You will canvass with us the use of certain persons as possible state witnesses once the investigation has reached a more advanced state.

I attach a copy of a timeline of the investigation into the disappearance of Nokuthula which reflects the terrible neglect received by this case. I confirm that I expect these investigations to be finalized by the end of May by which time a decision must be taken either to prosecute or establish a formal judicial inquest. I look forward to hearing from you.

Yours sincerely,

T P NKADIMENG

Copy to: Captain Masegela, South African Police Service
Colonel Xaba, Directorate of Priority Crimes Investigations -- XabaN@saps.org.za
Advocate Susan Bukau -- sbukau@npa.gov.za

TP

Angela Mudukuti TN 21.12 88

From: Robin Palmer <PALMER@ukzn.ac.za>
Sent: Wednesday, March 13, 2013 10:21 AM
To: Alan Wallis
Subject: FW: Nokuthula Simelane
Attachments: 20130308095040770.pdf

Alan- Please read and discuss- Robin.

From: Chris Macadam [mailto:cmacadam@npa.gov.za]
Sent: Wednesday, March 13, 2013 10:02 AM
To: Robin Palmer
Cc: Susan Bukau
Subject: Nokuthula Simelane

Dear Robin

I note with concern the contents of this letter. It contains several serious incorrect statements about what was discussed at our meeting, the most serious being the claim that I indicated that Ngidi was being untruthful. If any legal challenge is brought to any decision I may take in this matter, this document would have to be discovered and if subsequently Ngidi were to be a key witness in any proceedings, then his integrity will have been wrongfully brought into dispute and I will then have to become a witness in those proceedings. In fact, what I said was that in the light of the dates of the arrest of Mr Ngidi, a major question mark hangs around the veracity of the versions of certain of the suspects.

Both I and the DPCI must perform our duties without fear, favour or prejudice. In addition, the Courts have ruled that investigations must be conducted in an objective manner and that due weight must also be attached to any exculpatory versions which might assist the suspect's defence.

In the light thereof, I consider it improper to request that I have to give reasons for my decisions that certain matters be investigated (All the more so when there are incorrect statements about what I said.), explain my communications with the investigating officer and supply evidence out of the police docket to the victims. Consequently I am not prepared to accede to any of these requests. If this document were discovered, it would lay the basis for alleging that there was a manipulation of the investigation by persons who have a subjective interest therein.

I confirm that the matter will continue to be fully investigated, covering all the relevant issues raised in the evidence and an attempt will be made to have the investigation finalised by 31 May 2013. I would also be grateful if you could request your client to in future address her concerns with you and that you communicate with me having done the necessary filtering so as to eliminate any contentious issues which could be the subject of litigation.

Kind regards

Chris Macadam

Information from ESET Endpoint Antivirus, version of virus signature database 8108 (20130312)

TP 17

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TN 21.13 90

Angela Mudukuti

Subject: FW: Nokuthula Simelane
Attachments: letter to macadam- proposed response (22-3)- changes (Robin)finalx.docx

---

From: PALMER@ukzn.ac.za
To: cmacadam@npa.gov.za
CC: frankdutton@hotmail.com; nkadimeng.thembi@gmail.com; yasmin.sooka@gmail.com; nicolef@salc.org.za; alanw@salc.org.za; PALMER@ukzn.ac.za; Gevers@ukzn.ac.za
Subject: RE: Nokuthula Simelane
Date: Sat, 6 Apr 2013 13:25:55 +0000

Dear Chris,
I have extensively canvassed the concerns raised in your email of 13 March 2013 with our client and all members of her legal team, and attach the team's response. I will also call you on Monday 8 April (if suitable) to discuss this and related issues.
Regards,
Robin Palmer.

From: palmer@ukzn.ac.za [mailto:palmer@ukzn.ac.za]
Sent: Wednesday, March 13, 2013 10:13 AM
To: Chris Macadam
Subject: Re: Nokuthula Simelane

Hi Chris - I will phone to discuss- Robin.
Sent via my BlackBerry from Vodacom - let your email find you!

From: Chris Macadam <cmacadam@npa.gov.za>
Date: Wed, 13 Mar 2013 08:01:43 +0000
To: Robin Palmer<PALMER@ukzn.ac.za>
Cc: Susan Bukau<sbukau@npa.gov.za>
Subject: Nokuthula Simelane

Dear Robin

I note with concern the contents of this letter. It contains several serious incorrect statements about what was discussed at our meeting, the most serious being the claim that I indicated that Ngidi was being untruthful. If any legal challenge is brought to any decision I may take in this matter, this document would have to be discovered and if subsequently Ngidi were to be a key witness in any proceedings, then his integrity will have been wrongfully brought into dispute and I will then have to become a witness in those proceedings. In fact, what I said was that in the light of the dates of the arrest of Mr Ngidi, a major question mark hangs around the veracity of the versions of certain of the suspects.

Both I and the DPCI must perform our duties without fear, favour or prejudice. In addition, the Courts have ruled that investigations must be conducted in an objective manner and that due weight must also be attached to any exculpatory versions which might assist the suspect's defence.

TP

In the light thereof, I consider it improper to request that I have to give reasons for my decisions that certain matters be investigated (All the more so when there are incorrect statements about what I said.), explain my communications with the investigating officer and supply evidence out of the police docket to the victims. Consequently I am not prepared to accede to any of these requests. If this document were discovered, it would lay the basis for alleging that there was a manipulation of the investigation by persons who have a subjective interest therein.

I confirm that the matter will continue to be fully investigated, covering all the relevant issues raised in the evidence and an attempt will be made to have the investigation finalised by 31 May 2013. I would also be grateful if you could request your client to in future address her concerns with you and that you communicate with me having done the necessary filtering so as to eliminate any contentious issues which could be the subject of litigation.

Kind regards

Chris Macadam

_____ Information from ESET Endpoint Antivirus, version of virus signature database 8200 (20130406) _____

The message was checked by ESET Endpoint Antivirus.

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TN 21.14

92

Email between Chris Macadam and Robin dated 15 April 2013

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 02 May 2013 12:40 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com; alanw@salc.org.za
Subject: RE: Nokuthula Simelane

Dear Chris,

I confirm receipt, and shall circulate to other team members. Do you have an update on the current status of the investigation?

Regards,

Robin Palmer.

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: Monday, April 15, 2013 3:47 PM
To: Robin Palmer
Subject: Nokuthula Simelane

Dear Robin

With reference to our telcon last Friday, I do not deem it necessary to reply to the last letter from your clients, as we discussed all the issues during the course of our telcon. In the light of the DA/NDPP matter, a number of decisions of the NPA may now be reviewed and I would be obliged to file a record of all the communications which could cause embarrassment and open the doors for allegations.

I confirm that you drew my attention to a Sunday Times article where extracts from one of my letters were quoted. It should be brought to your client's attention that these types of disclosures are potentially prejudicial, as if proceedings are instituted, the other parties may then on the basis of the article require discovery fo my internal communications with you and your client.

TP

I note that Frank Dutton is being copied on the correspondence. He approached me two years ago, informing me that he had been appointed to investigate the matter on behalf of the family. It may well be necessary for him to provide the investigating officer with a statement outlining what he did.

I confirm that investigations are continuing regarding Radebe's claim to have been transferred to the Vehicle Theft Unit via the relevant police documentation and also locating all the dockets and background information relating to the detention of the various MK members as became relevant at the amnesty hearing.

Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.

Kind regards

Chris Macadam

TP

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 02 May 2013 02:12 PM
To: Robin Palmer
Subject: RE: Nokuthula Simelane

Dear Robin

There are no new developments at present.

Kind regards

Chris Macadam

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 02 May 2013 12:40 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com; alanw@salc.org.za
Subject: RE: Nokuthula Simelane

Dear Chris,

I confirm receipt, and shall circulate to other team members. Do you have an update on the current status of the investigation?

Regards,

Robin Palmer.

From: Robin Palmer
Sent: 17 May 2013 04:25 PM
To: Helena Zwart (H)
Subject: RE: NOKUTHULA SIMELANE

Thanks Chris- I will report back. Please let me know about timelines at the end of May.

Regards,

Robin.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 04:21 PM
To: Robin Palmer
Subject: RE: NOKUTHULA SIMELANE

Dear Robin

I agree that it is not necessary to meet. The alibi of Mr Radebe has been investigated and it was established that he was only transferred to the Vehicle Theft Unit in September 1984 and therefore he was still at the Security Branch at the time when Ms Simelane was on the farm at Northam.

The safe houses in use by the Soweto Security Branch at the time have all been identified and all have been eliminated as having exhumation potential, save for the smallholding at Westonaria where consideration is being given to the feasibility of a probe. The detention files relating to Mr Ngidi have been obtained from Justice. They give the case reference number of the docket upon which he was arrested, as well as dates of his detentions. Investigations are now in progress to locate the docket and other evidence whereupon he will be interviewed. The detention files relating to Gilbert Twala are still awaited from Justice. The original under-cover agent, Scotch, has been traced and will be re-interviewed as it would appear that he has also knowledge relating to the arrest of the MK members, which is central to the defence put up by Coetzee, Pretorius and Mong. The outcome of these investigations will determine whether it is still necessary to approach General Nyanda for a statement.

Work is in progress regarding checking mortuary records for entries which could correspond to the physical description of Ms Simelane and the time of her disappearance and once more information is forthcoming, consideration will be given as to whether exhumations are

TP

necessary. The outcome of these investigations will determine the necessity or otherwise of having to conduct the original queries directed by myself.

Kind regards

Chris

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 17 May 2013 03:46 PM
To: Helena Zwart (H)
Cc: Chris Macadam
Subject: RE: NOKUTHULA SIMELANE

Dear Chris,

I am out of the country for a while- perhaps you can update me on progress, and actions still to be taken with projected time-frames, at the end of May, and I will report to the other team members- a meeting seems unnecessary at this stage. I will be back in mid-to late June if a meeting is indicated at that stage.

Regards,

Robin Palmer.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 02:40 PM
To: Robin Palmer
Cc: XabaN@saps.org.za; Susan Bukau
Subject: NOKUTHULA SIMELANE

Dear Robin

With reference to our undertaking to meet at the end of May 2013, I would like you to indicate your availability. We are not in a position at this stage to have finalised all the investigations, but a number of key aspects have been dealt with and the remaining investigations should be finalised within a reasonable period of time.

TP

Kind regards

Chris Macadam

To Advocate C MacAdam ,

NPA.

Re Nokuthula Simelane

Dear Chris

I write on behalf of the legal team in this matter. In response to your indication that you are not satisfied that the investigation has progressed sufficiently to make a decision in this matter, I attempted to discuss this matter telephonically with you, but was unable to do so due to your involvement in an urgent application and court proceedings. Mrs Helena Zwart indicated that you would be available in the late afternoon of 26 June to discuss the matter but on calling her, she informed me that you were still not available. I did try your cell number and will try to speak to you again tomorrow morning, i.e. 27 June 2013.

In essence, the issues I wish to canvass on behalf of the family are the following:

1. *Finalisation of investigations for decision on the docket*

   Following early meetings with yourself and the police investigators in this matter, you did indicate that a decision would be made by the end of May 2013. This date has now passed and we still have no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute one or more alleged perpetrators, or to refer the matter for a formal inquest as this matter has now dragged on for the best part of 13 years. We respectfully request your urgent indication on what information or investigations you still require to put the NPA in a position to make a decision. In this regard, kindly also indicate how the complainant or any members of the complainant's legal support team can assist to expedite the making of this decision (in particular you did indicate that you would require an affidavit from Frank Dutton). In our view, there appears to be sufficient information and *prima facie* evidence to justify a formal judicial inquest, and we request you to seriously consider whether the matter should be referred for inquest at this stage. As you well know, the fact that the matter is referred for an inquest does not preclude the continuation of any investigations you nevertheless consider necessary.

TP

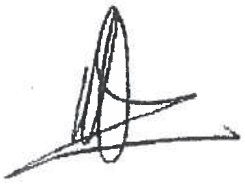
2. *The emotional toll on the family and friends of Nokuthula Simelane*

   As you can appreciate, the delays in finalising this matter create severe and on-going emotional stress and trauma for the family and friends of Nokuthula. I am sure you will agree that they are entitled to finalisation of the matter and emotional closure if the circumstances of the investigation indicate that no substantial progress is likely, especially given the length of time that has lapsed since the death of Nokuthula.

3. *Specific indications of remaining steps and actions*

   We kindly request that any remaining investigative steps and actions that the NPA requires still to be carried out be itemised and linked to specific target dates to prevent this matter from dragging on indefinitely. As requested above, the failure to make substantial progress on reaching these target dates should result in the referral of the matter to a formal inquest if sufficient evidence for a prosecution is not available. In this regard, your undertaking to assist with the motivation for a judicial inquest should there be insufficient evidence for a prosecution, is gratefully noted.

Yours faithfully,



Robin Palmer

(On behalf of the legal support team)

TP

TN 21.18

100

LRC

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PO Box 9495 • Johannesburg 2000 • South Africa • Tel: (011) 836 9831 • Fax: (011) 834 4273

Your Ref:

Our Ref: Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291

16 January 2014

Dear Mr. Nxasana

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to the letter of Adv S K Abrahams. Acting Director of the Priority Crimes Litigation Unit (PCLU), dated 5 December 2013 and received on 9 December 2013, in response to our letters dated 20 September 2013 and 28 November 2013.

2. We assume that Adv Abrahams' letter constitutes a full response to both our letters. If this is not the case he is invited to supplement his response or provide us with the letter prepared in response to our 20 September 2013 but not transmitted.

3. From the outset we note that nearly a year has elapsed from our client's request for an inquest and your predecessor's refusal. We appear to be no closer to resolution.

4. We note the point that the PCLU was only formed in 2003 and could not have attended to our client's matter prior to this year. However the TRC cases, including the Simelane case, was referred to the National Prosecuting Authority (NPA) in 2001. The NPA ought to have acted on these cases from 2001. The fact that the PCLU was only formed in 2003 is no excuse for the inaction during this period.

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance)
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
MR Chetty (Director), EJ Broster, FB Mahomed, AJ Richard
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde
T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Nindi, B Sibiya, W Wicomb

TP

5. We note with dismay that the NPA persists in claiming that the Simelane matter received attention prior to October 2010. Adv Abrahams denies that 'little of no action' was taken in the years prior to October 2010 and refers to the letter of Adv Ramaite dated 31 January 2013. The relevant paragraphs of Adv Ramaite's letter are at 6 to 9. These paragraphs disclose no investigations. Instead they set out a litany of excuses as to why no investigations took place. These are the so-called "guidelines", the Ginwala Commission, the closure of the DSO and creation of the Hawks. None of these excuses justify the NPA's idleness.

6. Adv Abrahams maintains that the Simelane matter was not referred by the SAPS or the authorities previously dealing with the TRC cases. He does not disclose who referred the case to the NPA nor does he identify the 'authorities' previously handling these matters. It is claimed that the Simelane case only came to the attention of the PCLU when the Foundation for Human Rights (FHR) made a submission to it in November 2004. It would seem that if it were not for the intervention of the FHR in 2004 the Simelane matter would never have been taken up, even though it was on the list of TRC cases originally referred to the NPA. Our client will not be persuaded that the NPA has acted diligently in this matter. The failure of the NPA to resolve this matter one way or the other constitutes monumental neglect or incompetence; alternatively it is the function of an erstwhile policy or political decision or arrangement not to pursue the "TRC cases".

7. We note that the Simelane matter was part of a broader investigation against former SAP General Engelbrecht. General Krappies Engelbrecht was implicated in organised violent crime by both the Goldstone Commission and the Truth and Reconciliation Commission. We assume that this investigation was yet another case arising from past conflicts that was abandoned by the NPA.

8. There is much irony in the fact that in the mid-2000s the then head of the PCLU resisted prosecutions in favour of an inquest only for the PCLU to resist an inquest several years later in 2013. It is correct that the family's representatives motivated for prosecutions at that time, particularly of those suspects who had

TP

not applied for kidnapping. I am advised that this was dismissed by the PCLU who did not wish to pursue "small fish". The family's representatives' advice that pursuing the small fish could lead to the conviction of more senior perpetrators fell on deaf ears. In any event it was not just "small fish" who had not applied for amnesty. The Commander of the Security Branch C1 Section under whose auspices the operation against Nokuthula took place also did not apply for amnesty. In the circumstances it is not difficult to see why my client and her family hold the view that the authorities do not wish to see justice done this matter.

9. We note that the NPA again attempts to escape responsibility for the failure to investigate on the basis that investigations are the responsibility of the police. According to Adv Abrahams the NPA played no role in the decisions to discontinue the investigations in this matter. My client does not accept this claim. It is common cause that the TRC matters (including my sister's case) were referred to the NPA not the police. The NPA accordingly had the responsibility to ensure that the cases were investigated. They failed to do so. In any event, the NPA has the authority to refer matters to the police for further investigation. Indeed it has been common practice for many years for prosecutors to direct investigations in serious or complex crime, as Adv Macadam is belatedly doing in the instant matter.

10. On the version of the NPA between November 2004 and 2010 (a period of more than 5 years) besides a few meetings between the PCLU and the representatives of the FHR nothing else was done. There was not the slightest attempt to investigate. According to my client very little happened between October 2010 and January 2013 when our client and her family finally gave up and sought an inquest.

<u>Investigation report</u>

11. The investigation report raises more questions than answers.

TP

DNA analysis and exhumations

12. In relation to the DNA analysis it is not stated when the second sample was sent for testing to Bosnia. Indeed it appears it has not been obtained, let alone sent. Par 5.2 says that a second sample "will be obtained and submitted to ... ." It is apparent from the paragraph on exhumations that as at the end of 2013, and notwithstanding our requests back in September 2013, the PCLU has no idea when the examinations will be complete. This is notwithstanding that a DNA sample was collected from my client on 4 April 2013.

13. I am advised that hundreds of unidentified remains are found each year in South Africa, many of which are of young women. Your Adv Abrahams advises that the remains could be of Nokuthula only because of the proximity of the site to the farm in Northham. Brits is situated 108 km south east of Northam; and is 68 km east of Rustenburg. A claim made before the Amnesty Committee of the TRC was that Nokuthula was taken from Northam to Westonaria via Rustenburg. Brits was not mentioned in evidence or in any statements as a place of interest in the Nokuthula matter. This exercise is accordingly a shot in the dark. While we would want the DNA from the remains of any and all young females in the wider region to be analysed, it would be pointless for the NPA to hold back from making a decision every time the remains of a young female was discovered.

14. Advocate Abrahams says that an anthropologist has made certain findings that the remains may be consistent with the missing person. Surprisingly no mention is made as to what these findings are. Since nothing was disclosed we must assume that such findings are tenuous. Strikingly, no mention is made as to whether there is evidence that the cause of death was violent. The modus operandi of the Security Branch at the time was to shoot their victims in the head. Since Adv Abrahams letter is silent on this point we must assume that there is no evidence of a violent death in respect of the remains found at or near Brits.

15. I am advised that it was wrong to have provided a photograph of Nokuthula to the facial reconstruction expert. The reconstruction should have been done independently of a photograph so as to avoid accusations that the face was

TP

reconstructed to resemble the photograph. In the circumstances any evidence arising from this work will have little evidential weight.

16. In short, as matters stand, there is no reasonable nexus between Nokuthula and the skeletal remains. There is accordingly no compelling reason to delay the finalisation of the investigation on the basis of these or other remains found in similar circumstances. In any event if new evidence does come to light from the recovery of human remains proper decisions can be made accordingly. This could include stopping an inquest and proceeding to a prosecution.

Westonaria plot

17. In respect of the plot at Westonaria it should be noted that this is not fresh news. The black Security Branch members who testified before the TRC all knew about the safe-house at Westonaria. If basic investigation had been done the plot would have been pointed out decades ago as part of routine investigations.

18. In regard to possible exhumations on this plot I am advised that several years ago the mining company that owns the plot bulldozed the then existing structures, including the building used as the "safe house", which was levelled. Unless there is specific information pinpointing an exact location there is little or no prospect of recovering remains on this plot. Since no such information has been disclosed we must also assume that this is another shot in the dark. In any event I am advised that it would take an experienced specialist anthropologist a few hours to determine the feasibility of an exhumation.

19. Again, a possible exhumation on this plot should not be a reason for any additional delay, unless there is specific and detailed information about the exact location of a grave.

Mortuary Records

20. An inspection of mortuary records was made in 1996 by Captain Leask, which included the Rustenberg Mortuary. No connections were made between any

TP

records and Nokuthula. Towards the end of 2013 it is now said that some incomplete and obscure records are possibly linked to this case. Again there is no reason why such a study could not have been conducted many years ago. While these apparent connections should be explored they also constitute shots in the dark and should not hold back the taking of a decision.

21. It is becoming increasingly apparent that the PCLU will delay making a decision on this matter on the basis of the most tenuous lines of inquiry.

Monthly Reports

22. If monthly reports are to be given they should be sufficiently detailed so as to be meaningful. Vague comments such as, "an anthropologist has made certain findings that the skeletal remains may be consistent with the missing person" without stating the findings are not helpful. The bulk of what is said in the October to December report is equally vague and unhelpful.

23. The monthly reports should be substantive, accurate and contain all relevant information not just suggestions or hints on progress in respect of the investigation.

Reasons for not holding an inquest

24. Quite remarkable reasons are given as to why an inquest should not be held at this time.

25. It has been demonstrated above that the outstanding investigations are shots in the dark and are not 'key outstanding investigations' as claimed by Adv Abrahams. In fact the investigating officer, Captain Masehela, who submitted his report to Adv Macadam in July 2011 recommended an inquest, which recommendation was ignored.

26. It is noted that the setting up of an inquest in the High Court could take several months. During this period outstanding investigations could be finalized. If any of

TP

these lines of inquiry resulted in evidence warranting a prosecution such a decision could be taken and effected. Should this happen the inquest will not be proceeded with; and if it has commenced, it can be stopped in terms of section 21(2) of the Inquest Act.

27. While we accept that there may be potential prejudice to witnesses who have to testify in two fora we note that this was of no consequence to the PCLU in the 2000s who were pushing for an inquest at that time. Our instructions are that the interminable delay is of even greater prejudice to witnesses and our clients.

October to December report

28. The October to December report suggests that there is no end in sight. There is simply no reason why these matters could not have been pursued and resolved in the 12 months since my client sought an inquest.

29. We note that Adv Macdam identified these matters as investigational tasks back in 2010. It is quite apparent that little or no progress has been made on these tasks over the past three years and they remain as "work to be done". Many of these tasks are simple and basic and there is absolutely no reason why they should not have been quickly completed.

30. It is worth mentioning that other tasks identified by Adv Macadam in his 2010 letter of 2010 seem to have dropped off the list. No indication has been given whether these tasks were completed.

31. I have taken instructions from my client in respect of the requests made by Adv Abrahams in paragraph 8 of his letter. My client is not in possession of any of the records of the amnesty hearing. My client advises that members of her family did collect Nokuthula's belongings from the Duma Nkosi home in Soweto in late 1983 or early 1984. Unfortunately they cannot recall collecting a passport from amongst her clothes and other belongings. My client's mother advises that Nokuthula was a dual citizen of South Africa and Swaziland and possessed

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passports for both countries. Nokuthula apparently used her Swaziland passport on her last few trips.

32. In respect of the holding of a meeting we had requested a meeting with the NDPP. My client and her representatives have met with the PCLU over the years and such meetings have proven to be utterly fruitless. We see no point in holding another meeting with the PCLU. We persist with our request for a meeting with yourself. The purpose of such a meeting would be to request an imposition of a reasonable time limit on the investigations and for the taking of a decision whether to prosecute or not. If a decision cannot be taken within a reasonable time period then this matter must be referred to a formal inquest in the High Court. We would submit that, in the circumstances of this case, a reasonable time period would be a matter of weeks not months.

33. Kindly advise per return whether you are willing to meet with us, and if so, the soonest date for such a meeting. If a meeting in the near future is not possible, then please advise whether you are willing to bring this matter to finality within a reasonable period as described above.

34. We look forward to hearing from you.

Yours sincerely

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Bongumusa Sibiya

Copy to: **Advocate Chris Macadam**
Priority Crimes Litigation Unit
By fax: (012) 845 6337
Email: cmacadam@npa.gov.za / hzwart@npa.gov.za

And to: **Advocate S K Abrahams**
Acting Head: Priority Crimes Litigation Unit
Office of the National Director of Public Prosecutions
By fax: (012) 845 6337

TP M

* * * Communication Result Report (16. Jan. 2014 11:05) * * *

1) LEGAL RESOURCE CENTER
2)

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File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
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	Bongumusa	0128456337		OK	
		0128456337		OK	

Reason for error
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Your Ref:
Our Ref: Our Ref: D Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291

16 January 2014

Dear Mr. Nxasana

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION): JV PLEIN: 1469/02/2/2013

1. We refer to the letter of Adv S K Abrahams, Acting Director of the Priority Crimes Litigation Unit (PCLU), dated 5 December 2013 and received on 9 December 2013, in response to our letters dated 20 September 2013 and 28 November 2013.

2. We assume that Adv Abrahams' letter constitutes a full response to both our letters. If this is not the case he is invited to supplement his response or provide us with the letter prepared in response to our 20 September 2013 but not transmitted.

3. From the outset we note that nearly a year has elapsed from our client's request for an inquest and your predecessor's refusal. We appear to be no closer to resolution.

4. We note the point that the PCLU was only formed in 2003 and could not have attended to our client's matter prior to this year. However the TRC cases, including the Simelane case, was referred to the National Prosecuting Authority (NPA) in 2001. The NPA ought to have acted on these cases from 2001. The fact that the PCLU was only formed in 2003 is no excuse for the inaction during this period.

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Agnes (Director: Finance),
B Bapela (Director), A Andrews, S Ngwenya, NM Farlane, C May, N Matsebatlela, KS Seleti,
PM Chetty (Director), D Dooms, NB Mehlomakhulu, AJ Rickard,
S Seshoka (Director), C McConnachie,
R Pillay (Director), T Nkhwana, Cruz da Costa,
T Nyembe (Head of CLU), N Bishop, G Bizos SC, J Brickhill, S Khoza, B Sibiya, W Wessels

TP 2

TN 21.19

103

South African Police Service Suid-Afrikaanse Polisiediens

Private Bag X1500, SILVERTON, 0127 Fax No: (012) 846 4400

Your reference :

Enquiries : Brigadier Kadwa

Telephone no : 012 846 4001

E-mail : dpci.head@saps.gov.za

THE NATIONAL HEAD

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

SOUTH AFRICAN POLICE SERVICE

Mr Bongumusa Sibiya
Legal Resources Centre
Constitutional Litigation Unit
JOHANNESBURG

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

Your letter dated 25 September 2013 bears reference.
Since the Legal Resource Centre has been dealing directly with NPA (Priority Crime Litigation Unit) regarding this investigation, the DPCI investigator was of the opinion that you were well informed about the developments of the case. The last correspondence was sent on the 3rd of December 2013 by NPA to your office.

Nevertheless, the DPCI will compile a comprehensive report in consultation with all the relevant stakeholders involved in this investigation. The entire investigation is based on the DNA analysis before we could conclude that the bones found in Brits were those of Nokuthula Simelane who disappeared 30 years ago. On the other hand, if results are negative the NPA will decide whether according to the evidence available the formal inquest could be held or not.

The comprehensive report will be submitted to your office by the end of January 2014 which will cover all the aspects raised in the letter.

Kind regards,

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
A DRAMAT
Date: 2014-01-16

TP

TN 21.20
110

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Your Ref: JB/ CAS: 1469/02/1996
Our Ref: Our Ref: B Sibiya

Lieutenant General A Dramat
Deputy National Commissioner: Directorate for Priority Crime Investigation
No 1 Cresswell Road
Silverton
Pretoria
By fax: 012 846 4400; and

Attention: Brigadier Kadwa
By fax: (012) 846-4400; and
By email: kadwaE@saps.gov.za

26 February 2014

Dear General Dramat

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We thank you for your letter dated 10 February 2013 in response to our letter dated 26 September 2013.

2. My client is disturbed to note that you do not accept any responsibility for the lengthy delay in finalizing this matter, or at least the delay of nearly 4 years, being the period from 25 March 2010 when the Directorate for Priority Crimes Investigation (DPCI) was given the file. Indeed you do not acknowledge that there has been any delay at all.

3. Since you have acknowledged that the DPCI was seized with this investigation since March 2010 my client holds you and your department responsible for failing to take expeditious steps to finalize this long outstanding investigation. Your letter provides no justifiable explanation for such delay. Your neglect has caused my client and her family considerable suffering and emotional anxiety. Moreover, such

National Office:
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MR Chetty (Director), EJ Broster, FB Mahomed, AJ Richard
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, C van der Linde
T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Ndidi, B Sibiya, W Wicomb

neglect constitutes a great disservice to the memory of the late Nokuthula Simelane (Nokuthula) who gave her life for the struggle for freedom and democracy in South Africa.

4. It is apparent from your letter that, notwithstanding the special circumstances of this case, it is still not being prioritized or treated as urgent. This conclusion is premised on the following:

4.1 The DNA from the Brits skeletal remains have not as yet been sent for testing to Bosnia because the police have still not yet received approval to incur such expense. A second sample has not even been secured should approval be granted;

4.2 The Westonaria plot has not been evaluated let alone excavated;

4.3 Additional 'manpower' has not as yet been assigned to the investigation;

4.4 The four mortuary entries have not yet been acted upon i.e. graves have not been identified and no decision has been taken as to whether or not to exhume and conduct DNA testing; and

4.5 The DPCI refuses to commit to specific time frames.

5. If past conduct is anything to go by, there is no end in sight to this investigation. The basic investigation into the disappearance of Nokuthula has not been completed; neither have the lines of inquiry agreed to between Advocates Macadam and Palmer during February 2013 been finalized.

6. We note your statement that, but for '*a significant new development*', the agreed date for finalising the investigation, the end of May 2013 would have been met. This development related to the discovery of skeletal remains of a young woman in the Brits area, presumably in March 2013. It seemed that but for this development the investigations were on track for completion by the end of May last year. One

TP

would have then expected the different lines of inquiry to have been concluded by the end of May, bar the forensic examination of the Brits remains.

7. It appears, however, that the balance of the investigation ceased following the discovery of the said remains. This conclusion can be drawn from a consideration of your letter as well as that of Adv. Abrahams of the Priority Crimes Litigation Unit (PCLU) dated 9 December 2013. The letter of Adv. Abrahams disclosed that very little of the agreed investigation had been attended to.

8. By way of example, a central pillar of the investigation has always been the tracing and interviewing of the 16 MK operatives that Willem Coetzee and Anton Pretorius claimed were arrested as a result of Nokuthula's cooperation. In October 2010 Adv. Macadam set this as one of the tasks to be carried out by the DPCI. According to the letter of Advocate Abrahams' dated 9 December 2013 this particular task had not yet been accomplished. This was his observation, more than 3 years after the instruction was given and some 9 months after the discovery of the skeletal remains. Many of these 16 individuals are well known personalities, easy to locate and are available for interview by investigators.

9. Your letter is oddly silent as to why this key aspect of the investigation could not be completed by end of May 2013, or soon thereafter. You confirm this lapse in your letter where you advise that "*(p)ending the forensic results, the investigating officer will continue to focus on the investigations identified by Advocate McAdam*". Since you add that the investigations are "*quite extensive*" and that it may be necessary to "*assign additional manpower*" we must conclude that as of February 2014, some 11 months after the discovery of the remains, little or nothing has been done in relation to the said investigations.

10. We are advised that a period of 3 years and 4 months (since the tasks set by Adv. Macadam in October 2010) is more than sufficient time to have completed these investigations. This is irrespective of whether or not skeletal remains had been found.

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11. We point out that that there is no apparent reason why the Brits remains should be regarded as "*significant*". No reason has been advanced as to why such discovery justifies the delay in completing the agreed investigations. The discovery of remains of a young woman is not an uncommon occurrence in South Africa. Apart from age and gender there is apparently no other link between the remains and Nokuthula. There is accordingly only a remote possibility that the remains may be identified as Nokuthula. While there is a need to establish the identity of the remains such a task should not have halted or slowed all other investigations.

12. The outstanding investigational aspects remain relevant, and still need to be investigated irrespective of whether the remains prove to be those of Nokuthula or not.

13. As matters stand, the balance of the investigation is far from complete. The forensic results of the skeletal remains and the four other bodies (all of which have no meaningful links to Nokuthula) have to be traced, exhumed, DNA samples obtained, procurement procedures completed, dispatched to Bosnia and then await results that will take at 6 months or more.

14. In the meantime time marches on and takes its toll on witnesses and suspects. Time in this case is critical because we have already had a delay running into decades. As a result our client and her family may be deprived of a meaningful legal conclusion to Nokuthula's death.

15. In the circumstances, we seek your answers to the following questions:

    15.1 Have the investigative tasks set by Adv. Macadam on 10 October 2010 been diligently conducted at all times?

    15.2 Did the discovery of the skeletal remains at Brits cause the investigations to be neglected, halted or slowed in any way?

We look forward to hearing from you.

TP

Yours sincerely

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Per: Bongumusa Sibiya

Copy to: Advocate S K Abrahams, Acting Head: Priority Crimes Litigation Unit
By fax: (012) 845 6337

Advocate C Macadam, Priority Crimes Litigation Unit
By fax: (012) 845 6337; and
By email: cmacadam@npa.gov.za / hzwart@npa.gov.za

TP

* * * Communication Result Report (26. Feb. 2014 10:40) * * *

1) LEGAL RESOURCE CENTRE
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Your Ref: JSI CAS: 1469/02/1998
Our Ref: Our Ref: S Sibiya

Lieutenant General A Dramat
Deputy National Commissioner: Directorate for Priority Crime Investigation
No 1 Cresswell Road
Silverton
Pretoria
By fax: 012 846 4400; and

Attention: Brigadier Kadwa
By fax: (012) 846-4400; and
By email: kadwaE@saps.gov.za

26 February 2014

Dear General Dramat

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1998)

1. We thank you for your letter dated 10 February 2013 in response to our letter dated 26 September 2013.

2. My client is disturbed to note that you do not accept any responsibility for the lengthy delay in finalizing this matter, or at least the delay of nearly 4 years, being the period from 25 March 2010 when the Directorate for Priority Crimes Investigation (DPCI) was given the file. Indeed you do not acknowledge that there has been any delay at all.

3. Since you have acknowledged that the DPCI was seized with this investigation since March 2010 my client holds you and your department responsible for failing to take expeditious steps to finalize this long outstanding investigation. Your letter provides no justifiable explanation for such delay. Your neglect has caused my client and her family considerable suffering and emotional anxiety. Moreover, such

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Johannesburg
Constitutional Litigation Unit:

J Love (National Director), K Pokwana (Director: Finance)
S Magardie (Director), A Andrews, S Kahanovitz, WH Corfield, C May, N Hudleston, HS Smith
HR Cheadle (Director), CH Botes, PB Holmes, AM Pickard
S Sephton (Director), LC McDonald
M Pieterse (Director), T Ndlovu, C van der Linde
T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Mbatha, S Sibiya, W Wicomb

TP 7

South African Police Service Suid-Afrikaanse Polisiediens

Private Bag X1500, SILVERTON, 0127 Fax No: (012) 846 4400

Your reference : JV Plein 1469/1996 THE NATIONAL HEAD

Enquiries : Brigadier Kadwa
Colonel Xaba DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

Telephone no : 012 846 4372 SOUTH AFRICAN POLICE SERVICE

E-mail : dpci.head@saps.gov.za

Legal Resources Centre
PO Box 9495
JOHANNESBURG
2000

Dear Ms van der Linde

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996.

I am in receipt of your letter dated 10 July 2014 and have noted the contents thereof.

It is unfortunate that your letter once again persists with the suggestion of inaction on the part of the investigators and the allegation that your client is not kept informed of developments; both of which are denied. While I do not deem it necessary to respond to each and every allegation contained in your letter under reply or your letter dated 26 February 2014, it needs to be pointed out that the allegation that the investigating officer has only contacted your client once during the last six months is disputed.

I am advised that contrary to this allegation, the investigating officer was in contact with your client on a number of occasions and that during this period she in fact visited him at his office where he showed her the docket and explained to her in detail the progress which had been made. According to the investigating officer your client expressed her relief that she had seen that the investigation was progressing and that she appeared to be satisfied with the progress made. I am also advised that shortly after receipt of your letter dated 26 February 2014 they had spoken and that your client had agreed that instead of continuous correspondence it would be more expedient for a meeting to be arranged where the matter could rather be discussed. I am furthermore advised that she undertook to take this matter up with yourself and to arrange a meeting towards the end of April 2014. No feedback was however received.

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KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996.

In addition to the above, I am advised that the investigating officer was also in telephonic contact with your client on 20 March, 3 April, 8 April and 11 May 2014. The last contact between your client and the investigator was during June 2014 when he contacted her whilst on leave, to inform her of this fact and to assure her that the investigation would continue in his absence. I am advised that a good relationship exists between the investigating officer and your client and, as such, the investigating officers surprise at being confronted with your letter, is, in the circumstances, is understandable.

As regards the DNA results, I may inform you that the laboratory in Bosnia has completed the tests and that the investigating officer received notification on 14 July 2014 that the samples provided by Ms Simelane's family are not consistent with the samples obtained from the skeletal remains which were uncovered.

Since my previous letter, extensive investigations have been conducted and the case docket has in view thereof recently been submitted to the National Prosecuting Authority for consideration and further instructions, if any.

In conclusion it needs to be reiterated, that the DPCI is, without compromising on the quality of the investigation, committed to finalising the same as soon as possible. The DPCI is also committed to building forth on the good relationship which already appears to exist between your client and the investigating officer. Accordingly I support the agreement reached between them that a meeting to resolve any issues you may have/ clarity which you may need is the preferable route to follow in order to ensure a common understanding of the matters at hand and the issues which need to be dealt with. You are therefore at liberty to contact the investigating officer's commander Colonel Xaba at telephone number 0798899582, should such a meeting be required.

Your cooperation in this regard will be appreciated.

Kind regards,

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
A DRAMAT
Date: 2014-07-17

TP

"TN 21.22"

MEETING WITH THE DPCI REGARDING THE CASE OF NOKUTHULA SIMELANE 31 JULY 2014

ATTENDEES

Frank Dutton

Thembi Nkadimeng

Angela Mudukuti

Carien Van Der Linde

Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS)

Captain Masegela (Investigating Officer)

SUMMARY

The meeting followed mostly a question answer format with Frank asking for details about the investigation. The docket was handed to the PCLU on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.

CLARIFICATION OF TEAM COMPOSITION

After brief introductions Colonel Xaba indicated that they had previously dealt with Robin Palmer whom they have not heard from for a long time but that he seems to have been replaced by the LRC. Frank then indicated that Robin is still very much a part of the team. Angela explained the composition of the team and that the letters come on the LRC letterhead but are produced after consultation with the entire team.

STATUS OF INVESTIGATIONS

Delays and Challenges Faced

Captain Masegela began by explaining that he only started investigating the matter in 2010 and struggled to trace all the original documents from the TRC. Throughout the process he maintained direct contact with the Simelane family. He also indicated that the entire process of investigation was done in consultation with Advocate Macadam. All decisions and instructions came from Macadam. He indicated that the investigations have been difficult as many of the senior officials involved have died and the evidence has been hard to obtain. He also felt that the people who were previously investigating the case had failed to do a thorough job otherwise this matter would have been resolved a long time ago. He felt that most of the delays can be attributed to obtaining DNA results from the laboratories in Bosnia and due to the difficult nature of the case. Despite the delays and negative DNA results he indicated that he could leave no stone unturned, making securing DNA results a very important part of the process. After the DNA results were obtained he submitted his entire docket to Macadam on 14 July 2014. They are currently waiting for Macadam to make a decision and/ or give further instructions.

TP

Further delays were attributed to the difficulty faced when dealing with uncooperative witnesses. According to Captain Masegela, in order to talk to TRC witnesses one has to go through their lawyers first. He indicated that many of the lawyers took a very long time to respond to his requests. He also expressed disappointment about the tone in our correspondence as it insinuated that he was not adequately doing his work despite the delays being out of his control.

Certificate of Completed Investigations
Frank asked if a certificate indicating that the investigations were complete had been issued. Captain Masegela said that a certificate had been issued but that it came from a different police department. Frank asked if Captain Masegela felt the investigations were complete and Masegela responded affirmatively but qualified the response by making it clear that investigations are complete with respect to instructions and guidance given by Macadam. Captain Masegela also said that, when necessary, he expanded investigations based on leads. Frank asked him again if, as the investigating officer he was satisfied with the investigations. Captain Masegela responded affirmatively.

DNA Tests
Frank raised that General Dramat had indicated that more DNA tests were to be done based on mortuary records and asked Captain Masegela if this had been done. Masegela indicated that it had been done and that they have ruled out the possibility of any of those bodies being that of Nokuthula as they are too old to be her.

Westonaria Plot
Frank asked if they had investigated the burial site at Westonaria. Masegela indicated that they went to the site and there were no more unidentified remains to examine. However, the people at Westonaria will keep him informed should anything else turn up.

Skeletal Remains from Brits
Frank asked what made them think that the skeletal remains at Brits were linked to this case. Captain Masegela indicated that he had received information that a female body fitting the age requirement had been discovered and that he had to ensure that it was not her. Brits is also close to where she disappeared. Thembi then asked if this means that they will continuously check every single female body fitting the age requirement as she felt that this is similar to shooting in the dark. She also indicated that these far-fetched options were time consuming and should not be allowed to prevent the pursuit of more credible leads. She acknowledged that they should leave no stone unturned but this must not be an excuse to waste time. She felt that the SAPS are walking down dark alleys whilst ignoring people like Radebe who could possibly lead them to her remains. Colonel Xaba stated that he agrees with her, but she must understand that they cannot rule out any avenues.

18 MK Operatives
Frank asked if they had interviewed the 18 MK members and Captain Masegela said he knew nothing about 18 MK operatives. He stated that he was only instructed to interview Ngidi, Ngubese, Olifant and Twala. He reiterated that he was never given the names of 18 MK operatives. Frank referred him to the letter from Macadam addressed to Captain Masegela dated 27 October 2010 where this task is specifically mentioned. Masegela denied ever seeing such a letter and repeated that he had followed every single instruction received from Macadam. Frank then went on to explain how finding the 18 MK members is central to the

investigation. During the TRC hearings Coetzee alleged that Nokuthula had turned into a spy for them and that her information led to the arrest of those 18 MK members. Coetzee produced a newspaper displaying the announcement by the Minister of Police that 18 MK members had been arrested. The newspaper date had been removed. Coetzee tried to use this to prove that Nokuthula had been released as a spy and managed to give information that led to the arrests. Later, it was revealed that the date on the newspaper was September 1984 and Nokuthula disappeared in 1983 making it difficult to believe that she had been released as a spy and facilitated the arrests of the 18 MK members.

Captain Masegela then indicated that they had traced Ngidi and he is also supposed to be one of the people betrayed by Nokuthula. Ngidi confirmed that there is no way that Nokuthula could have given information that led to his arrest. Frank then indicated that finding the remaining operatives is important as it will prove that Coetzee lied.

Interviewing General Nyanda

Frank asked if General Nyanda had been interviewed. Masegela indicated that he was instructed by Macadam *not* to interview Nyanda. Frank went on to ask if there were any outstanding tasks and at that point Captain Masegela stated that he felt like he was being questioned in an accusatory manner. Frank apologized and indicated that this was not his intention. He made it clear that he was merely trying to fully understand what had and had not been done. It was at this point that Thembi explained that Captain Masegela had not been copied in any of the letters sent from the NPA to the team. Thembi shared the letters with Captain Masegela to make sure he knew exactly what the NPA had communicated to the team. Captain Masegela then said that there are no outstanding tasks and that if there was anything he was unable to do, for example- interview a man who has already passed away, he attached an affidavit to that effect and any supporting documentation, for example death certificates.

Brigadier Schoon

Frank asked if Brigadier Schoon was still alive and Masegela said yes but that he is very old and hard of hearing.

Extra Resources

Frank asked if Captain Masegela had requested extra resources for this investigation. Captain Masegela said he had and that they had received assistance from a number of departments including the Crime Scene Management team. Colonel Xaba also responded to say that unfortunately one of the people instructed to assist had recently been involved in a car accident.

Prosecution of Coetzee and Pretorius

Frank asked Captain Masegela whether he felt that sufficient evidence existed for the prosecution of Coetzee and Pretorius. Masegela indicated that there could be. Colonel Xaba responded by saying that there is no direct evidence that links them to the crime. Captain Masegela said that Radebe should be charged with kidnapping and torture. Frank then asked if they had been able to speak to Radebe. Captain Masegela indicated that Radebe and his lawyers refused to talk to them as did Coetzee and Mong.

Allegations of Nokuthula becoming a Spy for the Security Branch

TP

Frank explained that the white Security Branch members claimed that they managed to make Nokuthula a spy for them and that they took her to Swaziland and she never returned. Frank stated that this is unlikely because they never circulated Nokuthula as a wanted person after she failed to return to her "handlers". This is peculiar considering they had classified her as a "terrorist". Colonel Xaba said that in 1983 the police did not have the capacity to circulate wanted persons and that that Frank was speaking with modern day technology in mind.

Captain Masegela said that according to Coetzee and Pretorius they turned her into a spy and Strongman (Bambo) took her to the Swaziland border. Bambo was later arrested for another crime and Coetzee and Pretorius panicked as they feared he would implicate them and so they arranged to have him killed.

SWT66
Frank asked if they were able to trace SWT66. Captain Masegela said that they were not able to trace SWT66.

Motsoanyame Commission
Frank asked if they had followed up with Motsoanyame Commission. Captain Masegela said they had not.

TRC cases sent for investigation
Frank said that the NPA wrote to the team indicating that South African president had directed the NDPP to give attention to 500 TRC missing people cases and according to the NDPP website 150 cases were identified for immediate investigation. He then asked Captain Masegela if he was aware of these 150 cases. Colonel Xaba and Captain Masegela both said that they were not aware of 150 cases being investigated but that they knew that a much smaller number of cases were sent for immediate investigation including that of Nokuthula.

Thembi then suggested that a meeting should be organized between the NPA, SAPS and the team so that the NPA can go through the docket with everyone. Thembi indicated that regardless of what the NPA's decision is- this meeting must be held as she would like to know all the details.

Hospital Records in Swaziland
Frank asked if they had looked into hospital records in Swaziland. Captain Masegela said that they had done so in conjunction with Interpol but that nothing useful had turned up.

Angela asked if Macadam had indicated when he would give them feedback and they responded by saying that he did not say when he would get back to them.

CONCLUSION
The meeting ended with Colonel Xaba asking for us all to focus on the positive aspects and he indicated that he would not object to having another meeting with the PCLU present.

TP

Carien van der Linde

From: Carien van der Linde <carien@lrc.org.za>
Sent: 16 September 2014 12:47 PM
To: 'XabaN@saps.org.za'
Subject: KIDNAPPING TORTURE DISAPEARANCE AND MURDER OF NOKHUTHULA AURELIA SIMELANE / PRIORITY INVESTIGATION; JV PLEIN 1469/02/1996
Attachments: AFFIDAVIT FRANK KENNAN DUTTON.pdf

Dear Col. Xaba

I attach a PDF version of the affidavit of Frank Kennan Dutton, the investigator appointed by the Simelane family.

The original copy is with Frank Dutton, if you should require it.

Warm regards

Carien van der Linde
Attorney

| Tel: 011 836 9831 | Fax: 011 836 8680 | Email: carien@lrc.org.za |
| Mobile: 060 346 9577 |
Physical : 15th Floor	Bram Fischer Towers	20 Albert street	Marshalltown
Johannesburg	South Africa
Postal: P.O Box 9495	Johannesburg 2000
Website: www.lrc.org.za
Johannesburg	Cape Town	Durban	Grahamstown

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LRC
Legal Resources Centre

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AFFIDAVIT

I, the undersigned

FRANK KENNAN DUTTON

Do hereby make oath and state:

1. I am a South African citizen with ID Number 4905204085086. I reside at 18 Lawrence Place, Waterfall, 3650, KwaZulu Natal.

2. I am an International policing and investigation expert and provide expertise on a consultancy basis internationally as well as locally. I have played leading roles in complex investigations in South Africa and many other countries. Including Bosnia, Croatia, Kosovo, Sudan (Darfur), Afghanistan, DRC, Cameroon, Uganda, Nigeria, Rwanda, Kyrgyzstan, Liberia, Mozambique, Zimbabwe, Brazil and East Timor. I have 38 years of policing experience in South Africa and I was the first head of the Directorate of Special Operations.

3. In 2012 I was awarded the Order of Baobab in Gold by the President of South Africa for my South African and International police work. In particular the President made this award in order to recognize my "*exceptional contribution to and achievement in [my] investigative work as a dedicated and loyal policeman, for exposing the apartheid government's "Third Force*".

4. I make this affidavit in response to a request set out in a letter from Colonel Xaba, Commander Crimes against the State, Directorate Priority Crimes Investigations (DPCI) dated 11 August 2014 to the family's legal representatives, the Legal Resources Centre (LRC). This letter sought an affidavit from me, as the family's

16/9/2024 TP

private investigator, setting out what investigation I had conducted and in particular what statements I had taken. In a letter dated 9 September 2014 the LRC advised Col Xaba that I took no statements. Col Xaba responded by way of a letter dated 10 September 2014 in which he indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit.

5. During June 2011 I was retained as a consultant by the family of Nokuthula Aurelia Simelane to inquire into the whereabouts of Nokuthula Simelane who had been kidnapped from the Carlton Centre, Johannesburg in September 1983 by members of the former Security Branch of the South African Police. My investigation was sponsored by the Foundation for Human Rights (FHR). After her kidnapping she was secretly held captive on a farm in Northam for several weeks and severely tortured after which she disappeared.

6. I researched documents provided to me by the family's legal representatives as well as the contents of public records pertaining to Ms Simelane's disappearance. I thereafter studied the testimonies before the Amnesty Committee of the TRC in respect of the abduction and assault of Ms Simelane. I also acquainted myself with the Truth & Reconciliation Commission (TRC) Report and the TRC findings concerning the Security Branch of the South African Police.

7. In the course of my inquiry I met and spoke to people concerning the disappearance of Ms Simelane. I did not take any written or sworn statements.

8. I spoke to the following relatives of Nokuthula Simelane:

- Ernestina Simelane - Mother
- Thembisile Phumelele Nkadimeng – Sister
- Lungelo Simelane - brother who was also a student at the University of Swaziland at the time of the disappearance.
- Richard Vilakazi – Uncle

TP

16/9/2014

- Thembi Vilakazi – Aunt (Ms Simelane was a frequent visitor to her home in Swaziland and saw her shortly before she left and disappeared in Johannesburg)
- Bonginkosi Nkumalo - Cousin - who was also a Swaziland University student and MK courier in Barney Molekwane 's unit and stayed with his Uncle Richard Vilakazi (together with Barney Molekwane and members of the Special Operations MK Unit. Barney was Ms Simelane's cousin).

9. I also met and spoke to the following persons who were in regular contact with Ms Simelane (in Swaziland) prior to her disappearance:

- Wendy Mpama - close personal friend.
- Sipho Twala – MK friend in Swaziland
- Philisiwe Twala – MK member and friend in Swaziland
- Ray Lala – MK member and friend in Swaziland
- Totsi Memela – Personal friend in Swaziland
- Mbali Mnqadi – a close friend (roommate at University) now a Brigadier in the South African Police Service.
- Zweli Sizane – Uncle who served in MK Security and Intelligence (Swaziland) at time of disappearance and enjoyed a close relationship with Ms Simelane.
- R.S Moloi – headed MK Security and Intelligence in Swaziland at time of Ms. Simelane's disappearance. He is currently South Africa's Ambassador to Vietnam. He enjoyed a friendly relationship with Ms Simelane.
- Siphiwe Nyanda – currently the President's personal representative in Parliament. He was a MK Commander in Swaziland. His positions included: Commander Transvaal Urban Machinery (1979 - 1983). Chief of Staff Transvaal Command (Eastern Command) (1983 - 1986). Commander Border Operations, Swaziland (1986). Deputy Head, Political Military underground leadership in South Africa (1988 - 1990). He was acquainted with Ms Simelane and her family members in Swaziland.
- Ricky Mkhondo – A senior MK Intelligence officer in Swaziland at the time of Ms Simelane's disappearance. He was friendly with Ms Simelane and Gilbert Twala.

TP

16/9/2011

- Gilbert Twala – now Director General of the Department of Civil Aviation. He was the Commander of the Transvaal Urban Machinery he was Ms Simelane's MK Commander and was also having a romantic relationship with her.

10. They all maintained that Ms Simelane had not returned to Swaziland after her disappearance in South Africa early in September 1983.

11. I spoke to Duma Nkosi and his mother Nthombi Nkosi who both confirm that Ms Simelane arrived at their home in Soweto and spent one night with them. Ms Simelane left the following morning to go to the Carlton Centre. She left a small travel bag of personal belongings at their home. She did not return and was not seen by them again.

12. I spoke to Norman Mkhonza who said he had last seen Ms Simelane on the day of her capture and had not been instructed by any of his superiors thereafter to be on the alert for her, or informed that she was a wanted person (terrorist).

13. I spoke to Nimrod Veyi and Mohapi Selamolela who confirmed that Ms Simelane had very noticeable injuries to her ankles and wrists (as one would expect) from the prolonged and continued shackling that she had endured over five weeks of captivity and said that in their opinion these injuries (apart from other injuries) would have precluded any attempt to re-infiltrate her back into MK Swaziland. They also both said that they were never informed by their superiors that Ms. Simelane was a wanted person (terrorist) and to be alert for her or to gather information regarding her activities or whereabouts. We also discussed safe houses which were used by their SB during 1983 in Klipspruit and Westonaria.

14. I investigated the death of Barney Molekwane because Willem Coetzee said in his testimony before the Amnesty Committee that while Ms Simelane was held captive at the Northam farm, she had provided him with information that led to action been taken against the Sasol MK sabotage group who were led by Barney

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16/9/2016

Molekwane. According to Piet Retief Inquest No 79/85 which dealt with the death of Barney Molekwane and members of his Special Operations group in the Eastern Transvaal on 28 November 1985. (Two years after Ms Simelane's capture.) The Molekwane group were on their way back to Swaziland when they encountered members of the Security Forces unexpectedly. A shooting ensued and Barney Molekwane and his fellow operatives were killed. The contact was unexpected and spontaneous. It was not a planned Security Force Operation and cannot be linked to Ms Simelane.

15. Coetzee and Pretorius testified that during Ms Simelane's detention she also provided information which enabled the Security Branch to arrest ANC cadres whilst she was still in confinement at the farm at Northam. They referred to the arrest of Curtis Norman Mkhonza aka MK Mpho. I spoke to Curtis Mkhonza and he told me he was arrested during 1984 and that his arrest was not linked to Ms Simelane.

16. Coetzee and Pretorius also claimed in their testimony before the Amnesty Committee that information from Ms Simelane whilst she was held captive on the farm led "directly or indirectly" to the arrest of 18 persons and referred to an undated news article as follows:

> *"Police Strike Hard at ANC. Le Grange states 18 identified members of the banned African National Congress, as well as numerous active supporters have been arrested and detained by the Security Branch in the last three months..."*

17. It became apparent at the hearing that The Star newspaper published this report on 22 June 1984. It therefore seems that these arrests occurred about 9 months after Ms Simelane's disappearance.

TP 16/9/2010

18. I spoke to some of the 18 persons who were arrested (as referred to in The Star news article dated 22 June 1984). The persons I spoke to were:

- Justice Ngidi
- Jabu Ngubese
- Enoch Mthombeni
- Lillian Gabashane
- Amos Masondo
- Duma Nkosi

19. I spoke to them individually and was told that their arrests in 1984 could not have been as a result of information supplied by Ms Simelane. Amos Masondo explained further that the majority of the 18 arrests related to persons who were not taking an active part in the "armed struggle" but were merely providing shelter and safety to MK Operatives who had been ousted from Swaziland in consequence to the Nkomati Accord, signed on 16 March 1984 between South Africa and Swaziland.

20. I spoke to Manuel Antonio Olifant who told me about a farmhouse at Westonaria which the Soweto SB Intelligence Unit used as a safe house prior to 1983. He also said that in 1983 he lived in house 23 Klipspruit and that the other section of the house, number 21, was used by Coetzee's SB unit as a safe house. He said he did not know what had happened to Ms Simelane.

21. I was told by Ray Lala, Ricky Mkhonda and Tim Williams (all of whom were appointed to senior positions within the South African Intelligence and police intelligence structures after their return from exile in about 1990) that they had not come across any official documentation declaring Ms Simelane a wanted person.

TP
16/9/2010

22. I spoke to Dirk Coetzee who told me that it was a SB strategy to always (wherever feasible) to deflect blame to the ANC. He provided several examples of how this strategy was used. In his opinion deflecting blame to the ANC for Ms Simelane's disappearance was a perfect example of this tactic. In addition to what Coetzee told me I noted too that the TRC made a finding concerning this SB strategy.

16/9/2014
F K DUTTON

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at HILLCREST SAPS on this the 16 day of September 2014 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

COMMUNITY SERVICE CENTRE
2014 -09- 16
HILLCREST

TP

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -05- 20
T. MALELE
REGISTRAR/GRIFFIER
SUID-AFRIKAANSE HOË HOF VAN
GAUTENG AFDELING, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG — Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE — Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

THE NATIONAL MINISTER OF POLICE — Fourth Respondent

WILLEM HELM COETZEE — Fifth Respondent

ANTON PRETORIUS — Sixth Respondent

FREDERICK BARNARD MONG — Seventh Respondent

MSEBENZI TIMOTHY RADEBE — Eighth Respondent

WILLEM SCHOON — Ninth Respondent

TP

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

V.P.

TP

IN CAMERA SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions. I have provided a supporting affidavit in these proceedings.

2. I refer to the memorandum mentioned in paragraph 51 of my supporting affidavit titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum is annexed hereto marked **"VPP1".** It was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

3. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to my open supporting affidavit. I have attached it this *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release.

V.P.

TP

3.1. The issues and complaints raised in the memorandum have already been discussed in my affidavit filed before the Ginwala Commission, which has been part of the public record since 2008.

3.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

3.3. It ought to be released as it points to unlawful and unconstitutional conduct.

4. In this memorandum I pointed out that:

4.1. The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

4.2. The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases. This was one of the tasks that the "Task Team" was required to address.

4.3. There were differences in interpretation in relation to the role of the other state departments in relation to the prosecutorial decision-making process.

5. I concluded by stating that:

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I have now reached a point where I honestly believe that there is "improper interference with my work and that I am hindered and/ or obstructed from carrying out my functions on this particular matter.

It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

VUSUMZI PATRICK PIKOLI

I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2011 ~~day of .....~~ the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Andrew Lehlogo Bucky Mohobio
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

COPY 134

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

V.P.

TP

(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

VP TP

2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings* ***and make recommendations to the National Director of Public Prosecutions in this regard****.*

(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

(i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;

(ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

VP
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Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

V.P. TP

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the **normal legal process**;

(ii) in order to reach a well-considered decision, **the NPA should work together with the Intelligence Agencies**, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be **in accordance with standard and normal execution of justice**;

(iv) such agreements should be in accordance with the NPA's **prosecution mandate**; and

(v) such agreements should be in accordance with **existing legislation**.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that **the NPA represents the community and is under an international obligation to prosecute crimes of apartheid.** (See ***The State v Wouter Basson CCT 30/03.)***.[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

V.P.
TP

3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU **"shall be assisted in the execution of its duties"** by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked **"B"** from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C" and "D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken.".
- "In my view a comprehensive report...should be discussed by the Directors-General".

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- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the **"normal legal processes"** and **"prosecuting mandate"** of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

AFFIDAVIT OF THEMBISILE PHUMELELE SIMELANE

I, the undersigned

THEMBISILE PHUMELELE SIMELANE

state under oath as follows:

Introduction

1. I am an adult female, and presently the Minister of Human Settlements in the Republic of South Africa.

2. I am the sister of Nokuthula Aurelia Simelane ("**Nokuthula**") who was abducted, brutally tortured and enforcedly disappeared in 1983 by the Security Branch of the former South African Police.

3. The facts contained in this affidavit are within my personal knowledge, unless the context provides otherwise, and are to the best of my knowledge and belief true and correct.

4. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

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Confirmation of affidavits

5. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

6. I also confirm the contents of my founding affidavit dated 18 May 2015 filed in *Nkadimeng v National Director of Public Prosecutions and Others* (Gauteng Division of the High Court, Pretoria, Case No: 35554/2015) ("**Nkadimeng 2**"), a copy of which was supplied by Webber Wentzel to the Commission on 10 October 2025 in bundle 4 of the Calata Group Volume.

7. My in-camera affidavit filed in *Nkadimeng 2* is attached to this statement marked as **TPS1**. I will rely on the full contents of these affidavits to address the aforesaid paragraphs of the terms of reference.

Background

8. The circumstances surrounding Nokuthula's abduction, torture and disappearance are well documented in the records of the Truth and Reconciliation Commission ("**TRC**") and various court cases:

8.1 TRC Amnesty Decision AC/2001/185;

8.2 TRC Human Rights Violations Hearing No: JB0280 – Leandra, 3 June 1997

TP D

8.3 *Nkadimeng and Others v National Director of Public Prosecutions and Others* (Gauteng Division, Case No: 32709/07) [2008] ZAGPHC 422 ("**Nkadimeng 1**");

8.4 *Nkadimeng v National Director of Public Prosecutions and Others* (Gauteng Division, Case No: 35554/2015) (**Nkadimeng 2**);

8.5 *Coetzee and Others v Minister of Police and Others* (Gauteng Division of the High Court, Pretoria, Case No: 72747/2016);

8.6 *Ex parte: Thembisile Phumelele Nkadimeng* (Gauteng Division of the High Court, Pretoria, Case No: 86381/2018).

9. Although we now know the facts about Nokuthula's abduction and brutal torture, we do not know the circumstances surrounding her death and her remains have not been recovered. She disappeared 42 years ago.

10. In our quest for justice for Nokuthula, our family, legal representatives and private investigators have engaged with numerous officials of the South African Police Service ("**SAPS**") and the National Prosecuting Authority ("**NPA**").

11. In this process, we discovered that Nokuthula's case, like many other TRC cases were not seriously investigated or prosecuted. We did not expect the former South African Police to investigate themselves, however, we firmly believed that the new democratic government would take steps to ensure that the TRC cases would be investigated and prosecuted where sufficient evidence existed. We were wrong.

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12. The failure to investigate and prosecute TRC cases, which I strongly believe could only have been the product of a policy or decision to abandon the cases, represents a deep betrayal of those who gave their lives for the struggle for freedom and democracy.

Interference in my sister's case

13. The interference that affected the investigation and prosecution of Nokuthula's case is set out in detail in the materials described above. It is also set out in detail in the Calata affidavit. I only set out an overview below, which is based on my personal experience to secure justice for Nokuthula.

14. The documents I refer to below are attached to my founding affidavit in *Nkadimeng 2* and my in-camera affidavit. I am advised that my in-camera affidavit will be submitted to the Commission together with this affidavit.

15. Since Nokuthula's disappearance at the hands of the Security Branch during September 1983, my family and I have spared no effort in our search for her or her remains. Our initial enquiries were conducted in South Africa and Swaziland where she studied at the time of her disappearance.

16. On 27 January 1996, the Sowetan newspaper published an article in which an unnamed former Security Branch officer disclosed the facts surrounding Nokuthula's disappearance. It was later revealed that the officer was Mzimkulu Nimrod Veyi. As a consequence of the disclosures by Veyi, a police docket was formally registered during 1996 (Priority Investigation: JV Plein: 1469/02/1996).

17. The initial investigation made promising progress, and the case was transferred to the D'Oliveira Unit towards the end of 1996, where it was handled by Captain

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Andrew Leask. Dr Jan D'Oliveira, former attorney-general of the Transvaal Provincial Division, was leading an investigation into apartheid-era crimes unearthed during the Goldstone Commission of Inquiry.

18. On 3 June 1997, the TRC amnesty hearings into Nokuthula's disappearance commenced. Amnesty applications were made for the crimes of kidnapping and torture, but no one applied for amnesty for Nokuthula's murder. The TRC amnesty hearings concluded on 30 June 2000. On 23 May 2001, the TRC granted amnesty to all the applicants for Nokuthula's abduction. However, WHJ Coetzee, A Pretorius and FB Mong were refused amnesty for her torture while MN Veyi and ML Selamolela were granted amnesty for this crime.

19. The investigation conducted by Captain Leask was apparently well advanced and our expectation was that the investigation would be concluded speedily, and that charges would follow given the vast amount of evidence that was placed before the TRC. However, before the conclusion of the investigation, Captain Leask was instructed by his superiors to stop his investigation and hand over the docket to Captain Mike Holmes, since Nokuthula's case was going to form part of a larger case against former SAP General Johannes Izak 'Krappies' Engelbrecht. As far as I am aware, Captain Holmes did not investigate Nokuthula's case further.

20. In 2003, the work of the TRC Amnesty Committee was concluded and the NPA's Priority Crimes Litigation Unit ("**PCLU**") became operational. The former NDPP, Mr Bulelani Ngcuka, referred the TRC cases to the PCLU. Nokuthula's case was brought to the attention of the PCLU in November 2004 when a submission was

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made by the Foundation for Human Rights (FHR) that the persons who were refused amnesty for crimes committed against Nokuthula should be prosecuted.

21. However, we learned that the TRC cases were placed on hold pending the formulation a new policy to deal with this class of cases. The suspension of investigations into our cases was grossly illegal and unfair. Effectively we were told that our cases, involving murders and other serious crimes, were less important than other murders.

22. The amendments to the NPA's prosecution policy emerged in late 2005 and created a backdoor amnesty for apartheid-era perpetrators. Both the suspension of our cases and the new policy deeply undermined the rule of law as well as our rights to justice, equality and human dignity.

23. Together with the widows of the Cradock Four, I went to court in *Nkadimeng 1* to challenge the amended prosecution policy which was struck down by the High Court in 2008.

23.1 During these review proceedings, the NPA disclosed a secret 2004 government report titled "*Report of the Amnesty Task Team*", which explored ways of promoting impunity for perpetrators of apartheid-era crimes.

23.2 In my view, the report is one of the clearest reflections of the policy or decision of the government not to vigorously pursue TRC cases.

23.3 Seen together with the many years of delay and inaction on our cases, it confirms in my mind that political interference effectively stopped the TRC cases.

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24. When the amended prosecution policy was set aside in 2008, we assumed that the way was now clear for investigations to be pursued into Nokuthula's case and the other TRC cases. We were again wrong.

25. When we met with the NPA, they advised us that their hands were still tied, as they had no investigators for the TRC cases. This was a refrain we had heard before. It signalled loudly and clearly to us that those in charge of the SAPS and the Directorate of Special Operations (known as the Scorpions) had decided not to investigate the TRC cases. Alternatively, and more likely, they had been told at a political level to keep our cases on ice.

26. Behind the scenes, my legal representatives and I called on the Ministry of Police to permit an investigation to proceed in Nokuthula's case. It was only in March 2010 that we learned that an investigation was going to be re-opened, however the original docket was lost or had gone missing, and a duplicate copy had to be created. I was outraged to hear this. At best it reflected the indifference and gross negligence visited on Nokuthula's case and at worse it was a deliberate attempt to suppress the investigation.

27. In June 2011, my family and I, with the support of the FHR, appointed the late international policing and investigation expert, Frank Dutton, to privately investigate Nokuthula's case. We decided to appoint Dutton because of the dire state of the police investigation.

28. I was advised by the former Acting NDPP, Advocate Nomgcobo Jiba who wrote a letter to my attorneys (on 14 August 2013) confirming what Dr S Ramaite had advised previously, that no investigations were conducted on Nokuthula's case between 2001 and March 2010.

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29. However, notwithstanding this dramatic neglect, little or no progress was made in the investigations post March 2010. On 27 October 2010, Adv Chris Macadam of the PCLU submitted a comprehensive list of investigative tasks to the investigating officer. To the best of my knowledge, none of the tasks were properly carried out and some were not carried out at all.

30. By early 2013, I had come to the conclusion that the NPA and DPCI were avoiding the finalisation of Nokuthula's case, alternatively they had no intention of prosecuting anyone. On 29 January 2013 I formally asked for the holding of an inquest. This was the first of several requests for an inquest, all of which fell on deaf ears.

31. Eventually, on 10 July 2014, my attorneys wrote to the NPA and DPCI noting that that there was no real intention on their part to make a prosecutorial decision; and no intention to refer the case to an inquest. The letter accordingly reserved my rights.

32. Out of sheer frustration, in 2015 I brought the application in *Nkadimeng 2* to compel the NPA and SAPS to finalize their investigations, and to compel the NPA to hold a formal inquest into Nokuthula's death or take a prosecutorial decision. In support of my application, former NDPP, Advocate Vusi Pikoli and former PCLU head, Advocate Anton Ackermann SC, filed supporting affidavits confirming that political interference effectively blocked the TRC cases.

33. As a direct result of my application in *Nkadimeng 2*, on 26 February 2016, four former Security Branch officers, Msebenzi Timothy Radebe, Frederick Barnard Mong, Willem Helm Johannes Coetzee, and Anton Pretorius were arrested and

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charged for Nokuthula's murder. Radebe died in 2019, and Mong passed away in 2021.

34. The trial of Coetzee and Pretorius is yet to commence. Initially, the criminal proceedings were delayed because the SAPS refused to pay the legal costs of Coetzee, Pretorius, and Mong. In June 2018, the Pretoria High Court directed the SAPS to pay the reasonable legal costs in the criminal proceedings. Around June 2022, Coetzee alleged he was mentally unfit to stand trial, which claim has still not been resolved. I have my doubts that the surviving accused will ever stand trial.

Conclusion

35. Neither the NPA nor the SAPS have ever taken responsibility for the delays that have besieged the investigation and prosecution of Nokuthula's case over the past decades. A graphical depiction of the delays is attached to this statement, marked as **TPS1**.

36. I do not believe that the delays were caused solely by negligence or sheer incompetence on the part of the NPA and the SAPS. I believe that outside forces imposed their will on both the NPA and SAPS to undermine, block or stop the TRC cases from being taken forward.

37. I humbly request the Commission to investigate the allegations of political interference and establish why my family, and many other survivors and victims of apartheid era crimes were denied justice.

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THEMBISILE PHUMELELE SIMELANE

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at GARSFONTEIN on 04 NOVEMBER 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

7263784
MAJULEKE
CST

COMMISSIONER OF OATHS

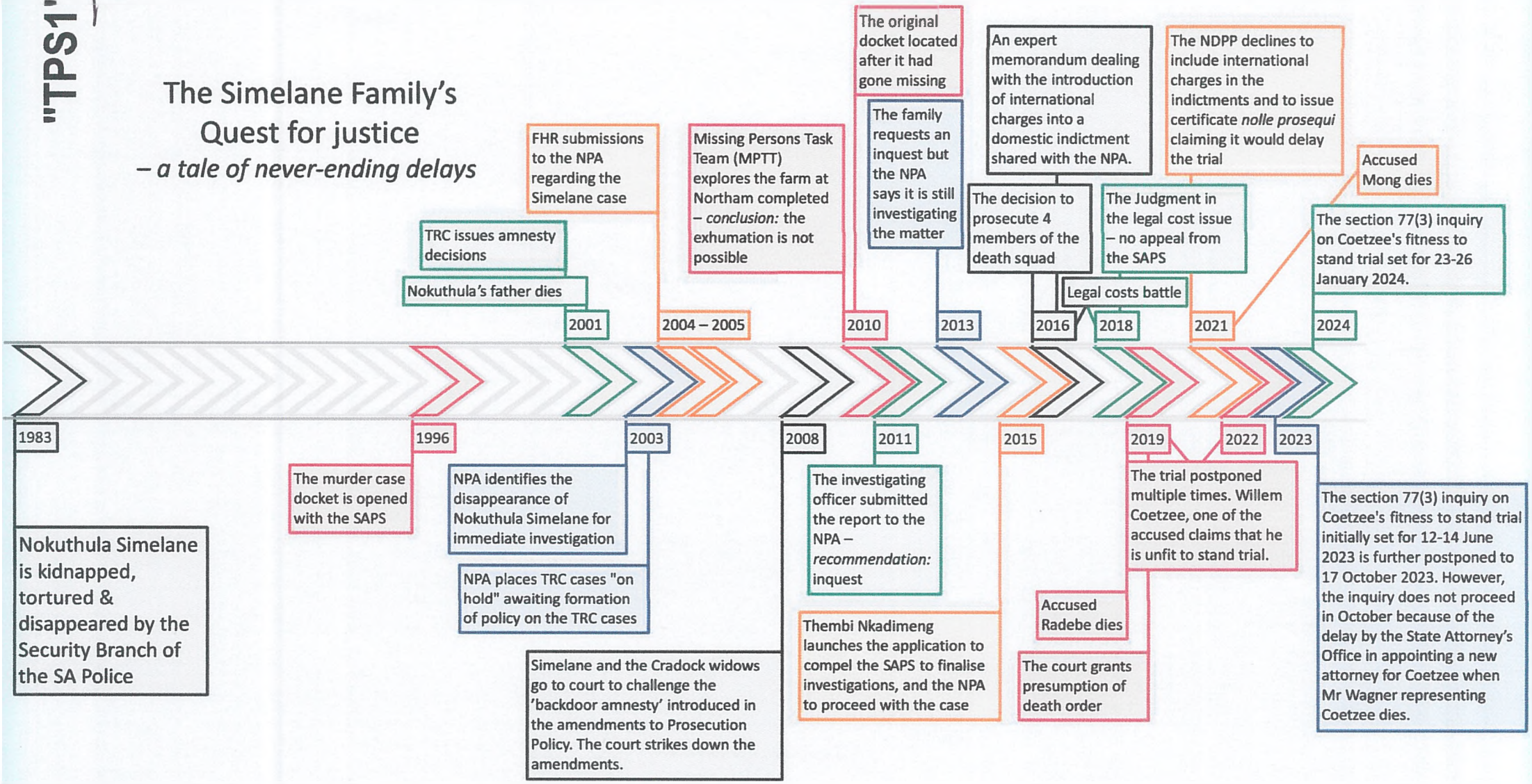
Full names: MAJULEKE DEGREE
Business address: 277 Johnny Claasens
Designation: Constable
Capacity: POLICE Official

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2025 -11- 04
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

"TPS1"

The Simelane Family's Quest for justice

– a tale of never-ending delays



Divider 5

Affidavit of Yasmin Sooka

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

Date: 17/01/2025
Certified a True Copy
of the Original
Nicola Irving
Nicola Grace Irving

LC
ABM
NGI

THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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SUPPORTING AFFIDAVIT – YASMIN LOUISE SOOKA

NGI
AM LC

I, the undersigned,

YASMIN LOUISE SOOKA

do hereby make oath and state as follows:

1. I am an adult female and I reside in Johannesburg. I am a member of the Foundation for Human Rights ("**FHR**") Supervisory Board situated at Metal Box Building, 7th Floor, 25 Owl Street cnr Stanley Avenue, Auckland Park, Johannesburg

2. I am a former Commissioner of the South African Truth and Reconciliation Commission ("**TRC**" or "**the Commission**").

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

My Background

4. I set out below some highlights from my career -

4.1 I served as a Commissioner on the TRC from 1995 to 2001 and chaired the committee responsible for the final report between 2001 and 2003.

4.2 I was subsequently appointed by the United Nations ("**UN**") to serve as a Commissioner on the Truth and Reconciliation Commission of Sierra Leone from 2002 to 2004

4.3 Since 2000, I have been a member of the High-Level Expert Advisory Group for the Global Study on the 15-year implementation of the United Nations Resolution 1325 on Women, Peace and Security (which

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NGI
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acknowledges the disproportionate and unique impact of armed conflict on women and girls).

4.4 I was the Executive Director of the Foundation for Human Rights between 2001 and 2019.

4.5 In 2010, I was appointed by the UN to a three-member Panel of Experts advising the UN Secretary-General on accountability for war crimes committed during the final stages of the civil war in Sri Lanka.

4.6 I am the Executive Director of The International Truth and Justice Project, an independent non-profit organisation based in London working since 2013 to protect and promote justice and accountability in Sri Lanka.

4.7 In 2015, I was appointed by the UN Secretary General to serve as a Member of the Independent Review Panel for the Central African Republic ("**CAR**"), which investigated allegations of sexual abuse by Foreign Military Forces in CAR as well as the UN response to the allegations.

4.8 In 2016, I was appointed by the UN Human Rights Council as the Chairperson of the Commission on Human Rights in South Sudan and have served in that role since then.

Confirmation

5 I have read the notice of motion and a substantially complete version of the founding affidavit of Lukhanyo Bruce Matthews Calata and confirm the contents in so far as they relate to me.

LC

NGJ

6. In particular, I confirm that I oversaw the handover of the cases from the TRC to the National Prosecuting Authority ("**the TRC cases**") in the winding up phase of the Commission.

7. I also confirm that, on behalf of the former TRC Commissioners, I addressed letters to the President in 2019 and 2021 requesting him to appoint a commission of inquiry into the political suppression of the TRC cases.

8. I wholeheartedly endorse the application of Lukhanyo Calata and the other families. They have suffered deep and intolerable injustices to their dignity. The rule of law of has been trashed for the sake of political expediency.

9 What the families have endured should have been unthinkable in a society based on democratic values, social justice and fundamental human rights.

10. The families have had to fight every inch of the way to get their cases before the courts. Over decades they have faced the ongoing intransigence and indolence of the authorities.

11. That the families had to go to such lengths speaks volumes of the indifference of the post-apartheid state and its uncaring and contemptuous approach to their struggles for closure.

12 The families are eminently entitled to an independent and open commission of inquiry to get to the bottom of the suppression of the cases which resulted in the mass denial of justice to those who gave so much for South Africa's liberation.

13. In light of the egregious and unrelenting violation of their rights over decades they are also entitled to constitutional damages to vindicate the defilement of such rights.

LC
ASM
NGT

14. Given the abandonment by South Africa's law enforcement agencies of their responsibilities under law, the families had to rely on their own devices. They had to appoint their own lawyers and investigators or rely on pro bono attorneys and counsel, or those provided by the FHR

15. If constitutional damages are awarded, the families will be able to more coherently pursue those few cases where justice is still feasible. They will also be able to properly commemorate the memories of their loved ones, which were so easily abandoned by the ruling elite.

The former TRC Commissioners

16. I bring to the attention of this Honourable Court that the former TRC Commissioners in two letters to the President in 2019 and 2021 expressed their deep concern at the brazen shutting down of the TRC cases. We called on the President to appoint a commission of inquiry to enquire into the suppression of the cases. Both letters are annexed to the founding affidavit of Lukhanyo Calata

17. The former Commissioners who endorsed the aforesaid letters were.

1. The late Archbishop Emeritus Desmond Mpilo Tutu
2. Ms Yasmin Sooka
3. Adv Dumisa Ntsebeza SC
4. Ms Mary Burton
5. Ms Glenda Wildschut
6. Dr Fazel Randera

LC NM NGT

7. Mr Richard Lyster

8. Revd Bongani Finca

9. Adv Denzil Potgieter

10. Dr Wendy Orr

18. Former Committee Members who endorsed the letters were:

    1. Ms Pumla Gobodo-Madikizela

    2. Dr Russell Ally

    3. Prof Piet Meiring.

19. The letters were also endorsed by the following organisations:

    1. Desmond and Leah Tutu Legacy Foundation

    2. The South African Coalition for Transitional Justice, including:

2.1 Centre for the Study of Violence and Reconciliation

2.2 Khulumani Victims Support Group (Galela Campaign)

2.3 Human Rights Media Centre

2.4 Institute for Justice and Reconciliation

2.5 Foundation for Human Rights

2.6 South African H'story Archives

3. Ahmed Timol Family Trust

4 Legal Resources Centre

ASM LC NGT

5. Imam Haron Family Trust

20. We also called on the President to issue an apology to the families, noting that "no expression of regret, remorse or apology has been offered by anybody in authority for the deep betrayal of victims of past atrocities."

21. Aside from letters of acknowledgment we have heard nothing further from the President. It is time for an honest reckoning with the past.

22. Since the President appears to be still held back by political constraints, he must be compelled to exercise his responsibilities under the Constitution.

23. Given the compromised position of the President and his government, we support the relief sought that the President must be required to request the Chief Justice to recommend a sitting or retired judge to head the aforesaid commission of inquiry.

YASMIN LOUISE SOOKA

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ on this the 19th day of June 2018

COMMISSIONER OF OATHS

Full Names: A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
Pritchard Street
Johannesburg

Business Address:

Designation

NGI 4C

IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

CONFIRMATORY AFFIDAVIT OF YASMIN LOUISE SOOKA

I, the undersigned,

YASMIN LOUISE SOOKA

do hereby make oath and state:

1. I am an adult female and I reside in Johannesburg. I am a member of the Foundation for Human Rights ("**FHR**") Supervisory Board situated at Metal Box Building, 7th Floor, 25 Owl Street cnr Stanley Avenue, Auckland Park, Johannesburg.

2. I am a former Commissioner of the South African Truth and Reconciliation Commission ("**TRC**" or "**the Commission**") and the Sierra Leone TRC. Since 2016, I have served as the Chairperson of the United Nations Commission on Human Rights in South Sudan.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

4. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

5. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 5 of the Calata Group Volume.

Y.L.S

6. I also confirm the contents of my affidavit dated 18 November 2024 which was attached as a supporting affidavit in the abovementioned matter. I will rely on the full contents of this affidavit to address the aforesaid paragraphs of the terms of reference. A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 at bundle 5 at paginated pages 1382 – 1390.

7. My supporting affidavit details the representations my colleague Adv Dumisa Ntsebeza SC and I made to the NPA to prosecute the TRC cases in our capacity as TRC Commissioners. My affidavit further details the role the Foundation for Human Rights played to help families and victims of gross human rights abuses to find justice due to the failure by the NPA and SAPS to investigate and prosecute the TRC cases.

YASMIN LOUISE SOOKA

Signed and sworn to before me at Rondebosch on this the 04 day of NOVEMBER **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

CST GELA M. Gela
.....7213824-6

COMMISSIONER OF OATHS
FULL NAMES: Mkhululi Gela
PHYSICAL ADDRESS: Church Street
DESIGNATION: Constable

SUID-AFRIKAANSE POLISIEDIENS
COMMUNITY SERVICE CENTRE
04 NOV 2025
RONDEBOSCH
SOUTH AFRICAN POLICE SERVICE

Divider 6

Affidavit of Dumisa Buhle Ntsebeza

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

Date: 17/01/2025
Certified a True Copy
of the Original
Nicola Irving
Nicola Grace Irving

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STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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CONFIRMATORY AFFIDAVIT - DUMISA BUHLE NTSEBEZA

I, the undersigned,

DUMISA BUHLE NTSEBEZA

do hereby make oath and state that:

1. I am an adult male former Commissioner of the Truth and Reconciliation Commission ("**TRC**" or "**the Commission**"). I am a Senior Counsel practicing as such as group leader of the Sandton Chapter of the Pan African Bar Association of South Africa (PABASA) Group of Advocates, situated at 1st Floor, PABASA Sandton Chambers, 82 Maude Street, Sandton, Johannesburg

2. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

Professional Career

3. I have practiced law for 40 years. I was admitted as an attorney in 1984, practicing in the Eastern Cape mainly in human rights. I represented many political prisoners throughout the 1980s and early 1990s.

4. Between 1993 and 1996 I taught law at the University of the Transkei (now the Walter Sisulu University).

5. In the mid to late 1990s, I was a TRC Commissioner and was the Head of the Investigation Unit of the TRC.

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6 I was called to the Bar in 2000 and took Silk in 2005. I have been an acting judge in three divisions of the High Court of South Africa, as well as in the Labour Court.

7. In 2004 I was appointed by the Secretary-General of the United Nations as a member of the International Commission of Inquiry on Darfur, which was established pursuant to a UN Security Council Resolution passed under Chapter VII of the United Nations Charter to investigate violations of international humanitarian law and human rights law in Darfur.

8. In 2012 I was appointed by the Socio-Economic Rights Institute as Lead Counsel on behalf of the families of the 37 Marikana miners who were killed by the police.

9. In 2017, the University of Fort Hare Council appointed me as Chancellor of the University of Fort Hare, which was renewed in 2022 for another five years.

10. I am a founder of South African National Association of Democratic Lawyers and served as its President I also served as president of South Africa's Black Lawyers Association. I was a member of the Judicial Service Commission (JSC) and a visiting professor of Political Science and Law at the University of Connecticut in the United States I am a former Chairperson of the Desmond Tutu Peace Trust, and I was a trustee of the Nelson Mandela Foundation.

11. I was appointed as Ombudsman by Cricket South Africa. I also serve as a Council member of the University of Cape Town. Rhodes University conferred on me a Doctor of Law (LLD honoris causa) in 2021.

12. In 2021 I was appointed by the 34th African Union Heads of State and Government Ordinary Summit as a judge of the African Court on Human and Peoples' Rights.

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Confirmation

13. I have read the notice of motion and a substantially complete version of the founding affidavit of Lukhanyo Bruce Matthews Calata and confirm the contents in so far as they relate to me.

14. I have also read the confirmatory affidavit of Yasmin Sooka and confirm the contents in so far as they relate to me.

15. I specifically confirm that:

15.1 Towards the end of the life of the TRC, Commissioner Sooka and I took steps to hand over lists of cases to the National Prosecuting Authority ("**NPA**"). These were serious cases, mostly involving murders and disappearances, in which the perpetrators had not applied for amnesty or had been denied amnesty.

15.2 Together with the former TRC Commissioners, I wrote to the President in 2019 and 2021 calling on him to:

15.2.1 offer an apology to the families of apartheid-era victims for the mass denial of justice visited upon them,

15.2.2 appoint an independent and open commission of inquiry into the political suppression of the TRC cases.

15.3 Apart from acknowledgments of receipts the President ignored our pleas.

15.4 That in January 2023 I was appointed by the NPA to "review the measures that had been adopted to deal with and prosecute TRC matters and to provide recommendations as needed."

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15.5 I submitted my report to the NPA in June 2023 and it was released in February 2024. In this report I found that:

15.5.1 The NPA and the PCLU were swayed from their constitutional and statutory duties in relation to the TRC cases.

15.5.2 My inquiry could not investigate the political interference given the narrow ambit of its terms of reference, and its lack of investigative powers.

15.6 I recommended that:

15.6.1 A commission of inquiry was the only sensible way to get to the bottom of why the TRC cases were neglected and suppressed.

15.6.2 A commission must investigate the extent and rationale behind the political interference and look into the roles of multiple state entities as well implicated individuals.

15.6.3 It must be a public inquiry and be empowered to hold hearings and conduct a proper investigation, including the exercise of powers of subpoena and search and seizure.

Conclusion

16 I have frequently gone on record stating that there has been a shameful lack of political will to deal with the issue of accountability for the apartheid-era victims of gross human rights violations. I fully endorse Archbishop Desmond Tutu's statement made in 2013 that the failure to prosecute those who failed to apply for amnesty undermined those who did.





17. The stories set out in Lukhanyo Calata's founding affidavit, as well as the supporting affidavits, are rooted in South Africa's bitter and divided past. They make for difficult and painful reading.

18. We as South Africans entered into a constitutional compact that we would grant perpetrators an opportunity to speak the truth and earn full immunity from criminal prosecution and civil litigation. We made a solemn promise that those who were not amnestied, or who spurned the process, would face the consequences where their crimes were serious, and evidence was available.

19. Instead of cherishing the memories of those who died for our freedom and acting expeditiously to make good on our past promises, the post-apartheid state engaged in various machinations to ensure that the bulk of the TRC cases would never see the light of day.

20. In so doing they treated the families as second-class citizens, not worthy of equal treatment under law. This must stand as one of the most shameful periods in South Africa's history.

21. Most of the TRC cases cannot be revived. Suspects and witnesses have died. Truth, justice and closure have forever been denied to the families, their communities and the nation.

22. In the few prosecutions and inquests that can proceed, they do so in a severely diminished way, since most persons of interest have passed on, particularly high-ranking offenders.

23. The suppression of the TRC cases stands as terrible stain on South Africa's post-apartheid history. It is in my view, unforgiveable. The families and their

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communities are entitled, under law, and as a moral imperative, to an independent commission of inquiry.

24. They are also entitled to constitutional damages to vindicate their deeply violated rights and to assist them to memorialise their loved ones and reach closure.

25. I accordingly endorse this application, and respectfully urge this honourable court to grant the order in the terms set out in the notice of motion.

DUMISA BUHLE NTSEBEZA

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was sworn to before me and the deponent's signature was placed thereon in my presence at SANDTON on this 8TH day of NOVEMBER 20 24, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with

COMMISSIONER OF OATHS

Full Names: NKOSINATHI ANDREW MAYO

Business Address 82 MAUDE STREET, SANDOWN SANDTON, JOHANNESBURG

Designation: EX-OFFICIO COMMISSIONER OF OATHS (LEGAL PRACTICIONER)

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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

STATEMENT OF DUMISA BUHLE NTSEBEZA

I, the undersigned,

DUMISA BUHLE NTSEBEZA,

do hereby make oath and state:

1. I am a former Commissioner of the Truth and Reconciliation Commission (the "**TRC**"). I am a Senior Counsel practicing as such at the Sandton Chapter of the Pan African Bar Association of South Africa (PABASA) Group of Advocates, situated at 1st Floor, PABASA Sandton Chambers, 82 Maude Street, Sandton, Johannesburg. I am currently a judge on the African Court on Human and Peoples' Rights.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions (the "**Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

4. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me (the "**Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

5. I also confirm the contents of my affidavit dated 8 November 2024 which was attached as a supporting affidavit in the abovementioned matter. I will rely on the full contents of this affidavit to address the aforesaid paragraphs of the terms of reference. A certified copy of this affidavit was supplied by Webber

Wentzel to the Commission on 10 October 2025 at bundle 6 at paginated pages 1391 – 1398.

DUMISA BUHLE NTSEBEZA

Signed and sworn to before me at SANDTON on this the 3rd day of NOVEMBER **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: KACIISO LETSHOLO
PHYSICAL ADDRESS: 34 FRICKER ROAD ILLOVO, SANDTON
DESIGNATION: ATTORNEY OF THE HIGH COURT

Divider 7

Affidavit of Ole Bubenzer

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. _____

In the matter between

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
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SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

Date: 17/01/2025
Certified a True Copy
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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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CONFIRMATORY AFFIDAVIT – OLE BUBENZER

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I, the undersigned,

OLE BUBENZER

do hereby make oath and state that:

1 I am an adult male, employed as Senior Legal Counsel in the European Central Bank, and presently resident in Germany. I am the author of the book Post TRC prosecutions in South Africa Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process ("**Post TRC prosecutions in South Africa**")

2 The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I have read the notice of motion and a substantially complete version of the founding affidavit of Lukhanyo Bruce Matthews Calata and confirm the contents are true and correct insofar as they pertain to me and the content of Post TRC prosecutions in South Africa.

OLE BUBENZER

The Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to or solemnly affirmed before me at _____ on this the ____ day of _____ 20____.

_____

COMMISSIONER OF OATHS

Full Names:

Designation:

Address:

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Sb Ia/24 331 013

I,

Dr. Tim Kasper,
Civil Law Notary with office in Wiehl,

hereby certify that the signature on the document attached above was signed in my presence by

Mr. Ole Frederik Bubenzer, born on 23.07.1979,

residing at 60385 Frankfurt am Main, Heidestrasse 48, Germany,

identified by his identity card

Wiehl, 28th November 2024

Notary
-Dr. Tim Kasper-

DR. TIM KASPER
1
NOTAR IN WIEHL

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Chapter One

Dealing With the Legacy of the Past—Transitional Justice in South Africa

1. *The Apartheid Conflict*

Practically since the first Europeans settled in South Africa in the late 17th century, the native African population was disadvantaged and discriminated against.[1] Control over political instruments, the economy, natural resources and the majority of the land was reserved to whites. After the National Party (hereinafter NP), a predominantly *Afrikaner*[2] nationalist party, won the elections in 1948, the situation was aggravated further as the state of racial segregation and economic exploitation was institutionalised into law.[3] Black and coloured South Africans had

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[1] If not stated otherwise, the general historical information contained in this subchapter derives from R. Davenport and C. Saunders *South Africa* (2000) and *TRC Report*, vol. 1, chap. 2; vol. 3, pages 12–33. See on the discrimination and human rights violations on racial grounds which occurred before 1948: *TRC Report*, vol. 1, pages 25–28.

[2] The *Afrikaner* population descends from an amalgamation of the earliest European settlers, mainly coming from the Netherlands, Germany and France.

[3] Racial segregation and discrimination was based on a range of acts, mainly the Population Registration Act of 1950, which provided for the classification of each South African according to four racial categories and the duty to carry a pass of racial identification; the Group Areas Act, which partitioned the whole country into zones for exclusive inhabitation by one of the racial groups and which provided for the eviction of millions of black and coloured South Africans from their land and property and the forced removal into townships and poor *bantustan* homelands; the Prohibition of Mixed Marriages Act of 1949; and the 1950 Immorality Amendment Act, which prohibited not only inter-racial marriages but all forms of sexual contacts between the

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practically no political or economic rights, yet were simultaneously exploited as cheap labourers, a practice which was vital for the thriving economy. Officially independent states were created on minimal and poor parts of the country which were intended to serve as homelands for the respective African ethnic groups. This racist system of so-called *apartheid*[4] became a guiding principle of South African government politics for the following decades.

Inevitably, resistance grew to white supremacy and apartheid. An opposition organisation, which in 1923 became the African National Congress (hereinafter ANC), formed in 1912. In 1959 the other major opposition movement, the Pan Africanist Congress (hereinafter PAC), was established. The opposition was faced with an intransigent commitment to apartheid and white supremacy. Peaceful political protest was greatly obstructed by the authorities. The opposition movement therefore resorted to militant means of protest. In 1961 the ANC formed its armed wing, *uMkhonto weSizwe*[5] (hereinafter MK) which attacked the security forces and directed acts of sabotage at important state facilities.

The legitimate quest for equal rights was perceived by the government merely as a terrorist onslaught[6] on the integrity of the state and

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ethnic groups. See for a comprehensive account of the legislation: *TRC Report*, vol. 1, chap. 2, paras. 25–40. See on the socio-economic effects of apartheid on the new democracy: K. Naudaschder-Schlag and H.R. Schillinger 'Von der Rassentrennung zur Regenbogennation' in R. Zugehör (ed.) *Kap der besseren Hoffnung?* (1994) 9–62. See for a survey of the gross human rights violations committed during apartheid: M. Coleman (ed.) *A crime against humanity* (1998) and *TRC Report* vols 1–7.

[4] Apartheid in Afrikaans means separate- or apart-ness. The term refers to the official government policy and system of racial segregation, discrimination and white political hegemony, introduced by the NP in 1948 (R.B. Beck *The history of South Africa* (2000) 125). See generally on apartheid R.B. Beck *The history of South Africa* (2000) 125–53; P. Bonner et al. (eds) *Apartheid's genesis—1935–1962* (1993); W Beinart and S. Dubow *Segregation and apartheid in twentieth-century South Africa* (1995).

[5] *UMkhonto weSizwe* means "spear of the nation".

[6] Interview with Jan Wagener in Pretoria (May 8, 2006). The perceptions within security police are illustrated in H.D. Stadler *The other side of the story* (1997).

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was increasingly met by force.[7] The resulting violent conflict reached its climax in the mid-1980s. During 1984 and 1989, 5600 people died as a result of political unrest.[8] Tens of thousands of people were detained during this period for political reasons without trial or court order.[9] Although security legislation had already been hugely extended, the state forces increasingly resorted to means that were criminal under South African law.[10] The South African Police (hereinafter SAP) abducted, tortured and murdered political opponents within and outside of South African borders. Secret death squads were established for this purpose.[11] Thus, the legitimate struggle of the black majority for equality and political as well as economic rights resulted in a violent conflict during which many gross human rights violations were committed on all sides.[12] The apartheid conflict extended to the South African

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[7] The opposition to apartheid was seen as part of a communist 'total onslaught' on South Africa which was to be countered by a 'total strategy' of force (*TRC Report*, vol. 2, chap. 1, paras. 108–11; M. Coleman (ed.) *A crime against humanity* (1998) 7–9).

[8] M. Coleman (ed.) *A crime against humanity* (1998) 42. Security force activities and vigilantism accounted for the majority of deaths. Vigilante groups operated in black communities. They were unofficial, yet directed and supported by the government to violently act against anti-apartheid activists.

[9] *TRC Report*, vol. 3, page 25. Cases of death in detention occurred frequently (M. Coleman (ed.) *A crime against humanity* (1998) 12 and 53–67; *TRC Report*, vol. 2, chap. 3, paras. 166–95).

[10] See for an elaboration on the scope of state crimes in South Africa: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 9–14.

[11] M. Coleman (ed.) *A crime against humanity* (1998) 118. The most notorious of these units was "Vlakplaas", named after a farm close to Pretoria where it was based. It operated from 1979 to the early 1990s (*TRC Report*, vol. 6, s. 3, chap. 1, paras. 157–79; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 23; V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 116–17). Revelations on such hit-squad activities were first made by Almond Nofomela, a former member of Vlakplaas, in 1989. This was followed by revelations of his former commander Dirk Coetzee and others (M. Coleman (ed.) *A crime against humanity* (1998) 119).

[12] G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 293.

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protectorate of South-West Africa, now known as Namibia.[13] Other neighbouring countries also suffered from what the TRC described as a 'reign of terror and destruction'[14] in that South Africa either waged war on unwanted governments, supported rebel movements to overthrow such governments or periodically attacked the ANC abroad.

2. *The Negotiated Transition and the Work of the TRC*

Heightening internal unrest and international pressure brought the last apartheid President F.W. de Klerk, who had come into power in September 1989, to start a process of democratic reform. After Nelson Mandela was released from prison in March 1990,[15] a period of negotiations began between representatives of the ANC and the government.[16] The consultations were aimed at facilitating the transition to a democratic state and establishing a new constitution. After an agreement was reached on the first democratic and human rights oriented constitution,[17] Nelson Mandela was elected President and the ANC won a majority of parliamentary seats in the first democratic elections in April 1994.

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[13] *TRC Report*, vol. 1, chap. 2, para. 53.

[14] Ibid., para. 21.

[15] Mandela had been sentenced to life imprisonment for high treason in 1963.

[16] The negotiations were accompanied by massive outbursts of violence, mainly resulting from clashes between supporters of the Zulu Inkatha Freedom Party and ANC members or sympathisers in Natal. Such conflicts were often instigated and fuelled by the state security forces. About 14,000 people died as a result of prolonged political conflicts all over South Africa during the negotiation period (*TRC Report*, vol. 2, chap. 7, para. 7), which is in total more than during the preceding decades of conflict (*TRC Report*, vol. 5, chap. 6, para. 126).

[17] The Interim Constitution (Act 200 of 1993) entered into force in April 1994 and was in 1997 replaced by the Constitution (Act 108 of 1996).

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This heralded a period of transitional justice,[18] demanding that the legacy of apartheid—human rights violations and crimes—would not be ignored.[19] It was decided that such matters would be dealt with by a truth commission.[20] The Promotion of National Unity and Reconciliation Act[21] (hereinafter TRC Act) established the Truth and Reconciliation Commission.[22] The brief of the TRC was '[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed' between 1 March 1960 and 6 December 1993.[23] Under the terms of the act, a gross human rights violation constitutes any act of killing, abduction, torture or severe ill-treatment of any person or any attempt, conspiracy, incitement, instigation, command or procurement to commit such an act.[24]

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[18] Transitional justice basically circumscribes the way a democratic government takes over power from an oppressive regime and the choices taken in the course thereof with respect to, *inter alia*, the transition of state organs and the dealing with human rights violations committed under the former regime (D.A. Crocker 'Truth commissions, transitional justice, and civil society' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 99 at 99; M. Fenwick 'Dilemmas of transitional justice' (2003) 35 3 *The Seinan Law Review* 1 at 1). See generally on transitional justice N.J. Kritz (ed.) *Transitional justice* vol. I (1995); A.J. McAdams (ed.) *Transitional justice and the rule of law in new democracies* (1997); G. Werle (ed.) *Justice in transition* (2006).

[19] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 142.

[20] The initiative to establish a truth commission was taken by the ANC, various human rights non-governmental organisations and leading personalities of the human rights sector (A. Boraine *A country unmasked* (2000) 11–46; E. Hahn-Godeffroy *Die südafrikanische Truth and Reconciliation Commission* (1998) 56–57).

[21] Act 34 of 1995. The act is available at http://www.doj.gov.za/trc.

[22] The process of establishing the legal framework of the TRC was accompanied by extensive debates in Parliament and the general public, which gave the TRC a high degree of democratic legitimacy (G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 287).

[23] Preamble of the TRC Act.

[24] Section 1 of the TRC Act.

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The Commission's work started when its commissioners were appointed in December 1995.[25] It consisted of three committees: a committee on human rights violations, a committee on reparations and a committee on amnesty—the work of the latter is the most relevant for the goals of this book. The commission's operation terminated in 1998. In October 1998 it issued a five volume final report[26] in which it published the findings it reached from its hearings and investigations on the nature, extent and causes of human rights violations committed during its mandate period. Since the work of the Amnesty Committee was only concluded later, two further volumes were published in March 2003.

The TRC found that the state and its security agencies accounted for the majority of gross human rights violations.[27] It found that during the political struggle between the late 1970s and early 1990s, state bodies increasingly made use of criminal measures in terms of the laws at the time. For example, occurrences such as extra-judicial killings of opposition members took place.[28] The Commission further found that the use of torture was systematic and widespread within the ranks of the SAP.[29] Many cases were recorded by the TRC where opposition members had been abducted, tortured and often killed by the security forces.[30] Such practices were condoned and authorised by leading police and security branch officials.[31] The Inkatha Freedom Party (hereinafter IFP) supported the state in its criminal activities.[32] The TRC found

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[25] See *TRC Report*, vol. 1, chap. 3, paras. 1–6 and chap. 6, para. 4.

[26] See sections 3(1)(d), 4(e), 43(1)(b) and 44 of the TRC Act.

[27] *TRC Report*, vol. 6, s. 5, chap. 2, para. 7.

[28] *TRC Report*, vol. 5, chap. 6, para. 77; *TRC Report*, vol. 6, s. 5, chap. 2, paras. 72–90; *TRC Report*, vol. 2, chap. 3, paras. 221–320, 509. See for testimonies received in amnesty applications and hearings on death squad activities of the various regional security branches *TRC Report*, vol. 6, s. 3, chap. 1, paras. 155–307.

[29] *TRC Report*, vol. 2, chap. 3, para. 220; *TRC Report*, vol. 6, s. 5, chap. 2, para. 16.

[30] *TRC Report*, vol. 6, s. 5, chap. 2, paras. 50–71; *TRC Report*, vol. 2, chap. 3, paras. 278–424. The security branch sometimes also killed its own members when it believed they were unloyal (*TRC Report*, vol. 2, chap. 3, paras. 425–56).

[31] *TRC Report*, vol. 6, s. 5, chap. 2, para. 17.

[32] *TRC Report*, vol. 5, chap. 6, para. 77.

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that the IFP was responsible for numerous killings in attacks on often unarmed ANC members and supporters and other gross human rights violations under the auspices of government policies.[33] With respect to the ANC and MK, the Commission took into account that it was the declared policy of the ANC to avoid the loss of civilian lives, but found nonetheless that civilians were killed and that MK members independently targeted persons outside of the ANC official policy in a manner which resulted in gross human rights violations.[34]

3. *Accountability for Past Human Rights Violations in the South African Context: Conditional Amnesties and Prosecutions*

The concept of amnesty within the TRC process is of paramount importance for the present research. Its parameters will be outlined in the following.

The question of criminal accountability was highly controversial at the negotiations.[35] The former government, the NP and the security forces of the apartheid state lobbied strongly for a general amnesty.[36] Although sympathies for a general amnesty could also be found among leading ANC members, such an approach was mostly seen as untenable.[37] A

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[33] Ibid., para. 121.

[34] Ibid., para. 136; *TRC Report*, vol. 6, s. 5, chap. 3, paras. 28–47. See generally on the liberation movement *TRC Report*, vol. 5, chap. 6, paras. 130–50.; *TRC Report*, vol. 6, s. 5, chaps. 3 and 5.

[35] See for the debates on amnesty: A. Boraine *A country unmasked* (2000) 275–86; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 53; L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 32–35; P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 1–7.

[36] Interview with Jan Wagener in Pretoria (May 8, 2006); L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 34.

[37] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 143.

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general amnesty was felt to be counterproductive to the establishment of a human rights culture and unconducive to the consolidation of the new democratic order, which demanded recognition of and reconciliation with the legacy of the past.[38] Many ANC members demanded strict prosecution of those responsible for apartheid crimes and Nuremberg-style trials of the leaders.

However, a concession had to be made in this regard in order to secure the support of the security forces during the negotiation period and to facilitate a peaceful transition to democracy with the support of the former elites.[39] It was agreed that amnesty should be granted in some form for gross human rights violations committed during the conflicts of the past.[40] The post amble of the Interim Constitution, headed National Unity and Reconciliation, eventually incorporated the following statement concerning amnesty:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[41]

As no specific agreement could be reached, the determination of the precise form of the amnesty had to be left open for later implemen-

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[38] Ibid., 142; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 52.

[39] G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 275. It is commonly accepted that a compromise on amnesty was the price which invariably had to be paid in order to avoid civil war and in order to make a negotiated settlement possible at all. (Mbeki as cited in A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 143; A.M. Omar 'Foreword by A.M. Omar' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) vii at x).

[40] G. Werle 'Without truth no reconciliation' (1996) 29 *Verfassung und Recht in Übersee—Law and politics in Africa, Asia and Latin America* 58 at 64–65.

[41] Post amble of the Interim Constitution of South Africa, Act 200 of 1993.

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tation. The amnesty model eventually incorporated in the TRC Act empowered the Amnesty Committee to grant amnesty only on certain conditions and restrictions.[42] First of all, violators had to apply for amnesty.[43] According to section 20(1)(b) of the TRC Act, amnesty could only be granted for an act, omission or offence which was associated with a political objective and was committed in the course of the conflicts of the past during the period of 1 March 1960 to 10 May 1994.[44] Applications for amnesty could only be submitted until 30 September 1997.[45] An additional decisive precondition in section 20(1)(c) of the TRC Act for attaining amnesty stated that the applicant had to make a full disclosure of all relevant facts concerning the crime to which the application related.[46] Thus, if any of the preconditions, most notably the full disclosure or political objective requirements, were not satisfied, amnesty would be denied. This legal mandate applied to all crimes, regardless of whether they were committed by the liberation movements or the state security forces.[47]

Despite the extensive public and parliamentary debates which preceded the enactment of the amnesty legislation, the amnesty scheme was not based on popular and political consensus. Many victims strongly contested the basic notion of amnesty and demanded retributive justice, prosecutions and trials.[48] The former apartheid government and security force representatives, however, perceived the TRC to be a one-sided

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[42] Sections 16–22 of the TRC Act.

[43] Section 18 of the TRC Act.

[44] The time frame for amnesty had later been extended. The political objective criteria is more concretely outlined in sections 20(2) and 20(3) of the TRC Act. See further on these so-called 'Noorgaard Criteria' and the political offence criteria J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 37–8, 63 and 278–335; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 221–61.

[45] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 144.

[46] See on this criteria: J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 249–78; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 261–70.

[47] A. Boraine *A country unmasked* (2000) 69.

[48] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 149.

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exercise of victor's justice and a raw deal for their side.[49] They had expected what they had advocated for all along, a general amnesty.[50] As will become apparent below, such positions still strongly influence the political discussions on post-TRC prosecutions.

However, the TRC was and continues to be held in high regard internationally. This is because with conditional amnesty and especially the onus to make a full disclosure it introduced a unique and unprecedented way of dealing with past atrocities in a transitional society.[51] The model was heralded as an innovative moral and legal achievement.[52] While many other countries adopted a course of blanket amnesty and forgetting of the past,[53] South Africa put in place a scheme by which it could uphold accountability, avoid total impunity[54] and unearth the truth regarding past human rights violations.

Amnesty was not designed to replace prosecutions entirely. It was only to be granted in exchange for a process of public truth telling. Criminal and amnesty proceedings, thus, ran parallel to each other. In the wake of the TRC, it clearly follows as a logical consequence from this concept as well as from the legal setup of the amnesty provisions that those perpetrators who were not granted amnesty for their politically motivated crimes must be prosecuted.[55] After the work of the Amnesty

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[49] Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006); F.W. de Klerk as cited in A. Boraine *A country unmasked* (2000) 275 at footnote 10.

[50] Ibid.

[51] A. Boraine *A country unmasked* (2000) 269; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 3; G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 287. See for other truth commissions: P.B. Hayner 'Fifteen truth commissions' in N.J. Kritz (ed.) *Transitional justice* vol. I (1995) 262–89.

[52] E. Kiss 'Moral ambition within and beyond political constraints' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 68 at 76.

[53] A. Boraine *A country unmasked* (2000) 269. See also K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 23–159.

[54] A. Boraine *A country unmasked* (2000) 283.

[55] M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 17.

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Committee was concluded in May 2001,[56] the TRC accordingly recommended in its final report that:

> Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions. Attorneys-general must pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care. In order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted.[57]

Equally President Mandela on the occasion of the tabling of the TRC Report in Parliament in February 1999 stated that '[a]ccountability does need to be established and where evidence exists of a serious crime, prosecution should be instituted within a fixed time frame.'[58]

Against the background of this concept the importance of post-TRC prosecutions for the whole process of dealing with past human rights abuses in South Africa becomes obvious. Since the concept of amnesty in South Africa was premised on the fact that those who were not granted impunity would be prosecuted, the issue of post-TRC prosecutions strongly affects the credibility and legitimacy of the entire process.[59] The amnesty process would be rendered paradoxical and might 'unravel into a farce', as Fernandez puts it strongly, if no prosecutions

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[56] Due to the workload and ongoing amnesty hearings the Amnesty Committee's operation had to continue (*TRC Report*, vol. 6, s. 1, para. 3).

[57] *TRC Report*, vol. 5, chap. 8, para. 14.

[58] Opening address by President Nelson Mandela in the special debate on the report of the Truth and Reconciliation Commission (National Houses of Parliament) (Feb. 25, 1999).

[59] G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 297; G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 282.

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take place in the aftermath of the TRC.[60] An evaluation of the success or failure and the overall justice of the TRC process must therefore inevitably take into account whether and how post-TRC prosecutions take place.[61] It is the purpose of this book to provide the basis for such an evaluation by examining the scope of post-TRC prosecutions in the following chapters.

7115 applications were registered by the TRC.[62] Of this total, 5143 applications were refused administratively, without a public hearing, mostly since no political objective was found to exist in the events referenced.[63] 1973 applications were dealt with in public hearings in terms of section 19(3)(a) and (b) of the TRC Act, meaning that the applications conveyed a prima facie politically related offence and a gross human rights violation in terms of the TRC mandate.[64] This number of applications relates to 1701 individual applicants. 1100 amnesty decisions were published in respect thereof.[65] 857 applicants of those were aligned to the ANC, 85 to the IFP, 116 to the PAC or the

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[60] L. Fernadez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 79; M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 36.

[61] R.C. Slye 'Comment on the papers by Lovell Fernandez, Jeremy Sarkin and Volker Nerlich' in G. Werle (ed.) *Justice in transition* (2006) 83 at 84; G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte *Wirkungsforschung zum Recht* vol. III (2001) 291 at 301.

[62] *TRC Report*, vol. 6, s. 1, chap. 3, para. 4. See for an empirical study of the amnesty decisions: A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785–828.

[63] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 47. About 65 per cent of the applications were received from persons who were already convicted and served jail terms (*TRC Report*, vol. 6, s. 1, chap. 2, para. 74).

[64] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 48.

[65] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 795. Pedain points out that all applications concerning *prima facie* political conduct were published on the Commission's website (http://www.doj.gov.za/trc).

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Azanian Peoples Liberation Army (hereinafter APLA) and 289 to the security forces.[66] Very few applications were received from the South African Defence Force (hereinafter SADF).[67] 1499 of those applicants submitted applications which concerned offences falling in the ambit of the committee's jurisdiction in terms of section 20(1) of the TRC Act.[68] Of the remainder, 105 applicants were high-ranking ANC members, whose applications generally related to political activities, but were refused since they did not specify a specific violation or circumstance to be considered.[69] Of the applications that were dealt with in public hearings, 1164 were granted, 806 were denied.[70]

The figures give an indicator of how many cases, potentially worthy of prosecution, might arise from the TRC amnesty proceedings. Considering the scale of human rights violations in the period of South Africa's history, which is relevant for the TRC's inquiries, the number of amnesty applications must be considered rather low.[71] Thus there are potentially hundreds of cases for which amnesty was not applied that could be relevant to future criminal prosecutions. The amnesty proceedings suffered especially from a lack of applications by figures from the upper ranks of politics and commanders of the security forces of the apartheid state.[72] The vast majority of amnesty applicants, especially from the state security forces, were ordinary rank and file officers.

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[66] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 804. Pedain points out that the numbers are by no means representative for the number of human rights violations committed by each respective group.

[67] *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

[68] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 804–5.

[69] Ibid., 805.

[70] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 48.

[71] Ibid., 46.

[72] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 806–7.

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There was basically no participation by the military.[73] Significantly, the amnesty process also lacked the participation of IFP members, despite the fact that IFP members were the second most active group of perpetrators with respect to gross human rights violations.[74] In 1998, however, the TRC handed over to the prosecution authorities a list containing approximately 300 references to names and cases, resulting from the various TRC hearings, which the Commission considered worthy for further criminal investigation.[75]

4. *Criminal Trials During the 1990s*

As has been pointed out above, criminal proceedings took place before and during the operation of the Amnesty Committee.[76] However, very few trials took place regarding the former security forces and only two convictions of former security police members were recorded during the 1990s.[77] After the confessions surrounding the death squad unit Vlakplaas,[78] initial investigations were launched into the apartheid state's secret hit squad activities.[79] Subsequently, a special prosecution team headed by Transvaal Attorney-General Dr. Jan D'Oliveira was established to conduct the investigation and prosecution of hit-squad

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[73] M. Fullard and N. Rousseau 'Truth, evidence and history' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 195 at 199.

[74] Ibid., 200.

[75] E. Kiss 'Moral ambition within and beyond political constraints' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 68 at 78.

[76] See on the tense relationship of the Amnesty Committee, its investigation unit and the prosecutors: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 240–41; *TRC Report*, vol. 1, chap. 11, para. 93.

[77] See for the only comprehensive study on the prosecution of apartheid crimes during the 1990s: V. Nerlich *Apartheidkriminalität vor Gericht* (2002).

[78] See *supra* Chapter 1 note 11.

[79] The Harms- and later the Goldstone-Commissions were charged with conducting such investigations (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 116–22; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 77–84.

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activities.[80] The team consisted of prosecutors and investigators, and could therefore, contrary to the normal process, conduct its own investigations. This was vital in order to maintain a high degree of independence and efficiency.[81]

The first trial involved Eugene de Kock, former commander of Vlakplaas from 1985 to 1993.[82] De Kock was charged in February 1995 on 121 counts, 12 of which related to murder.[83] De Kock had been a central figure in a wide range of secret security force operations. He was, however, charged mainly for crimes which did not have a primarily political background.[84] De Kock was found guilty on 89 charges in August 1996 and was sentenced to two terms of life and 212 years of imprisonment.[85] After his conviction de Kock cooperated intensively with the prosecution authorities and testified on secret hit squad activities and concomitant command structures.[86]

In another case, the investigations of the D'Oliveira Unit led to charges against the former Eastern Cape security policemen Gideon Nieuwoudt, Gerhard Lotz, Wybrand du Toit, Jacobus Kok and Marthinus Ras in August 1996. They were charged with the murder of three black members of the police service and an *askari*[87] in December 1989.[88]

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[80] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 122–24.

[81] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

[82] *TRC Report*, vol. 2, chap. 3, appendix, para. 19 at page 317.

[83] See on the de Kock trial: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 124–34.

[84] This in part was due to the fact that such crimes were less difficult to prove but also since it was still unclear at the time how politically motivated crimes would be dealt with on a political level (ibid., 223–43).

[85] *TRC Report*, vol. 6, s. 3, chap. 1, para. 16. See for an analysis of the verdict: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 129–34.

[86] De Kock's testimonies also contributed chiefly to the amnesty process in that they urged perpetrators to apply for amnesty. According to the TRC de Kock accounted for about 48 per cent of all applications from security branch personnel (*TRC Report*, vol. 6, s. 3, chap. 1, para. 16).

[87] *Askari* is a term used for black members of the security police, who were liberation movement activists 'turned' to security policemen.

[88] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 134–37.

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The case became known as "Motherwell-Four".[89] Nieuwoudt, du Toit and Ras were sentenced in June 1996 to 20, 15 and 10 years imprisonment respectively. The three later applied for amnesty and never had to serve their respective prison sentences.

In a trial closely connected to the de Kock prosecution, the security policemen Peter McIntyre, Andries Venter, Jaques Else and their superior Philip de Beer were charged in November 1996 with the murder of Sweet Sambo, who died in police custody in 1991.[90] As McIntyre, Venter and Else had already been charged and acquitted on assault charges in connection with Sambo's death in 1994, they successfully pleaded *autrefoi acqui*[91] and were accordingly acquitted.[92]

In April 1997, former Vlakplaas commander Dirk Coetzee and four other policemen were charged with the murder of lawyer and political activist Griffiths Mxenge in Durban in 1981.[93] Coetzee and two others were found guilty in May 1997 but shortly thereafter all received amnesty by the TRC.[94]

The investigations of the D'Oliveira team also concerned other security branches and the military. In October 1996 General Jack Cronjé and Jaques Hechter of the Northern Transvaal security branch were charged on 33 counts, including 27 counts of murder and four of attempted murder between 1986 and 1987.[95] Cronjé and Hechter immediately tendered amnesty applications, including the crimes in

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[89] *TRC Report*, vol. 6, s. 1, chap. 4, paras. 111–19; *TRC Report*, vol. 3, chap. 2, para. 301.

[90] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 144.

[91] See for the double jeopardy pleas: *infra* Chapter 2(2.4).

[92] De Beer's indictment hinged on the other charges and could thus not be pursued (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 145).

[93] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 146–53. The revelations of Nofomela and Coetzee in 1989 (see *supra* Chapter 1 note 11) related to the Mxenge murder. The prosecution was not conducted by the D'Oliveira team but by KwaZulu-Natal Attorney-General Tim McNally.

[94] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 149. Decision no AC/97/0041. Transcripts of decisions of the Amnesty Committee are available at http://www.doj.gov.za/trc/amntrans/index.htm.

[95] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 153–54.

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question, which were eventually successful.[96] The trial was therefore not concluded.[97]

Ferdinand Barnard, a member of the special unit Civil Cooperation Bureau,[98] which was attached to the SADF, was charged in September 1997 with the murder of human rights activist David Webster in May 1989, the attempted murder of the later ANC Minister of Justice, Dullah Omar, and a number of other political and non-political deeds.[99] Barnard was convicted in 1998 on 25 counts, including the murder and attempted murder counts. He was sentenced effectively to life imprisonment.[100]

The trial with the highest political impact started in Durban in December 1995. It resulted from investigations of the independent Investigative Task Board and Investigative Task Unit into the political violence between IFP and ANC supporters in KwaZulu-Natal before and during the negotiation period.[101] The last apartheid Minister of Defence, Magnus Malan, and 29 others, among them former high-ranking SADF generals such as former SADF chief Jan Geldenhuys and Jacobus "Kat" Liebenberg, were charged with their alleged involvement in the murder of 13 ANC supporters in Natal in 1987, the KwaMakutha massacre, and for conspiracy to murder various ANC and United Democratic Front (hereinafter UDF)[102] activists during the late 1980s. During the so-called "Operation Marion", which took place in the Namibian Caprivi Strip in 1986, the SADF instructed and trained about 200 Inkatha supporters in paramilitary combat techniques to fight the ANC.[103] The charges alleged that the murders were committed by the Caprivi recruits with

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[96] Decisions no. AC/99/0031 and AC/99/0030.

[97] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 154.

[98] CCB. The CCB's initial task was to attack opposition members abroad but it later also operated in South Africa.

[99] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 158–67.

[100] Ibid., 167.

[101] Ibid., 184–211.

[102] The UDF was an association of various anti-apartheid organisations, founded in 1983 (R. Davenport and C. Saunders *South Africa* (2000) 495).

[103] *TRC Report*, vol. 2, chap. 5, paras. 236–56.

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the support of the SADF generals.[104] The trial ended in an acquittal of the accused due to various circumstances.[105]

On the whole, therefore, the trials contributed very little to the examination of the criminal apartheid past in terms of revealing new information on past conflict related atrocities and crimes.[106] This can be attributed to the fact that, on the one hand, political issues were not sufficiently investigated in most trials or simply ignored, and on the other, only a few trials took place with only two convictions.[107] Nevertheless, the prosecutions, which took place parallel to the amnesty process, contributed significantly to the work of the TRC as they had a major effect on the number of amnesty applications. The threat of prosecution was the decisive incentive for the vast majority of perpetrators from the security police to apply for amnesty. Many only applied for amnesty when they became aware of an imminent threat of being charged or when they were implicated in a criminal trial concerning former colleagues.[108] Without concomitant criminal trials, the number of amnesty applications for apartheid-state sponsored crimes would, thus, have been significantly lower.

[104] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 191–95.

[105] Ibid., 205. See for an analysis of the judgment: H. Varney and J. Sarkin 'Failing to pierce the hit-squad veil: an analysis of the Malan-trial' (1997) 10 *South African Journal of Criminal Justice* 141–61.

[106] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 328.

[107] Ibid.

[108] For a statistical analysis of this point see V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 30 and 294–319.

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Chapter Two

Prosecution of Political Crimes After the TRC

This chapter documents the prosecutions arising out of and/or connected with the TRC that have been initiated since the conclusion of its work. The chapter will also describe the various special units within the prosecutorial service, which were established for this purpose. The analysis will embrace all proceedings concerning crimes that were committed during the time period relevant for the Amnesty Committee's mandate from 1960 to 1994 and which potentially also fall within its legal mandate. Such crimes were, thus, at least politically motivated and connected with the apartheid conflict. The discussion therefore focuses on two types of crimes: those for which amnesty has been applied but was refused or those for which amnesty was not applied at all. Although the issue of post-TRC prosecutions in fact became more salient after the Amnesty Committee finished its work in 2001, the focus will be on all trials that were instituted after the deadline for amnesty applications had lapsed in 1997.

The first four documented cases concern proceedings that were conducted and initiated by the regional prosecution authorities independent of any central or special units in Pretoria. The following four cases, starting with the Terre'Blanche case, contain descriptions of prosecutions that were instituted and conducted by the special Priority Crimes Litigation Unit. Both sets of cases will be presented in chronological order.

1. *Special Units for Post-TRC Prosecutions*

In 1998 the work of the team headed by Jan D'Oliveira came to an end. In the course of that year the prosecution authorities were completely restructured. A new centralised National Prosecution

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Authority (hereinafter NPA), headed by a National Director of Public Prosecutions (hereinafter NDPP), was established in Pretoria.[1] The first NDPP was Bulelani Ngcuka who was succeeded in early 2005 by Vusi Pikoli.[2] D'Oliveira became one of the deputy NDPP and was no longer involved with prosecutions related to the apartheid conflict.[3] In September 1999 most of the members of his unit were integrated into the newly established Directorate of Special Operations (hereinafter DSO),[4] the so-called "Scorpions", which was in urgent need of skilled investigators and prosecutors.[5] However, the question remained, what should happen with the TRC-related cases with which the D'Oliveira Unit had been dealing.

1.1 *The Human Rights Investigative Unit*

In early 1999 a working group called the Human Rights Investigative Unit was established within the NPA on the initiative of then Minister of Justice Dullah Omar. The unit's mandate was to review, investigate and possibly prosecute all cases falling within the ambit of the TRC Act for which amnesty had been refused or was not applied,[6] thus, to continue the work of Jan D'Oliveira.

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[1] See for a comprehensive study of the NPA: M. Schönteich *Lawyers for the people* (2001).

[2] Ngcuka resigned as a result of political conflicts over the prosecution of former Deputy President Jacob Zuma. Pikoli was suspended in September 2007 for political reasons and replaced by Mokotedi Mpshe.

[3] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

[4] The DSO was an Investigating Directorate according to section 7 of the National Prosecuting Authority Act 32 of 1998 (hereinafter NPA Act) (for the capacities of the DSO see Chapter 5 of the NPA Act). It was the only prosecutorial entity capable of conducting its own investigations. According to section 7(1A) of the NPA Act the President may appoint two further Investigating Directorates, which as yet has not happened. Meanwhile the DSO has been disbanded on the initiative of the ANC. Most likely this happened for political reasons, since the DSO successfully targeted a number of high profile ANC leaders for corruption. See *End of the road for Scorpions* SAPA, Oct 10, 2008.

[5] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 214.

[6] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

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The unit was headed by Vincent Saldanha; and his deputy was former Witwatersrand prosecutor Brink Ferreira.[7] According to Saldanha, four lawyers worked basically on a full or part time basis for the unit.[8] He sensed intense political support for his work, especially from the Department of Justice, led by Dullah Omar. Distinctions were not to be made between perpetrators of the political groups.[9] The composition of the unit further reflected, according to Saldanha, an approach that was extremely human rights- and victims-orientated. He himself comes from the human rights sector and was involved in a number of TRC hearings as an attorney for victims.[10] Some of the other members of the unit had prior work experience with the TRC or with human rights non-governmental organisations (hereinafter NGO).[11] The drafting of personnel from outside the ordinary prosecution structures also guaranteed for a high degree of independence.[12]

In November 1999 all dockets concerning criminal cases were moved from the D'Oliveira Unit to the Human Rights Investigative Unit.[13] Furthermore, some prosecution dockets from the regional NPA offices concerning TRC-related cases as well as all relevant dockets from the TRC were gathered at the latter unit. Although the dockets often concerned ongoing investigations, which in some cases had reached a very advanced stage, there was strangely no consultation or cooperation between D'Oliveira and the Saldanha team.[14]

It was intended that Saldanha would head the unit for a short period. After the conclusion of his secondment from his primary place of work, the Legal Resources Centre in Cape Town, he left the unit, having

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[7] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[8] According to Nerlich it was initially intended to assign three deputy directors and five senior state advocates to the unit (ibid.).

[9] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[10] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[11] Ibid.

[12] Interview with Vincent Saldanha in Cape Town (April 26, 2006). However, the unit had to appoint police to conduct investigations and had to appoint NPA prosecutors once a case was ready for indictment.

[13] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[14] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

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served for only one year. Until then all investigations were still ongoing and no charges had been laid.[15] Among the cases under scrutiny some were very high profile, such as the case of the torture and killing of Steve Biko.[16] Moreover, a number of persons from the upper echelons of the former security apparatus were among those under the scrutiny of the unit.[17] The rationale behind the fact that nobody was charged lay, according to Saldanha, with the complexities of such high profile cases, which required meticulous preparation and the fact that a great number of cases were still handled by the Amnesty Committee. Once Saldanha's tenure lapsed, the unit's work only continued for a brief time. The setup of the unit was probably not ideal. Saldanha worked only on a part-time basis for the unit and lacked experience as a prosecutor.

However, thereafter the responsibility for TRC cases was again allocated to a working group within the DSO, the so-called Special National Projects Unit headed by Advocate Chris Macadam.[18] It is doubtful whether any significant and/or ongoing work was done on the issues during that time as it was probably only Macadam who worked on post-TRC prosecutions on a part time basis.[19] Again, no court proceedings were instituted. TRC cases apparently did not enjoy high priority at that time. Macadam asserts that, again, it was the ongoing amnesty proceedings that acted as the main barrier to progressing with prosecutions.[20]

Whereas the D'Oliveira Unit had been well-staffed and well-equipped, the resources allocated to post-TRC prosecutions after 1998 were absolutely minimal, which naturally contributed to their slow progress.[21]

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[15] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[16] See text accompanying *infra* Chapter 4 note 166.

[17] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[18] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Macadam had previously also worked for the TRC as head of the Commission's witness protection programme.

[19] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[20] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[21] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

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The NPA did not want to commit resources to cases which might eventually collapse due to amnesty applications being granted to those under investigation.[22] Yet it seems probable that there were also a significant number of potential cases for which amnesty had not been applied or that the D'Oliveira team had already prepared, such as the investigations against General Krappies Engelbrecht, the former commander of Eugene de Kock.[23] By 1999 the D'Oliveira Unit had allegedly already prepared about 20 charge sheets.[24]

According to Macadam, the NPA wanted to await the presentation of the last volumes of the TRC Report. This could not, however, have constituted an obstacle in a legal sense, especially considering the clear recommendations the TRC had already made with regards to criminal accountability in 1998. However, the NPA tried to avoid interfering with the President's response to the TRC Report with respect to policy approaches to tackle TRC-related crimes, including the possible pardoning of certain perpetrators.[25] This and the lack of resources could explain why, although the Amnesty Committee's work ended in May 2001, still by 2003, when the last TRC Report volumes were published, criminal proceedings had yet to be instituted. Moreover, the structures put in place for post-TRC prosecutions were not ideal, as was especially the case when matters were placed with the DSO,[26] which was primarily an elite unit for the investigation and prosecution of serious economic crimes, corruption, organised crime and terrorism.[27]

In conclusion it must be stated that the work on post-TRC prosecutions within the central NPA office between 1998 and 2003 was insignificant.

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[22] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[23] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 154–55.

[24] Ibid., 154.

[25] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[26] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[27] M. Schönteich *Lawyers for the people* (2001) 64.

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1.2 *The Priority Crimes Litigation Unit*

The pace of developments did indeed pick up, however, after the last two volumes of the TRC Report[28] had been tabled in Parliament on 15 April 2003. President Mbeki stated in a speech before Parliament on this occasion that it was in the hands of the NDPP to pursue any cases arising from the TRC that he considered prosecutable as is normal practice in criminal justice.[29] This apparently provided the clarification the NPA had awaited to proceed on TRC cases.

One month prior to this statement the responsibility for TRC prosecutions had been transferred again. On 24 March 2003, three days after the final Report volumes had been presented to the President, Advocate Anton Ackermann was appointed Special Director of Public Prosecution[30] and head of the newly founded Priority Crimes Litigation Unit (hereinafter PCLU).[31] According to the respective presidential proclamation, the PCLU is responsible for managing and directing the investigation and prosecution of crimes dealt with in the Implementation of the Rome Statute of the International Criminal Court Act no 27 of 2002, serious national and international crimes, including acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the NDPP.[32] No mention is made of post-TRC prosecutions. However, at the inception of the PCLU the NDPP declared all crimes relating to the TRC for which

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[28] *TRC Report*, vols 6 and 7. See also section 44 of the TRC Act.

[29] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[30] According to section 13(1)(c) of the NPA Act the President may appoint Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain special functions.

[31] Proclamation by the President of the Republic of South Africa of 24 March 2003 (No. 46 of 2003).

[32] Ibid. The PCLU is also responsible for prosecutions relating to the non-proliferation of weapons of mass destruction (nuclear, chemical and biological) and regulations of conventional military arms (National Prosecuting Authority, *Annual report 2005/2006*).

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amnesty had not been granted as priority crimes in the context of the proclamation, which made the PCLU the agency responsible for dealing with such crimes.[33] In fact, TRC matters initially made up the main proportion of the unit's work.

In mid-2006 the PCLU effectively consisted of six prosecutors: its head Anton Ackermann, his deputy Torie Pretorius, Chris Macadam, who was previously responsible for TRC matters in the DSO, Shawn Abrahams, Susan Bukau and the then newly appointed Mtunzi Mhaga, who had previously been involved in two TRC-related trials in the Eastern Cape.[34] The composition of the unit shows a high degree of continuity. Ackermann and Pretorius had worked under D'Oliveira. Prior to that Pretorius had worked for the Goldstone commission.[35] As already stated, Macadam had been involved with TRC cases before 2003 and had gathered experience by working for the TRC.

When Ackermann took over matters, he instituted an audit of all available cases. The result was that some 459 cases[36] could be registered from the material, contained in dockets concerning the cases handed over from the TRC or the D'Oliveira Unit. About 160 cases were immediately deemed not to warrant further proceedings. Only about 16 cases were identified as worthy of pursuing prosecution.[37] At least three were prepared almost immediately for indictment.[38] It would, however, be totally unrealistic to expect all of the hundreds of cases, especially those submitted by the TRC, to warrant criminal proceedings.[39] The list handed over by the TRC does not significantly contribute to the work of the PCLU in general, as most cases had already been known to the D'Oliveira Unit.[40] By the end of 2006 the PCLU was

[33] E-mail from Anton Ackermann (Oct 18, 2005).
[34] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).
[35] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123.
[36] National Prosecution Authority, *Annual report 2002/2003.*
[37] Interview with Anton Ackermann in Pretoria (May 11, 2006).
[38] Ibid.
[39] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).
[40] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

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working on 16 cases in total, five of which were considered to be of high priority and had been prepared to an advanced stage.[41]

As far as the general approach to post-TRC cases is concerned, the PCLU focuses first on cases in which amnesty has been denied, since it is generally easier to identify a case worthy for prosecution. The PCLU's secondary focus is cases where amnesty was not applied at all.[42] Cases that involve the use of egregious violence and which resulted in the death of more than one person are naturally of higher priority than those which, for instance, were only directed at non-human entities, such as sabotage attacks of the liberation movement.[43] However, according to its senior members, the PCLU attempts to ignore as much as possible political implications and to resist distinguishing between the political groups of liberation movement and apartheid state forces. The approach taken is strictly dependent on the availability of evidence and the egregiousness of the crime, regardless of political affiliation of the perpetrator.[44]

Besides this, there is also a working group within the NPA which works on the exhumation of missing persons who were killed during the struggle against apartheid and secretly buried. The primary aim of the exhumation work is to return the remains to the victims' relatives. It is not driven by criminal investigations but occasionally new information can come to light that is relevant for prosecutions.[45]

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[41] E-mail from Anton Ackermann (June 19, 2006). It is unclear what happened to the above mentioned 20 indictments allegedly prepared already in 1999 or in how far those overlap with the 16 cases.

[42] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[43] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[44] Interview with Torie Pretorius and others in Pretoria (May 2, 2006); Interview with Anton Ackermann in Pretoria (May 11, 2006).

[45] Interview with Madeleine Fullard in Pretoria (May 4, 2006). Valuable information was uncovered in the case concerning the death of Ntombi Khubeka, who was a member of MK. In 1987 she was arrested by the security police in Natal and beaten during her interrogation. The policemen at their amnesty hearing claimed that she had suddenly died of a heart attack. However, when her remains were discovered

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The biggest obstacle facing the PCLU is the severe lack of resources.[46] Apart from TRC matters, the unit is responsible for a range of other issues. As such, cases pertaining to the illegal trafficking of nuclear material and knowledge by South Africans took up a particularly large proportion of the unit's resources in recent times. Until the end of 2006, TRC matters took up on average only about 30 to 50 per cent of the unit's work.[47] Considering the already small number of prosecutors in the PCLU, this proportion is rather modest. Furthermore, the minimal resources devoted to the unit's investigative work is a major problem. Some cases had already been fully investigated, others needed more investigation. The D'Oliveira team included about 20 carefully selected, highly skilled and experienced police investigators, who were not suspected of sympathising with their former colleagues accused of political crimes.[48] Whereas this unit could thus conduct investigations independent of the police, the PCLU has to rely on the assignment of investigators and the conduct of investigations by the South African Police Service (hereinafter SAPS) or the meanwhile disbanded DSO.[49] The gathering of evidence concerning TRC cases is especially

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and exhumed, a bullet hole in her temple was detected which, of course, exposed the police testimony presented as false (See *TRC Report*, vol. 6, s. 4, chap. 2).

[46] Interview with Anton Ackermann in Pretoria (May 11, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006). See also N Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 47.

[47] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[48] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123; Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[49] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Traditionally investigations, which are basically the independent responsibility of the police, and prosecutions are quite strictly separated (M. Schönteich *Lawyers for the people* (2001) 41). Only with the establishment of the NPA was this traditional separation eased since with the DSO investigative powers were permanently introduced to the NPA. Furthermore, with the NPA Act prosecutors were granted greater influence on investigations. According to section 24(4)(c) of the NPA Act, a Director of Public Prosecutions, such as Ackermann, may in some bounds direct the responsible investigator who is according to section 24(7) of the NPA Act obliged to follow requests. It is also interesting to note that the first steps towards a combination of investigation and prosecution capacities occurred at the investigation of apartheid

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demanding of investigators. The crimes often happened secretly without independent witnesses and were covered up meticulously. Thus, as was the case with the D'Oliveira team, the PCLU relies to a great extent on state witnesses in order to bring cases before the courts.[50] Again, incriminating evidence has to be compiled in order to urge the conspirators to cooperate.

Such circumstances and the political implications of TRC cases place special demands on the skills, commitment and experience of investigators. In contrast to the abilities of the investigators working for the D'Oliveira team, the PCLU has major problems recruiting such investigators.[51] Although it was intended for the DSO to provide the PCLU with investigators, the DSO declined to cooperate.[52] Thus, the unit has to rely on the police, who are obliged to cooperate. However, a request to the police of early 2004 to assign investigators on an ongoing basis was not followed.[53] The investigators, who were assigned to

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crimes through the D'Oliveira team and the Investigative Task Unit in Natal which was necessitated by the during the 1990s still largely untransformed police service (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123).

[50] Interview with Anton Ackermann in Pretoria (May 11, 2006). According to section 204 of the Criminal Procedure Act no 51 of 1977 arrangements can be made for participants in a crime to testify on behalf of the state against their accomplices to secure a conviction. If the state witness testifies frankly and honestly in the opinion of the court, he may be discharged from criminal liability for the offence in question. According to Ackermann, Pretorius and D'Oliveira evidence gathered by the TRC in comparison is not helpful and plays no significant part in the work of the PCLU. See also V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 327 and 244.

[51] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[52] Ibid.

[53] Ibid. It has to be borne in mind that the SAPS also suffers from a major lack of resources and availability of skilled investigators. The focus of the SAPS is clearly on tackling the high present-day crime rate. It is thus not willing to assign resources for cases which mostly took place more than 20 years ago. (Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006)). Added to this power struggles between police commissioner Jackie Selebi and the NDPP, which came to a head at the prosecution of former deputy President Jacob Zuma, tainted the relationship between the SAPS and the NPA (Interview with Torie Pretorius and others in Pretoria (May 2, 2006)).

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investigate certain matters, often lacked the necessary skill, determination and experience.[54] Compared to this problem, a possible lack of development and change in the police service or the reluctance of certain officers to investigate their former colleagues no longer plays an influential role.[55]

From early 2006 all post-TRC prosecutions were concentrated at the PCLU and the regional prosecutors are obliged to refer such cases to the NPA in Pretoria. A centralised prosecution certainly has the advantage of enabling the achievement of consistent progress. Moreover, it certainly makes sense to concentrate the experience in prosecuting TRC-related cases in one central unit. The advantages of centralised prosecutions were highlighted by the D'Oliveira team and also by the prosecution of systematic crimes committed by the socialist regime in the former German Democratic Republic (hereinafter GDR).[56]

2. *The Wouter Basson Case*

On 4 October 1999 the trial of Dr. Wouter Basson was opened at the High Court of Pretoria.[57] Basson was the leader of South Africa's secret programme on chemical and biological warfare also referred to as "Project Coast".[58] Project Coast was established by the SADF in the early 1980s initially with the intention of providing the country with the defensive capacity to react to chemical and biological warfare attacks.[59] Especially due to the activities of Basson, the project became increasingly involved in criminal activities in relation to the countering of opposition efforts against apartheid in Namibia, South Africa and various other countries.

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[54] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[55] Ibid.

[56] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 233–34.

[57] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 167.

[58] *TRC Report*, vol. 2, chap. 6 C, paras. 1–2.

[59] Ibid., para. 40.

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The trial against Wouter Basson is not a genuine post-TRC case. It is rather connected to the prosecutions of the 1990s since it was conducted by Ackermann and Pretorius, both members of the D'Oliveira Unit at that time. The amnesty hearings were still in full swing when it was started. However, Basson failed to apply for amnesty and the deadline for applications had lapsed by the time charges were laid. Moreover, the Basson case was significant due to its links to other post-TRC cases, such as the attempted murder of Frank Chikane which will be described below, and the scope and seriousness of the charges, which were of great significance. The litigation only came to an end in late 2005. It went through the Supreme Court of Appeal and the Constitutional Court. The ruling of the Constitutional Court potentially has great effects for post-TRC prosecutions in general. The trial court litigation has already partly been analysed by legal scholars and was generally well documented in the public.[60] The following subchapter will thus only outline the charges and give an overview of how the case progressed. The Constitutional Court's judgment will then be analysed in greater detail.

2.1 *The trial and quashed charges*

Basson was initially charged with 64 counts, 24 of which pertained to non-political fraud offences allegedly committed by Basson while managing Project Coast.[61] Further counts pertained to drug offences.[62] Of special importance are 29 counts which concerned murder.[63] According to the prosecutors, the murders in which Basson participated were aimed at killing enemies of the apartheid state. Most of these incidents were distinctly connected to a political objective and were allegedly

[60] See especially V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 167. For a comprehensive overview of the development of the trial see http://ccrweb.ccr.uct.ac.za/archive/cbw/cbw_index.html.

[61] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported, at para. 16. See for a comprehensive summary of the indictment: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 169–74.

[62] *S. v Wouter Basson*, akte van beskuldigung, vol. II, aanklagte 25–30.

[63] Ibid., aanklagte 31–36, 38–43, 45–50, 52–58, 60–63.

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committed in the fight against the opposition movement's anti-apartheid struggle.[64]

Targets for such murders were detainees in Namibia, the then South-West Africa, who belonged to the rebel movement South-West African People's Organisation (hereinafter SWAPO), members of the South African state's own forces who were believed to be a security risk, ANC members such as Ronnie Kasrils and Pallo Jordan[65] and various other persons believed to be enemies of the apartheid state.[66] One of the gravest incidents concerned the poisoning of about 200 SWAPO detainees in Namibia.[67] Basson allegedly provided the poison. Apparently many corpses were later dumped from a plane into the sea off the Namibian coast.[68] In another incident Basson allegedly provided cholera bacteria, which were introduced to a drinking water well in a SWAPO refugee camp.[69] The aim was to disturb the first free elections in Namibia.[70] Basson was allegedly involved mostly in organising the murders and especially providing the poison.[71]

After an extensive and very costly trial he was eventually acquitted on all charges by the trial judge, Mr Justice Hartzenberg, on 11 April 2002.[72]

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[64] See for a summary of the wide ranging charges against Basson: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 192.

[65] Pallo Jordan served the ANC as a senior member in exile in London and Lusaka and later inhibited various posts as a minister in the cabinet (P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 133–35).

[66] *S. v Wouter Basson*, akte van beskuldigung, vol. II, aanklagte 31–36, 38–43, 45–50, 52–58, 60–63.

[67] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 170.

[68] *S. v Wouter Basson*, akte van beskuldigung, vol. II, opsomming van wesentlike feite, aanklag 31, para. 16.

[69] Ibid., aanklag 61.

[70] The bacteria were unexpectedly killed due to a high proportion of chlorine in the water.

[71] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 171–73.

[72] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported. The judgment stretches over more than 1400 pages. The trial was one of the most extensive ones in South African history. 140 witnesses were heard. The costs for the state totalled several million Rand. The state also had to cover the costs of Basson's defence team, since he was still a state employee.

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The failure to secure a conviction can be attributed mainly to the fact that Hartzenberg rejected most of the evidence and witnesses testifying on behalf of the State as unconvincing and untrustworthy.[73] The judge was criticised for being biased and generally hostile towards the prosecutors but also for erring on several legal issues.[74]

However, three issues emerged during the trial which were of central relevance in the Appeal Court and Constitutional Court litigations. The first of the three issues emerged about three months after the start of the trial. The prosecutors applied for the recusal of Judge Hartzenberg. They claimed that Hartzenberg was biased and could not rule on the case objectively.[75] The judge, however, refused to recuse himself.[76] The second issue pertains to the prosecutors' intention to introduce records of a bail hearing regarding the fraud charges to the trial. Hartzenberg ruled that the bail records were inadmissible in the trial.[77]

The third and most important issue for the purposes of the present discussion, concerns the objection made by Basson's defence team to certain charges before the trial had commenced.[78] The attorneys applied for nine of the charges to be quashed on the grounds that they would not concern criminal offences.[79] The judge granted the application with respect to seven charges.[80] Six of these quashed charges, counts 31, 46, 54, 55, 58 and 61, concern acts of conspiracy to commit murder in terms of section 18(2) of the Riotous Assemblies Act no 17 of 1956.[81] The

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[73] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[74] Ibid.; M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 92; V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 179–82.

[75] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 3.

[76] *S. v Basson* [2000] 3 All SA 59 (T).

[77] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 4.

[78] See for a summary of this issue: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 13–18. See for a legal evaluation: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 174–83.

[79] The application was based on section 85(1)(c) of the Criminal Procedure Act.

[80] *S. v Basson* [2000] 1 All SA 430 (T).

[81] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 5. The provision reads as follows:

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charges contained the most serious of the accusations against Basson. Count 31 concerned the poisoning of the SWAPO detainees. Count 46 concerned the conspiracy to murder a high-ranking administrative official in northern Namibia. Count 54 related to the unsuccessful conspiracy to murder the later ANC ministers Pallo Jordan and Ronnie Kasrils in London. Counts 55 and 58 concerned a conspiracy to murder ANC members in Mozambique and Swaziland. Count 61 concerned the conspiracy to murder the SWAPO refugees with cholera bacteria.

As is evident, these charges concern cases of murder or attempted murder that took place beyond South Africa's borders. Since South African courts have no jurisdiction to try crimes which were committed abroad,[82] prosecutors were relegated to pursuing convictions for Basson's participation in the conspiracy that took place in South Africa.[83] However, Basson's defence argued that the conspiracy to commit crimes abroad would according to the definition of the crime itself not constitute a criminal offence, even if this conspiracy took place in South Africa.[84] Hartzenberg accepted the defence's arguments and held that conspiracies to commit crimes abroad were not covered by section 18(2) of the Riotous Assemblies Act.[85] Should this legal opinion prevail it would have serious consequences for all cases in which a similar indictment is intended. The litigation proceedings concerning this point will now be examined.

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(2) Any person who

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

[82] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 223.

[83] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 175. Nerlich points out that the prosecutors in the trial of Eugene de Kock successfully exercised this approach in respect of certain charges.

[84] Ibid., 175.

[85] *S. v Basson* [2000] 1 All SA 430 (T) at 444g.

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2.2 *The appeal litigation*

Immediately after the judgment had been handed down, the State applied for judgment to be reserved on certain questions of law[86] for resolution by the Supreme Court of Appeal.[87] The application concerned the three issues outlined above. Subject to certain conditions, Hartzenberg reserved the recusal and bail record issues for consideration by the Supreme Court of Appeal. However, he refused to reserve the question of whether he erred in law concerning his ruling to quash the aforementioned charges.[88] The NPA in June 2002 appealed against the judgment concerning the questions of law reserved by the trial judge and simultaneously applied to the Supreme Court of Appeal to reserve the issue of the quashing of the charges for consideration.[89] However, this specific application was seriously defective in various procedural aspects.[90] The prosecutors then applied for condonation regarding the non-compliance with the procedural requirements.[91] Due to the appeal application's clear and serious violations with respect to the Supreme Court of Appeal rules, the Court refused condonation, and, thus, did not even consider the merits of the legal question of whether the charges were correctly quashed, nor did it answer the other questions in favour of the State.[92]

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[86] See section 319(1) of the Criminal Procedure Act.

[87] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 8. For a comprehensive summary of the litigation up to the Constitutional Court see *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 paras. 1–14 and *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 paras. 1–18.

[88] *S. v Basson* [2002] JOL 9680 (T) at 19–20.

[89] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 10.

[90] *S. v Basson* 2003 (2) SACR 373 (SCA) at 379. See on defects of the application also: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 paras. 157–160.

[91] *S. v Basson* 2003 (2) SACR 373 (SCA) at para. 379; *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 11.

[92] *S. v Basson* 2003 (2) SACR 373 (SCA) at para. 118. The Supreme Court of Appeal held that the bail record and recusal issues concerned questions of fact and not of law as required for an appeal litigation.

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2.3 *The Constitutional Court litigation*

After the appeal had failed, the prosecutors applied for special leave to appeal against the judgment of the Supreme Court of Appeal in mid-2003 and for leave to appeal the judgment of the High Court directly at the Constitutional Court.[93] The application again concerned the three central issues: bias of the trial judge; admissibility of the bail records; and the quashing of six charges, which had already been before the Supreme Court of Appeal.[94] The focus here will be on the quashing of the charges.

In a preliminary judgment the Constitutional Court ruled that even though the conduct in question had taken place before the Constitution had come into force, the issues concerned constitutional matters within the jurisdiction of the Court.[95] Apart from various complex procedural issues,[96] the crucial issue to be considered by the Constitutional Court was whether the Supreme Court of Appeal exercised its discretion wrongly in not considering the respective question and whether it was in the interest of justice to grant leave to appeal on this question.[97] The Court therefore found it crucial to consider the seriousness of the charges in light of South Africa's international obligations regarding the maintenance of fundamental principles of international humanitarian law.[98] Since the crimes in question were very grave and had been committed abroad, the question arose whether South Africa had an obligation to prosecute under international law. In its preliminary judgment, the Court had stated, without dealing exhaustively with the issue, that international law obliged South Africa to prosecute crimes against humanity and war crimes.[99] In its final judgment, however, it

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[93] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 1. The application was unique in that it was the first time that a state organ, the NPA, appealed to the Constitutional Court against a judicial decision.

[94] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 1.

[95] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 79.

[96] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 128–187.

[97] Ibid., at paras. 185–186.

[98] Ibid., at para. 171.

[99] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

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confined itself to evaluating the importance of the charges in general terms with regard to South Africa's obligations under international humanitarian and human rights law.

The Court was of the opinion that no country ought to allow the planning of cross-border criminal activities.[100] The Court then elaborated in general terms on the great significance of international humanitarian law, thereby quoting the decision of the International Court of Justice on the legality of the threat or use of nuclear weapons,[101] which highlighted humanitarian law as a fundamental and intransgressible aspect of international law.[102] The Court further made it clear, with reference to the decision of the International Criminal Tribunal for the former Yugoslavia in the *Dusko Tadic* case, that the distinction in international law between internal and international conflict had become increasingly blurred.[103] Thus, since the minimum standards for internal and international conflicts were identical, the Court neglected to determine how the conflict between SWAPO and the SADF in Namibia should be classified.[104] Due to the growing overlap of international human rights and humanitarian law the precise characterisation of the participants' legal status was also left open.[105] However the Court pointed out that South Africa, as a party to the Geneva Conventions, was bound to respect the principles outlined therein and was bound to respect fundamental principles of customary humanitarian law.[106] Such rules had also to be obeyed in the Namibian conflict. The subjection of captives to asphyxiation through poison under the guise of medical care and the insertion of cholera bacteria in the water supply of hundreds

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[100] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 170. The Court pointed out that this factor has neither been considered by the Supreme Court of Appeal in any regard, nor had it been brought to the attention of the Supreme Court of Appeal.

[101] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[102] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 174.

[103] Ibid., at para. 175.

[104] Ibid., at para. 178.

[105] Ibid., at para. 179.

[106] Ibid., at para. 177.

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suspected opponents of the regime grossly transgressed even the most minimal standards of international humanitarian law.[107] According to the Constitutional Court, the Supreme Court of Appeal had failed to consider these grave breaches and the, what it termed 'international consensus on the normative desirability to prosecute war criminals'.[108] The application of the State thus succeeded.

The Court went even further and examined whether the quashing of the six charges was based on a proper interpretation of section 18(2) of the Riotous Assemblies Act. The Court initially referred to the main arguments of counsel for the State[109] that the Military Discipline Code[110] criminalised certain conduct of SADF members even if the acts were committed beyond the borders of South Africa, that section 19A of the Riotous Assemblies Act provided that the Riotous Assemblies Act was also applicable in South-West Africa and most importantly, that South African Courts generally had jurisdiction to try crimes committed abroad when there was a sufficient connection between the crime and South Africa.[111]

According to the Court, section 47 of the Military Discipline Code[112] determines that any SADF member who commits a civil offence, meaning an offence not criminalised by military law but by common South African law, is criminally liable in terms of the code even if the crime was

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[107] Ibid., at paras. 179–182.

[108] Ibid., at paras. 184–185.

[109] Counsel for the state were Wim Trengrove, A. Cockrell and N. Fourie.

[110] The code is part of the Defence Act (Act no. 44 of 1957).

[111] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 210.

[112] The section provides that:

> 'Any person who beyond the borders of the Union commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Union, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to such penalty applicable in respect of that civil offence as could be imposed under section ninety-one of this Code.' The Code was in force during the time in that the offences were allegedly committed and during the time of the trial. According to section 104(5) of the Defence Act, the Code applies to all members of the Permanent Force of the Defence Force.

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committed abroad.[113] Any member of the army who commits murder beyond South Africa's borders is liable to prosecution in a military as well as an ordinary court in South Africa.[114] Thus, provided the murders were to be carried out by members of the SADF, South Africa has jurisdiction to try the conspiracy.[115] This was especially relevant for counts 55, 54 and 58 that pertained to murders in Mozambique, London and Swaziland.[116] In terms of the Defence Act and the Military Discipline Code, Namibia was in any case considered part of South Africa, which had certain specific implications for the matter.[117]

In any event, the Court did not take this further and turned to a general rule concerning the jurisdiction over crimes committed abroad. It basically stated that the rule that South African courts have no jurisdiction over crimes that are committed abroad, based on the principle of international comity, is not absolute.[118] The Constitutional Court then approved and followed the ruling of the Canadian Supreme Court on the same legal issue.[119] The Canadian Supreme Court had ruled that Canadian courts have jurisdiction to try conspiracies concerning crimes to be committed abroad when a significant portion of the activities constituting the offence took place in Canada or when there is a real and substantial link between the conspiracy to commit the crime and the country itself.[120] The Constitutional Court confirmed the existence of such a real and substantial link in the Basson case[121] and based this opinion on the following grounds, which can be partitioned in two groups.

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[113] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 214.

[114] Ibid., at para. 216.

[115] Ibid., at para. 219.

[116] Ibid.

[117] Ibid., at paras. 220–222. See section 1(xxii) of the Defence Act.

[118] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 223 and 225. International comity in this sense means the respect for another country's sovereignty in terms of exclusively exercising jurisdiction over crimes committed on its territory.

[119] *Libman v The Queen* [1985] 2 SCR 178.

[120] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 226.

[121] Ibid., at para. 228.

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The first group encompasses factors pertaining to the special situation of Namibia at the time. A number of findings show that there was a real and substantial link between the conspiracy to commit the crime and South Africa, including the following: Namibia was administered by South Africa; the Riotous Assemblies Act was applicable in Namibia; at all material times, the SADF was deployed in Namibia in terms of the Defence Act, which deems Namibia part of South Africa; certain charges pertain to the murder of detainees who were held captive by the SADF; and that the Defence Act generally criminalises acts of SADF members even if committed abroad.[122]

The other set of factors indicating the real and substantial link to South Africa are broader in nature and are not confined to the Namibian situation. They include: the mere fact that the conspiracy was entered into in South Africa; that it was organised and directed by members of the South African military; that the means for the implementation of the killings were provided and prepared in South Africa; and that the respective instructions were issued from there.[123]

The Court rejected the arguments of Basson's legal counsel.[124] Accordingly the Constitutional Court unanimously held on 9 September 2005 that South African courts have jurisdiction to try the crimes in question

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[122] Ibid., at 227.

[123] Ibid.

[124] The main argument was based on the hypothetical situation that if section 18(2) of the Riotous Assemblies Act was construed in the way desired by the State, the conspiracy to smoke cannabis in the Netherlands, which is not criminal there, would be criminal in South Africa as well as the situation where the conspiracy to consume alcohol in a Muslim country, in some countries a criminal offence, would be criminal in South Africa. This argument was rejected on the basis that there anyways is not a sufficient connection between South Africa and the acts to warrant jurisdiction and that they are by no means comparable to the murder of detainees by SADF personnel held captive in a country administered by South Africa. The second argument, namely that the acts were covered by an amnesty proclaimed in Namibia in 1989, was rejected on the basis that the proclamation has no application for South African courts. See *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 237 and 244.

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and ordered that the quashing of the charges be set aside.[125] The judgement thereby clarified to a certain degree the question concerning section 18(2) of the Riotous Assemblies Act.

The Court obviously viewed international law, more precisely the international law obligation to prosecute this case, as a decisive factor in coming to the conclusion that the Supreme Court of Appeal should have granted the State leave to appeal against the trial court's judgment. Nevertheless, in this regard the Court's elaborations remained of a rather broad and general nature. It did not analyse in any detailed way whether there is a strict obligation to prosecute such crimes under international law. Although this issue is relevant for the decision on whether South African courts have jurisdiction to try crimes of the gravity and international relevance such as in the Basson case, or the concomitant conspiracy, it did not analyse whether the crimes and conspiracies could also have been prosecuted on the basis of the international law principle of universality.[126] According to the principle of universality, any state's courts have jurisdiction to try a person accused of an international crime, regardless of the place where the crime was committed or the nationality of the victim or alleged perpetrator.[127] This principle is accepted under international customary law for war crimes, crimes against humanity, genocide and also with regard to crimes committed in civil wars.[128] The Constitutional Court had pointed out that the crimes of which Basson was accused would violate even the most minimal standards of international humanitarian law and would

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[125] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 265. The applications regarding the recusal and the admissibility of the bail record were dismissed.

[126] See on the issue of universal jurisdiction and generally international law in the Basson case: M. Swart 'The Wouter Basson prosecution: the closest South Africa came to Nuremberg?' (2008) 68/1 *Heidelberg Journal of International Law* 209–26. The Court expressly states that it does not consider it necessary to examine these issues in detail (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 172). It apparently sufficed for the Court to approach the topic on the basis of South African law.

[127] A. Cassese *International criminal law* (2003) 284.

[128] G. Werle *Principles of international criminal law* (2005) para. 174.

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thus constitute horrendous war crimes.[129] Against this background, it is incomprehensible why the Court did not elaborate on the principle of universality, which would clearly have provided for the jurisdiction of South African courts and would have rendered as incorrect the quashing of the charges.

2.4 *A new trial?*

With respect to the six quashed charges, the NPA won its case. The Constitutional Court had stated that the previously quashed indictment stands and that it was up to the State to charge Basson anew.[130] The way seemed clear for a new trial on the basis of the six charges. Yet rather surprisingly, especially considering the time and effort required to reach this result, the NPA announced in October 2005 that it would not recharge Wouter Basson on the six counts.[131] The reason provided for this decision was that a new trial on the basis of the six charges would violate the double jeopardy rule, which in this case would be an inescapable procedural obstacle for a new indictment.[132]

The principle of double jeopardy is laid out in section 35(3)(m) of the Constitution. Its roots lie in the basic principle common to most legal systems that no one shall be punished for the same offence more than once.[133] In criminal procedure, the rule is embodied in the pleas of *autrefoi acqui*, if the accused has previously been acquitted, or *autrefoi convict*, if the accused has previously been convicted for the offence in question in terms of section 106(c) and (d) of the Criminal Procedure Act. However, the rules on these pleas provide that the accused must

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[129] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 179–180.

[130] Ibid., at para. 260.

[131] W. Menges *'Dr Death' is off the hook in South Africa* The Namibian, Oct 24, 2005.

[132] NPA, press statement *NPA decides not to re-charge Wouter Basson* (Oct 19, 2005).

[133] P.M. Bekker et al *Criminal procedure handbook* 7ed (2005) 220; *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 61. See generally on the double jeopardy rule M.L. Friedland *Double jeopardy* (1969); Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991).

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have been in danger of conviction in the first trial[134] which was never the case with Basson, since the specific charges were not admitted.[135] The NPA's decision must therefore have been based on a different aspect of the double jeopardy rule, which is the plea of *res judicata*.[136] The doctrine of *res judicata*, known in England and Canada as issue estopple, in the United States as collateral estoppel,[137] is part of the double jeopardy rule in criminal procedures of common law countries.[138] It holds that if issues of ultimate fact, including those concerning evidence such as the credibility of witnesses and the like, have already been determined by a valid and final judgment of a trial court, these issues cannot be made the subject of another criminal litigation between the parties.[139]

In the present case, the six charges, which had been set aside, were all materially also covered by an umbrella charge (count 63), which encompassed virtually all conspiracy charges, those relating to crimes to be committed abroad and those relating to crimes to be committed in South Africa.[140] According to Pretorius, who mainly led the evidence in question at the trial, the evidence supporting the quashed charges

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[134] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 254. See on the preconditions of the pleas *autrefoi acqui* and *autrefoi convict*: P.M. Bekker et al. *Criminal procedure handbook* 7ed (2005) 220–25; E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 36 (2006) 15–28 to 15–34.

[135] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 256.

[136] The Constitutional Court only briefly touched upon this issue when it stated that the question could arise whether the quashed charges, were they subject of a new indictment, could be rendered susceptible to a plea of *res judicata* (ibid. at para. 257).

[137] Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13.

[138] See generally M.L. Friedland *Double jeopardy* (1969) 117–60; Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13–14; C.F. Stuckenberg *Double jeopardy* (2001) 26–28.

[139] Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13; C.F. Stuckenberg *Double jeopardy* (2001) 26. The principle is accepted in most English speaking countries (M.L. Friedland *Double jeopardy* (1969) 117), obviously including South Africa.

[140] NPA, press statement *NPA decides not to re-charge Wouter Basson* (Oct 19, 2005). Count 63 basically concerned all charges where Basson had to provide the poison (Interview with Torie Pretorius and others in Pretoria (May 2, 2006)).

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equally supported the relevant parts of the umbrella charge.[141] Thus, for the purpose of count 63, the State led all the evidence, including especially witness statements, on which also the six quashed charges were almost entirely based.[142] Judge Hartzenberg refers to this situation in the final judgment when he states that:

> Although I initially ruled that conspiracies to commit crimes abroad are not justiciable in this court and a number of charges had therefore been quashed, it made no difference to the evidence the State has led, because the State has led evidence to support the charges, as it was required of the State, to prove the wider conspiracy (charge 63) the accused allegedly had committed.[143]

The trial judge considered the evidence and rejected it as being not credible enough to support the guilt of the accused with respect to count 63.[144] The Court, therefore, had ruled on issues of ultimate fact. Thus, there was the peculiar situation that, although the six charges had not been admitted to the trial, the Court apparently nevertheless heard virtually all evidence in respect thereof. Before the trial, Basson's defence had also applied for the quashing of count 63, which was refused by Hartzenberg since it also concerned conspiracies regarding crimes to be committed in South Africa.[145] Nevertheless, Hartzenberg ruled that the defence had the right to object to all evidence, which was led in connection with count 63, that is only aimed at proving conspiracies to commit crimes abroad, which according to the judge

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[141] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). See also *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 para. 257.

[142] Pretorius estimates that only about 5 per cent of the evidence concerning the six charges has not been led in the trial.

[143] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported, at para. 1610 (abstract translated from Afrikaans).

[144] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). The dismissal of the evidence was made on factual not legal grounds and could thus only be taken on review not on appeal. However, a review of the judges rulings on the evidence would have provided a gross irregularity which was not given (Interview with Susan Bukau and others in Pretoria (May 2, 2006)).

[145] *S. v Basson* [2000] 1 All SA 430 (T) at 436h.

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do not disclose criminal offences.[146] Apparently either the defence did not object to the leading of evidence in this regard or the evidence that was actually led in the trial always concerned both justiciable and non-justiciable conspiracies. Thus, since the judge at the trial had ruled over all relevant evidence and no fresh evidence was available to sufficiently sustain the charges,[147] further charges would be vulnerable of a plea of *res judicata*.

It is difficult to comprehend, why the NPA applied for leave to appeal in respect of the six charges at the Constitutional Court at all, when a new indictment would be exposed to a double jeopardy plea anyway. The specific issue had already been raised during the Supreme Court litigation. The NPA must have been aware of such implications. Furthermore, the Constitutional Court did not state that these circumstances completely precluded a new prosecution. Instead, the Court appeared much more encouraging stating that it would be up to the judge in a newly convened trial to determine in the light of the new charges and the record of the previous criminal proceedings whether the mass of evidence led previously indeed particularly covers the new charges.[148] However, the Court also left it up to the NPA to decide on a fresh charge.[149] Although the prosecutors are naturally well able to consider this question, a ruling by a new trial court, after careful consideration of the criminal records, would have had greater authority, which would probably have made it easier for many victims concerned to find closure on the issue.

The reason for the decision not to proceed with the trial after the NPA had succeeded on the issue of the six quashed charges probably lies in the fact that this issue was only one of three that were taken to the Constitutional Court. The NPA had also applied at the Constitu-

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[146] Ibid. at 443e and 444h.

[147] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[148] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 169, 258 and 260. The court expressly refrained from tackling this complex task in the proceedings before it since it had no effect on its decision to grant leave to appeal (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 258).

[149] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 260.

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tional Court for a ruling on the refused recusal of Judge Hartzenberg and his alleged bias, which did not succeed. A successful ruling in this regard might have led to the setting aside of the judgment and would have enabled the NPA to proceed with a new trial regardless of the double jeopardy rule. However, it is not possible to conclude with certainty what the considerations of the NPA were in this regard. The independent decision of the NPA has not been accepted by many victims.[150] Basson continued to work as a member of the South African National Defence Force (hereinafter SANDF) and as a cardiologist in various hospitals.[151]

2.5 *Conclusion*

In the view of many apartheid victims, the trial against Wouter Basson was very promising. That it did not succeed was equally disappointing for many. The case had the potential to become one of the most significant prosecutions of apartheid era crimes. It offered the possibility of focussing more closely on the secret activities of the military, which had thus far not received the same attention as the security police.[152] The acquittal prevented the achievement of definite clarity on such criminal activities. It also had a negative impact on further post-TRC prosecutions. Since the costs of millions of Rand were not "balanced" by a conviction, the government might become increasingly reluctant to push for other trials. Also, a number of state witnesses who had testified extensively against Basson were nevertheless not granted immunity by Hartzenberg in terms of section 204 of the Criminal Procedure Act, which might generally impact negatively on the willingness of co-perpetrators to cooperate with the prosecutors.[153]

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[150] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[151] *Defence confirms Basson's suspension payments* SAPA, Sep 13, 2006; *Wouter Basson to defend himself against complaints* SAPA, Feb 26, 2007.

[152] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 174.

[153] M. Fullard and N Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 93.

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However, one positive aspect is that the Constitutional Court dealt with the matter and made a number of statements with regards to the relevance of international human rights law for the prosecution of apartheid era crimes. It is also of great importance for other post-TRC trials regarding the conspiracy issue. It concerns all similar situations in which crimes were organised in South Africa but were carried out abroad. These include the numerous cross border raids of the security police during which opposition members and other civilians were killed in neighbouring countries. The judgment is also generally relevant for all crimes committed by SADF members abroad.

The Court outlined that South African courts have jurisdiction over conspiracies in terms of section 18(2) of the Riotous Assemblies Act to commit crimes abroad when there is a real and substantial link between the conspiracy and South Africa. However, it did not formulate general criteria to determine the existence of a real and substantial link. One can nevertheless conclude from the factors applied by the Court with respect to the Basson case, the general criteria that are relevant should such factors mutually occur. Accordingly, apart from the factors that pertained to the special situation in Namibia, a real and substantial link exists when the conspiracy was entered into in South Africa, when it was organised and directed by members of the South African state forces, when the relevant orders emanated from South Africa and when the means for the implementation of the crime were provided from within South Africa. Such circumstances probably existed in most criminal cross-border activities of the security police. The conspiracy to commit such acts would thus be prosecutable.

Additionally it is implicit from the judgment that South African courts have jurisdiction to try all crimes committed by former SADF members covered by the Military Discipline Code. Conspiracies to commit crimes in Namibia generally fall under the jurisdiction of South African courts due to the Court's strong emphasis on the close connection between Namibia and South Africa at the time.

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3. *The Bisho-Massacre*

In October 2001 a criminal trial commenced at the High Court of Bisho in the Eastern Cape that dealt with the Bisho-massacre, one of the most serious and tragic political killings in the South African transition period.

3.1 *The massacre*

The events commonly referred to as the Bisho-massacre occurred on 7 September 1992 in the immediate vicinity of Bisho, capital of the then homeland Ciskei.[154] The ANC had organised a protest march from the Eastern Cape city of King Williams Town towards the adjacent town of Bisho. The rally, in which about 70,000 to 80,000 people participated, was intended to proceed into Bisho in order to press for the resignation of then Ciskei leader, Oupa Gqozo.[155] However, the marchers only received permission to enter a stadium right behind the Ciskei border.[156] The organisers of the march, among them prominent ANC members such as Chris Hani, Ronnie Kasrils[157] and Cyril Ramaphosa, nevertheless were adamant that they would proceed into Bisho.[158] The assigned route to the stadium was marked off by razor wire fencing and approximately 200 Ciskei Defence Force (hereinafter CDF) soldiers were lined up in the surroundings.[159] The situation was, due to recent intense violent clashes between ANC supporters and Ciskei authorities, very tense.[160]

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[154] *TRC Report*, vol. 3, chap. 2, paras. 368–69.

[155] Ibid., para. 369.

[156] Ibid., para. 374.

[157] Kasrils became deputy Minister of Defence in the new government in 1994 (P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 139). In 1999 he was appointed Minister of Water Affairs and Forestry.

[158] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[159] *TRC Report*, vol. 3, chap. 2, paras. 369 and 374.

[160] Numerous warnings that the march is in danger of ending in a bloodshed were made by prominent politicians from all sides and reported in the media (*S. v Mkosana and Gonya*, indictment, summary of substantial facts, pages 20–22).

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However the marchers were clearly unarmed and the rally proceeded peacefully.[161]

Events took a turn when a group of marchers, headed by Ronnie Kasrils, noticed a gap in the fence and decided to break through.[162] Some hundred marchers then ran towards a CDF battalion that was lined up at a distance. Commander Vakelele Archibald Mkosana gave the order to fire.[163] What ensued was uncontrolled and indiscriminate shooting.[164] Without warning of the order to fire the shooting was joined by most of the other soldiers employed around the march.[165] 29 protestors and one CDF soldier died, dozens others were injured.[166] Many were shot either when running away or while already lying on the ground.[167]

The massacre was subject to various investigations and TRC hearings.[168] The TRC found that Gqozo and the CDF were accountable for the massacre but also criticised the ANC leadership for having lacked prudence in the volatile situation.[169] Indictments were drafted shortly after the massacre concerning CDF soldiers and even Ronnie Kasrils.[170] However due to political circumstances, charges were not instituted and it was only in 1996 that a new police investigation docket was submitted to the Attorney-General.[171] The proceedings were pending the outcome of amnesty applications, received from Vakele Archiebald

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[161] Decision no. AC/2000/122; *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[162] *TRC Report*, vol. 2, chap. 7, para. 180.

[163] Ibid., para. 182.

[164] Over 400 shots and four rifle grenades were fired.

[165] *TRC Report*, vol. 3, chap. 2, para. 375.

[166] Ibid. para. 369. The prosecutors of the case list 67 injured (*S. v Mkosana and Gonya*, indictment, annexure D, page 17). Other sources refer to about 300 injured (J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 377).

[167] *TRC Report*, vol. 2, chap. 7, para. 184.

[168] The TRC had held two extensive public hearings on the Bisho-massacre in September and November 1996, during which about 60 witnesses testified (See especially *TRC Report*, vol. 3, chap. 2, paras. 368–99).

[169] *TRC Report*, vol. 3, chap. 2, para. 399.

[170] Ibid., para. 397.

[171] Ibid., para. 398.

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Mkosana and Mzamile Thomas Gonya, who were both concerned by the investigations.[172] Both applications were refused in 2000.[173] In 2001 the newly appointed Director of Public Prosecutions of the area, Johan Bezuidenhout, took the matter up again.[174]

3.2 *The indictment*

In October 2001, Mkosana and Gonya were both charged with one count of murder and two counts of attempted murder. Mkosana was also charged with culpable homicide.[175]

Mkosana was the field commander of the CDF soldiers employed in the operation on the particular day in question and was stationed directly behind the CDF line facing the approaching protestors who had broken through the gap.[176] He allegedly radioed his superiors for instructions and reported, as he later admitted, that shots were fired by the approaching protestors. He then received permission to fire single shots in return to turn back the crowd.[177] Following this, Mkosana allegedly ordered the line in front of him to open fire on the approaching group.[178] The State based the charges against him on the claim that he lied when he reported the shots.[179] He had supposedly known that the situation did not pose such a compelling threat as to justify the shooting and he had failed to ensure that only single shots were fired, knowing that his conduct would result in many deaths.[180] Due to the chaotic nature of the events it was not possible to determine exactly who was shot by which group of soldiers.[181] At least one victim from

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[172] Applications no. AM/4458/96 and AM/7882/97.
[173] Decision no. AC/2000/122.
[174] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH).
[175] *S. v Mkosana and Gonya*, indictment.
[176] Ibid., preamble, at page 5.
[177] Ibid. at page 6.
[178] Ibid.
[179] Ibid. at page 7.
[180] Ibid. at pages 8–9.
[181] Ibid. at page 7.

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the group of protestors, which had run through the fence, was allegedly killed by the CDF line in front of Mkosana.[182] Accordingly, he would be guilty of murder of this one protestor and also of attempted murder of an undeterminable number of other demonstrators.[183] Furthermore, Mkosana would be guilty of having negligently caused the death of all other victims shot dead at other places around the stadium (culpable homicide count), since he had failed to ensure that the other soldiers would not join in the shooting without specific orders.[184]

Gonya was a soldier armed with a rifle grenade launcher, employed in the CDF line facing the approaching protestors.[185] He allegedly fired two grenades, without orders to do so, into the approaching group or in the direction thereof with the intention to kill members of the group.[186] He was accordingly charged with murder of one victim who died through grenade shrapnel and with the attempted murder of an undeterminable number of persons.[187]

The prosecutor was initially not convinced that the case against the accused would be strong. The indictment was rather the result of the great significance of the massacre and the expectations among victims and the public since amnesty had been denied to the accused. An inquest was not conducted since it was feared that public expectations would rise even more should the inquest result in a recommendation to charge the suspects.[188]

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[182] Ibid. at page 10.

[183] Ibid. at page 11.

[184] Ibid. at page 9. Allegedly Mkosana's order was transmitted by radio and was also audible to at least some of the other lines engaged in the shootings, who then mistook it as being directed at them (Telephone interview with Johan Bezuidenhout in June 2006).

[185] *S. v Mkosana and Gonya*, indictment, page 10.

[186] Ibid.

[187] Ibid. at page 11. It appears contradictory that on the one hand Mkosana was charged with murder by having ordered the line to shoot and on the other hand Gonya, who allegedly killed the only one protestor in the group charged with murder for acting without any order to shoot.

[188] Telephone interview with Johan Bezuidenhout in June 2006.

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3.3 *The judgment*

Exploring the Bisho-massacre confronted the Court with a major task. After 43 court days during which the events were dealt with thoroughly, Judge White delivered his ruling on 13 March 2002.[189] Both accused were found not guilty and were acquitted on all charges.[190]

The crucial issues were whether the accused were entitled to act in self-defence and whether the limits of self-defence had been observed.[191] The Court confirmed both issues. The ruling took into account that all soldiers were very anxious of possible attacks due to the row of violent clashes[192] and had beforehand been advised that the marchers could be armed.[193] With respect to the examination of whether a situation of self-defence existed, the Court found no evidence of shots being fired from the protestors.[194] Mkosana had suggested that he might have mistaken the rotor sound of a helicopter, flying above the march, for shots.[195] After examining closely the evidence and testimony on this question, the Court found it reasonably possible, especially considering the tense and agitated conditions, that the sounds were indeed mistaken for shots.[196] On this basis the Court was of the opinion that a situation justifying actions taken in self-defence existed.[197] With regard to the question of whether the limits of self-defence had been exceeded, the Court found that to order shots immediately was indeed appropriate.

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[189] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 66. The state had submitted an extensive list of 134 state witnesses (*S. v Mkosana and Gonya*, indictment, list of state witnesses).

[190] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 95.

[191] Ibid. at page 87.

[192] Ibid. at page 67.

[193] Ibid. at page 1.

[194] Ibid. at page 63.

[195] This possibility had already been raised at the TRC (*TRC Report*, vol. 3, chap. 2, para. 383).

[196] A special *in loco* inspection was undertaken by the Court after which it found that there was considerable similarity between the sounds (*S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 88). A number of protestors also mistook the rotor sounds for shots during the march.

[197] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 90.

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Less stringent measures, such as warning shots etc., could not have been considered since the crowd was running towards the soldiers and was already relatively close.[198] The Court thereby also took into account that senior commanders had expressly prohibited the use of warning shots.[199] The charge of culpable homicide was rejected since the Court could not find proof that Mkosana had submitted his order to shoot to the line in front of him via radio, which could, thus, not have been mistaken by other CDF groups as being directed at them.[200] With regard to Gonya the Court could not find proof that it was exactly the grenade fired by Gonya that killed the one specific victim.[201] It appeared possible that the death was caused by grenades that might have been fired by other soldiers.[202]

3.4 *Conclusion*

The Bisho massacre is an example of the clashes that occurred at the mass rallies during the early 1990s. It is not representative of the secret state activities against political activists. It had already been examined extensively due to its scope, the great public attention and the investigations of the TRC. It was doubtful whether the trial could contribute further to the findings already made by the TRC. However, the call for retributive justice from victims and from many in the public was still strong.[203]

There is a strong impression from the judgment that the judge was of the opinion that the events were merely a tragic coincidence of various unfortunate factors rather than a crime for which a specific person could be held accountable. This becomes clear when the Court refers to the events as an inevitable 'clash between an irresistible force and an immovable object'.[204] Moreover, the judge apparently found it

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[198] Ibid. at page 91.
[199] Ibid. at page 92.
[200] Ibid. at page 93.
[201] Ibid.
[202] Ibid. at page 94.
[203] Telephone interview with Johan Bezuidenhout in June 2006.
[204] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 68.

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inappropriate to blame only the two accused, although he presumably found others equally or even more responsible. The Court for instance heavily criticised the leadership of the ANC for taking the irresponsible decision to break through the gap in the fence and run towards Bisho.[205] It also made it clear that the prosecution should have rather focussed on CDF soldiers in other positions surrounding the march, who had shot in a totally defenceless and harmless crowd, which had caused the vast majority of deaths and injuries on that day.[206] Such action was described as 'a wanton and brutal slaying of innocent people'.[207] According to the prosecutor,[208] the willingness of the Court to punish the accused diminished further when Ronnie Kasrils made statements during the trial in which he once again called strongly for closing the books on the massacre and indicated his lack of vindictiveness.[209]

Against this background, it appears that the Court accepted too easily that Mkosana acted in self-defence when he ordered the line in front of him to open fire. The Court simply accepted that warning shots had not been appropriate since they had been forbidden for whatever reason by the CDF leadership. Warning shots would generally have been insufficient to stop the crowd. The judge went further to state that even if Mkosana had not thought the protestors were firing he would have been exonerated by the defence of self-defence by the plain fact that some hundred marchers running towards them in a distance of about 150 meters constituted a real danger.[210] Furthermore, he stated that it would be 'churlish for a Court to blame an accused who has, through no fault of his own, been placed on the horns of a dilemma as to the exact steps he must take to protect himself and those in his care'.[211]

It is hard to accept this. Mkosana was a senior officer of the CDF who was in command on the ground on that day. One requires a high degree

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[205] Ibid. at page 77. Indeed Kasrils had already expressed a deep sense of moral responsibility for the events before the TRC (*TRC Report*, vol. 2, chap. 7, para. 181).

[206] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 81.

[207] Ibid. at page 80.

[208] Telephone interview with Johan Bezuidenhout in June 2006.

[209] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[210] Ibid. at page 91.

[211] Ibid. at page 93.

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of prudence and responsibility of an officer in such a high position of the army. Furthermore, a distance of 150 meters seems far enough to fire warning shots or single shots. Kasrils had stated that they would have stopped right away if there had been warning shots.[212] The Court's findings on self-defence are in stark contrast to the findings of the TRC and especially to the findings of the Amnesty Committee. The Amnesty Committee refused amnesty to Mkosana and Gonya on the grounds that their actions were totally disproportionate to the dangers they faced.[213] The committee had described the firing under the circumstances as totally irrational and unjustified.[214] However, in the end, the acquittal is consequent as it is clear from the judgment that the judge had to acquit the accused due to the principle of *in dubio pro reo*.

4. *The Trial of Michael Luff*

In November 2001 the policeman Michael Phillip Luff was charged with murder in the Regional Court of Worcester in the Western Cape. He was accused of having shot the 17-year-old William Dyasi in Zwelethemba township in 1985. At the time, Luff was a young member of the so-called Unrest Unit of the Worcester police, a riot squad that was dealing primarily with containing unrest in the townships of the region.[215]

According to the prosecutor, events unfolded as follows.[216] In early November 1985, Luff and a colleague were called while on duty in the

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[212] *TRC Report*, vol. 2, chap. 7, paras. 180–81.

[213] Decision no. AC/2000/122. According to section 19(3)(f) of the TRC Act the proportionality of the act *inter alia* determines the political character of the offence. The offences were on this basis not considered to be political.

[214] Decision no. AC/2000/122.

[215] MMM Mackay *Outrage as amnesty reject gets off in court* Cape Argus, May 7, 2002.

[216] The following information derives from an interview with prosecutor Themba Velem on 21 June 2006 in Paarl, if otherwise is not stated. The judgment and the charge sheet concerning the trial have been destroyed after the lapse of two years since Luff had been acquitted. Velem's account, often differs from information

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township to deal with a rioting group of protestors who were stoning a local beer hall.[217] When confronting the protestors, the policemen fired shots and Dyasi, who was among the crowd, was seriously injured by a lead gun-shot in his chest. Dyasi managed to escape. Two women gave him shelter in a nearby house. Later that evening, Luff and his colleague were informed that he was hiding in the house. Dyasi was found by the two policemen, who wanted to arrest him. Luff took the heavily bleeding youth outside while his colleague was still inside the house with the two women. Luff then shot Dyasi outside of the house. The prosecutor claimed that Luff intentionally shot Dyasi without justification.

Already in early 1986, an inquest was conducted by the Worcester Magistrate's Court in order to establish whether an indictment of Luff was worthwhile. It was found that Luff was criminally liable for Dyasi's death and that the Attorney-General should institute a prosecution.[218] However, the Attorney-General declined to charge Luff, most likely for political reasons. Only in December 1996 was the decision reversed and a trial set to begin. This was due to intervention by the TRC. Dyasi's death and the subsequent events had been the subject of a TRC Human Rights Violations Committee hearing, in which his parents told their story.[219] Luff, however, immediately applied for amnesty.[220] The criminal proceeding was pending at that time. At the amnesty hearings, Luff testified that Dyasi had tried to escape when they had gone outside. He admitted to having shot him in the back only in order to effect an arrest.[221] Amnesty was refused in 2000 mainly because the offence lacked a political objective.[222] However, the Amnesty Committee also raised serious doubts regarding Luff's version of events. It found it especially

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deriving from TRC proceedings. An exact account of the events is thus under the circumstances impossible.

[217] Beer halls in townships were perceived by political activists as an apartheid instrument to keep Africans quiet.

[218] Decision no. AC/2000/005.

[219] *TRC Report*, vol. 3, chap. 5, para. 144.

[220] Application no. AM/3814/96.

[221] Decision no. AC/2000/005.

[222] Ibid.

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improbable that Dyasi was able to run away at all considering his severe injuries caused by the first shots at the beer hall. These doubts were not further explored since the criminal proceedings were still pending.

After the refusal of amnesty, the case was resumed and went to trial in November 2001. The prosecution was conducted without any involvement by the unit for TRC prosecutions in Pretoria. The prosecutor, Themba Velem, intended to base the charges mainly on the evidence provided by the two women of the shack in which Dyasi was hiding, one of whom could be traced, and most importantly on the testimony of a doctor who had conducted the post-mortem examination of the corpse in 1986. He had also testified at the inquest in 1986. This testimony contradicted Luff's version of events. For example, the doctor there had stated that Dyasi's injuries would probably not have allowed him to walk or run away at all. In a meeting with the doctor right before the trial, Velem convinced himself that the evidence given at the inquest in 1986 would be repeated. When testifying at the trial, however, the witness made a complete about turn, according to Velem, and his new recount of events was no longer consistent with his previous testimony.

Luff was eventually acquitted by Magistrate van Rensburg in May 2002. According to Velem, the Court could not find sufficient proof that Dyasi was shot by Luff at all. Velem stated that Luff had testified at the inquest that he had accidentally shot Dyasi in the back while stumbling outside the shack. Strangely, however, Luff never had to testify at the trial. The main reason for a lack of proof was that the doctor testified differently. A number of other important witnesses also could not be traced. Furthermore, Velem sensed a strong reluctance on the part of the police to investigate the case thoroughly. Initially only a junior officer, who had even attended shooting lessons led by Luff, was assigned to investigate the case. A senior, more independent officer later replaced him. Certain witnesses were only traced after Velem intervened personally. He also had the impression that the Magistrate van Rensburg was very reluctant to conduct the trial. For example, on many occasions the judge strangely did not grant applications for adjournments by Velem in order to trace other witnesses. The judge

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also apparently made certain derogative statements about the fact that Luff was prosecuted at all.

The case was certainly loaded with political implications and emotions. After the acquittal, the judge was accused of racism by Dyasi's relatives and representatives of the black population in the area.[223] The victim's relatives found it especially difficult to accept that there was insufficient proof that Luff killed Dyasi since they had attended the amnesty hearings in which Luff admitted to having killed Dyasi.[224] The trial raised much racial tension and emotion in the area. The exact circumstances of Dyasi's death were not established. There were indications that there was a politically motivated reluctance on the side of the police and the Court to convict Luff, who continues to work as an inspector at the Ceres police. However, even the prosecutor admitted that under the circumstances the evidence was probably not sufficient to secure a conviction.

5. *The Case of Tyani and Gumengu*

In 2004 two former members of the Transkei homeland security police, Aron Mtobeli Tyani and Pumelele Gumengu, were each charged in the Butterworth Circuit Court[225] with one count of attempted murder and one count of murder. The two were charged with having murdered Sithembele Zokwe on 8 August 1987.[226] Zokwe was a political activist and member of MK. He had undergone military training abroad. The indictment alleged that the accused and other members of the local security police arrested Zokwe in Umtata in August 1987 and took him to a remote quarry where they shot him in the neck and head.

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[223] M.M.M. Mackay *Outrage as amnesty reject gets off in court* Cape Argus, May 7, 2002.

[224] Such self-incriminating evidence is according to section 31(3) of the TRC Act inadmissible in a criminal trial.

[225] Umtata High Court.

[226] *S. v Tyani and Gumengu*, indictment. The charges were conducted by M. Mhaga, who later shifted to the PCLU in Pretoria.

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Zokwe, who was severely injured, miraculously survived the attack. He later managed to call for help and was brought to a hospital.[227] After his release from hospital, he was again arrested by the security police in January 1988. Gumengu and Tyani took Zokwe to a house where he was allegedly asked to point out where he was hiding hand grenades. On this occasion, he was shot by Tyani inside the house. The accused then allegedly placed the dead body on a hand grenade, which was activated in the house to create the impression that Zokwe had tried to throw the grenade at them so that they had to shoot him in self-defence.[228]

After they had already previously been charged for the murder both applied for amnesty in relation to it in 1996.[229] Gumengu simultaneously applied for amnesty regarding the previous murder attempt. The prosecution was then pending the amnesty decision and only continued after amnesty had been denied in March 2000.[230] The Amnesty Committee found that the applicants had presented highly improbable and contradictory versions of the events and accordingly denied amnesty for a lack of full disclosure.[231] At trial, the accused nevertheless presented the same account of events. They claimed that when they had brought Zokwe to the quarry he attempted to escape which they tried to prevent by shooting in the air and in his direction without intending to kill him.[232] With regard to the actual murder they claimed that Tyani shot at Zokwe since he had tried to attack them with a hand grenade. Both pleaded not guilty.[233] The versions were again rejected as obviously false and highly improbable considering the various pieces of evidence and the post-mortem examination.[234] The judge was certain that Zokwe was

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[227] *S. v Tyani and Gumengu*, indictment, summary of substantial facts.

[228] Ibid.

[229] Applications no. AM/3786/96 and AM/3610/96.

[230] Decision no. AC/2000/042.

[231] Ibid.

[232] *S. v Tyani and Gumengu* (Transkei division) Case no. 76/2004, unreported, at para. 55.

[233] Ibid. at para. 4.

[234] Ibid. at para. 76.

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not killed in self-defence[235] and that both acted with a common purpose when Zokwe was shot.[236] Gumengu and Tyani were found guilty of murder.[237] Only Gumengu was found guilty of attempted murder whereas Tyani was discharged on that count for a lack of evidence.[238] Both were sentenced to 25 years imprisonment.[239]

Although a conviction was secured, it is rather disconcerting that the judgment did not clarify the truth regarding the facts of the case. There is no proper examination of why exactly Zokwe was murdered. While the amnesty decision clearly stated that Gumengu had been ordered by his superiors to eliminate Zokwe, there is no mention of such implications and the intentions behind the deed in the judgment. The political background is only touched upon in the trial judge's judgment when he mentions that Zokwe was indeed a very active member of MK and that it was the common goal of Gumengu and Tyani to subdue him since he was considered a dangerous terrorist.[240] The judgment is also largely confined to rejecting the accused' versions of events. It does not clarify in detail how Zokwe's murder took place. It also fails to clarify whether Zokwe was brought to the quarry with the sole purpose of killing him there. However, it is most likely that the judge did not consider it necessary to elaborate on these questions since he was convinced that the case against the accused was strong and clear.[241] Moreover, it is not the purpose of a criminal trial to deal with the political background of a crime, if this does not contribute to establishing the guilt of the accused. The case nevertheless provides evidence that the security forces also engaged in the practice of murdering opposition members in the officially independent homelands.

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[235] Ibid. at para. 79.

[236] Ibid. at para. 81.

[237] Ibid. at para. 83.

[238] Ibid.

[239] Telephone interview with Advocate Quitsi in June 2006.

[240] *S. v Tyani and Gumengu* (Transkei division) Case no. 76/2004, unreported, at paras. 42 and 79.

[241] Ibid. at para. 83.

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6. *Eugene Terre'Blanche*

The first TRC-related trial conducted by the PCLU concerned the right wing organisation *Afrikaner Weerstandsbeweging* leader, Eugene Terre'Blanche. Terre'Blanche was accused of various terrorist attacks aimed at thwarting the negotiations during the early 1990s which potentially fell in the TRC amnesty mandate but for which he had failed to apply for amnesty. He had entered into a plea agreement with the PCLU in terms of section 105A of the Criminal Procedure Act. On 12 November 2003 he pleaded guilty to five counts of terrorism in contravention of section 54(1)(i) of the Internal Security Act[242] in the Regional Court of Potchefstroom and was sentenced to six years imprisonment, which was wholly suspended.[243] The case did not demand extensive investigations. Since it concerned isolated acts of right-wing terrorist violence and not the violence of the liberation movement and the security forces during the apartheid conflict, it is only of minor relevance for the present research. Thus it is not examined in detail.

7. *The PEBCO-Three Case*

Soon after the PCLU was established, Ackermann decided to press charges in early 2004 in the first major TRC case, the murder of the so-called PEBCO-Three. In May 1985 Sipho Hashe, Champion Galela and Qaqawuli Godolozi were abducted, tortured and killed by the security police.[244]

During the mid-1980s the Eastern Cape was heavily disrupted by political unrest. After a visit to the region in 1985, a high-ranking delegation of security force officials expressed concern, which signalled to the local security police branch, based at Port Elizabeth, that they

[242] Act no. 74 of 1982.

[243] E-mails from Shaun Abrahams of 30 May 2007 and 6 June 2007.

[244] Unless otherwise is stated the following information derives from the amnesty decision no. AC/99/0223 and from *TRC Report*, vol. 2, chap. 3, paras. 240–44.

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should drastically intensify their efforts. The three victims were leading members of the Port Elizabeth Black Civic Organisation[245] (hereinafter PEBCO), an important regional political organisation with close ties to the UDF and ANC. The security forces considered PEBCO to be a mere extension of the ANC and a major author of the political unrest and anti-apartheid movement in the region. The Port Elizabeth security branch, thus, decided to eliminate Hashe, Godolozi and Galela in a concerted effort with a Vlakplaas unit that was operating in the area at that time in order to break the opposition in the region.[246] On 8 May 1985, the three were lured to Port Elizabeth airport, from which they were abducted to a defunct police station in Post Chalmers, close to the town of Cradock. There they were interrogated. During the interrogation they were continuously and severely tortured. Eventually, on the 9 or 10 May they were shot dead.

In 1996 the Amnesty Committee received amnesty applications of Gideon Nieuwoudt, Harold Snyman, Hermanus Barend Du Plessis, Johannes Martin van Zyl and Gerhardus Johannes Lotz of the Port Elizabeth security branch[247] as well as of Johannes Koole[248] and some other members of the Vlakplaas group[249] for their involvement in the events.[250] In the amnesty hearings contradictory testimony was given. The applicants of the Port Elizabeth security police stated that no torture had taken place during the interrogation, which had been conducted by van Zyl, Lotz and Nieuwoudt. They further claimed that the Vlakplaas members only took part in the abduction, not in the interrogation and murder. This evidence was contradicted by the Vlakplaas *askaris*,

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[245] Godolozi was the President, Galela the General Secretary and Hashe the Secretary of PEBCO (*S. v Nieuwoudt and others*, konsep akte van beskuldiging).

[246] The operation was commanded by the Port Elizabeth security branch.

[247] Applications no. AM/3920/96; AM/3918/96; AM/4384/96; AM/5637/97; AM/3921/96.

[248] Application no. AM/3748/96.

[249] The group consisted of Roelf Venter, Gerhardus Beeslaar, Kimani Peter Mogoai, Joseph Mamasela and Johannes Koole.

[250] Snyman and Du Plessis had not been physically involved in the deed but were the ones who had ordered the actions.

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Mogoai, Koole and Mamasela, who claimed to have been present in the interrogation during which the three victims, allegedly, were severely assaulted. The Amnesty Committee found their versions reasonably true. Since other contradictions also emerged, in 1999 amnesty was refused to Nieuwoudt, van Zyl and Lotz for the abduction and killing of the PEBCO-Three for lack of full disclosure.[251] Amnesty was also refused to du Plessis, for conspiring and ordering the abduction and murder, to Beeslaar, for his role in the abduction and assault, and to Koole for the abduction and assault.[252] Later, amnesty was also refused to Venter.[253] Snyman was granted amnesty and has since died. Mogoai was also granted amnesty for his role in the abduction and assault.[254]

7.1 *The indictment and further development*

In February 2004 Anton Ackermann informed the attorney of Gideon Nieuwoudt[255] that he intended to charge his client in connection with the PEBCO-Three murder.[256] Nieuwoudt, who since passed away in August 2005, then appeared for his bail hearing in the Magistrate Court on 11 February 2004. He was released on 3000 Rand bail. The case was postponed to 3 June 2004. Shortly thereafter an arrest warrant was also issued for van Zyl,[257] who, at the time, was working for a company in Cambodia, clearing landmines. Van Zyl then also became a client of Wagener, who arranged for his return to South Africa. He appeared in court in early March 2004 and was released on bail. At the same time

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[251] Decision no. AC/99/0223.

[252] Ibid.

[253] Decision no. AC/2001/064.

[254] Decision no. AC/99/0223.

[255] Gideon Nieuwoudt came to prominence through his involvement in a range of other cases for which he applied for amnesty and which were interrogated by the TRC such as the torture and killing of Steve Biko, which also involved Snyman, and the murder of the so-called Motherwell-Four.

[256] Unless otherwise is cited, all information contained in this subchapter derives from an interview with the attorney of Nieuwoudt and van Zyl, Jan Wagener, on 8 May 2006 in Pretoria.

[257] *Nieuwoudt charged with murder* SAPA, Feb 11, 2004.

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the PCLU had tried to convince Johannes Koole to serve as a state witness in terms of section 204 of the Criminal Procedure Act.[258] However, Koole refused to cooperate and the PCLU decided to charge him as well.[259] In the PEBCO case the PCLU again relies heavily on state witnesses to sustain their case. Roelf Venter, Gert Beeslaar, Joe Mamasela and Peter Mogoai were approached for this purpose and thus for the time being were not included in the charges.[260]

Nieuwoudt, van Zyl and Koole were each to be charged with three counts of abduction, assault and murder respectively.[261] The charges accuse them of the deeds the Amnesty Committee determined they had committed: that they abducted the three deceased at the airport and then took them to Post Chalmers. The indictment further alleges that throughout the night and the following day the PEBCO-Three were severely assaulted. On 10 May 1985 the accused allegedly killed the PEBCO-Three under circumstances that, as the indictment asserts, are unknown to the State.[262] However, after the bail hearings of early 2004 until mid 2007, the Court proceedings made no progress at all. The trial was pending. The delay was caused mainly by an application of van Zyl and Nieuwoudt to review the refusal of amnesty. The circumstances of this application will be outlined in the following subchapter. Adding to this NDPP Bulelani Ngcuka imposed a moratorium in November 2004 on all TRC-related cases.[263] All TRC-related investigations and prosecutions were put on hold, which also affected proceedings in the PEBCO case.[264] The case is since pending. Only in July 2007 did the NPA again make statements on the matter when it was announced that the PCLU

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[258] Act 51 of 1977. See *supra* Chapter 2 note 50.

[259] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[260] Ibid.

[261] *S. v Nieuwoudt and others*, konsep akte van beskuldiging. Counts one to three relate to the abduction, counts four to six to the murder and counts seven to nine to the assault of the three deceased.

[262] *S. v Nieuwoudt and others*, konsep akte van beskuldiging, opsomming van wesentlike feite, pages 3–5.

[263] The causes and circumstances of the moratorium will be discussed below (Chapter 3(3.1)).

[264] E-Mail from Anton Ackermann (Oct 10, 2005).

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also intended to charge Herman du Plessis, Gerhardus Lotz, Gerhardus Beeslaar and Peter Mogoai if they did not cooperate.[265] Mogoai, who had been granted amnesty for the abduction and assault, could only be charged for a possible participation in the murder.

In mid-July 2007 an NPA investigation team found remains of corpses on the farm in Post Chalmers near Cradock in the Eastern Cape where the PEBCO-Three had been kept.[266] These remains are believed to be those of the PEBCO-Three, which would contradict the testimony of van Zyl and other amnesty applicants from the Port Elizabeth security police that the corpses had been burned and thrown into the Fish River.[267] At the date of completing this book it remained to be seen how the case would proceed.

7.2 *The review application*

The decision to apply for a review of Nieuwoudt's and van Zyl's refusal of amnesty was taken shortly after their bail hearings.[268] As will become apparent, this has major implications for the PEBCO-Three prosecution. The review application, which now only concerns van Zyl since Nieuwoudt has passed away, was tendered at the High Court of Pretoria[269] by the attorney Jan Wagener in September 2004.

Considering that the amnesty decisions were already handed down in 1999, the tendering of the review application appears to have been

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[265] T. Mtshali *Pebco Three: old cops face charges* The Sunday Times, July 17, 2007.

[266] L. Oelofse *NPA may have found bodies of Pebco Three* SAPA, July 16, 2007.

[267] Decision no. AC/99/0223.

[268] Decisions of the Amnesty Committee can be taken on review at the High Courts by applicants, victims or other parties with a substantial interest in the matter (*TRC Report*, vol. 6, s. 1, chap. 2, para. 68; J. de Lange 'The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission' in W. Verwoerd and C. Villa-Vicencio (eds) *Looking back reaching forward* (2000) 14 at 26). See further J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 86–88; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 139–41,.

[269] The legal successor of the TRC is the Minister of Justice and Constitutional Development (see section 46(7)(b)(ii) of the TRC Act), seated in Pretoria.

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delayed. According to section 7(1) of the Promotion of Administrative Justice Act[270] (hereinafter PAJA), an application for judicial review of an administrative action must be brought no later than 180 days after the person was informed of the administrative action. The High Courts ruled that the Amnesty Committee is part of the executive power and that amnesty decisions are administrative actions.[271] Thus, according to this provision the deadline for applying for review already lapsed six months after the decision was handed down. Section 9(1)(b) PAJA, however, provides that the period of 180 days may be extended by agreement between the parties. This is what happened in the PEBCO-Three amnesty proceedings. Shortly after the applications in question had been refused, some of the applicants approached Wagener for advice on the possibility of reviewing the decision.[272] Wagener then negotiated an agreement with the Justice Department according to which the time limit for instituting judicial review proceedings in the PEBCO amnesty process was extended to the date on which the authorities charge the applicants. While Johannes Koole has never been a client of Wagener and, accordingly, the agreement does not cover him, the criminal proceedings against Koole are also affected since the charges will be tried jointly. The agreement does cover van Zyl and covered Nieuwoudt. Moreover, it not only affects the PEBCO matter, but another eight applications of clients of Wagener in which amnesty has been refused.[273] In the following, the legal and factual effects on the criminal litigation will, therefore, be outlined.

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[270] Act 3 of 2000. It merely repeats the common law rule which already existed in 1999.

[271] *Nieuwoudt, du Toit and Ras v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C) at 311; *Derby-Lewis and another v The Chairman of the Committee on Amnesty and Truth and the Reconciliation Commission and others* 2001 (3) BCLR 215 (C). Whether the Amnesty Committee is an administrative body was rarely discussed in legal literature (see F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 113 and 141).

[272] Most of them had not been Wagener's clients during the amnesty proceedings but became his clients thereafter.

[273] E-mail from Jan Wagener (Feb 12, 2007).

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The amnesty proceedings and criminal litigation generally run parallel to each other.[274] However, once an application has been lodged the Amnesty Committee may request the appropriate authority to postpone the proceedings pursuant to section 19(7) of the TRC Act[275] pending the consideration and disposal of the amnesty application. In practice the applicant always tenders a request at the criminal court himself[276] and the courts have always granted such requests.[277] However, in this case, an amnesty hearing is not pending and the Amnesty Committee no longer exists. Nevertheless, the review application stays the criminal proceedings. This conclusion derives from a similar case, the Motherwell-Four case. As has been outlined above, Nieuwoudt and two other policemen were convicted of murder in the Motherwell case in 1996.[278] The conviction was immediately appealed to the Supreme Court of Appeal. The three had applied for amnesty simultaneously in relation to their conviction for the Motherwell-Four incident.[279] The appeal proceeding was then postponed pending a final decision on the question of amnesty.[280] After amnesty was eventually denied to all applicants in December 1999,[281] Wagener applied at the High Court in Cape Town for a review of the decision to refuse amnesty.[282] In the still pending appeal of the criminal conviction, the Supreme Court of

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[274] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 201.

[275] The section reads: 'If the person who submitted an application under section 18 is charged with any offence constituted by the act or omission to which the application relates, or is standing trial upon a charge of having committed such an offence, the Committee in consultation with the attorney-general concerned, may request the appropriate authority to postpone the proceedings pending the consideration and disposal of the application.'

[276] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 201.

[277] Ibid., 202.

[278] See *supra* Chapter 1(4.).

[279] Applications no AM/3920/96; AM/3381/96; AM/5183/96.

[280] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 67.

[281] Decision no. AC/99/0345. Thereafter du Toit and Nieuwoudt became clients of Jan Wagener.

[282] Interview with Jan Wagener in Pretoria (May 8, 2006).

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Appeal then ruled that this appeal litigation will remain pending until the review litigation concerning the refused amnesty applications has been concluded, since only when such review proceedings are concluded would an amnesty application be disposed of in terms of section 19(7) of the TRC Act.[283] The same applies to the PEBCO-Three case. The prosecution, which was initiated in early 2004, is now pending the final outcome of the review application concerning the rejected amnesty application of van Zyl.

The practical effects of a review application on the PEBCO prosecution, in terms of delay, are again illustrated by the Motherwell-Four case. There, the review application to have the amnesty decision set aside was granted on 23 November 2001.[284] It was ordered that the amnesty decision be set aside and, quite interestingly, that the Minister of Justice had to reconvene a new amnesty committee to hear and consider the amnesty applications afresh, since the Amnesty Committee had meanwhile been disbanded.[285] It took until March 2004 for a new amnesty committee to be constituted in Port Elizabeth.[286] The ad hoc committee consisted of the attorney F Bosman and High Court judges R Pillay and N Motata. The hearing was concluded in September 2004 but the decision on whether to grant amnesty was reserved.[287] Only on 29 August 2005, did the majority of the committee decide that amnesty should be granted to du Toit and Ras but again refused

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[283] E-mail from Jan Wagener (Feb 12, 2007).

[284] *Nieuwoudt, du Toit and Ras v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C). The court found that the decision of the Amnesty Committee was unstructured, that the evidence had largely been disregarded or only considered on a selective basis. Moreover the amnesty decision did not make it sufficiently clear how the decision had been reached at all.

[285] *Nieuwoudt and others v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C) at page 304.

[286] J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 88. The Promotion of National Unity and Reconciliation Amendment Act (Act no 23 of 2003) was specially enacted to make provisions for the setting up of a new amnesty committee in case applications need to be dealt with afresh.

[287] Interview with Jan Wagener in Pretoria (May 8, 2006).

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to Nieuwoudt.[288] Nieuwoudt did not hear of the decision since he died shortly before it was handed down. The proceedings illustrate that a review application can lead to drastic delays in the pursuit of criminal justice. Six years have passed from the time the first amnesty decisions were handed down to the time of the final decision on amnesty in 2005. If Nieuwoudt had still been alive, the second refusal would have again been taken on review, if possible.[289] Although the delay in the Motherwell-Four case is also due to the fact that special legislation had to be enacted, providing for the establishment of ad hoc amnesty committees, which only happened in 2003, the example, nevertheless, illustrates that the PEBCO-Three prosecution will be delayed significantly by the judicial review hearings.

At the time of writing, no decision had been reached in the PEBCO-Three review proceedings since 2004. The start of the review litigation is held up by the Department of Justice, which takes an inexplicably long time to file the necessary papers to the court in order to initiate the proceedings. By the end of 2007, years after the review application had been tendered, the Department had yet to file the documents and the criminal matter remained postponed until August 2008.[290] Should the review application succeed, an amnesty committee would need to be reconvened. Should van Zyl's amnesty application eventually succeed, he would be freed of criminal and civil liability in terms of section 20(8) of the TRC Act.

7.3 *Conclusion*

The charges in the PEBCO-Three case aroused strong reactions in the South African public, both welcoming and critical.[291] The PEBCO-Three

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[288] The new amnesty hearing also concerned former police general Jacobus Janse Nicolaas ("Nic") van Rensburg, who was also granted amnesty. He has since died. Information on the decision was only provided to the public in December 2005. The decision has not been published yet. It was provided to the author by the Justice Ministry.

[289] Interview with Jan Wagener in Pretoria (May 8, 2006).

[290] E-mail from Jan Wagener (Sep 13, 2007).

[291] See *infra* Chapter 3 (1.2.3).

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case is a well-known, high profile case, exemplifying the use of egregious violence by the security police and the cold-blooded murder of political opponents. It was heralded by many as the starting point of a larger body of prosecutions. Indeed, it marked the first major sign of progress on the subject of post-TRC prosecutions after the establishment of the PCLU in 2003. However, as will be pointed out later in this book, it was not the starting point of a larger process. Though it started promisingly, the case quickly stagnated and the review application will prevent it from proceeding. It is probable that it will take years before the criminal trial can continue, if at all.[292]

The interruption of the criminal proceedings through the amnesty review applications was, as described above, unavoidable in procedural terms. However, the Department of Justice can easily avoid long delays until the start of the review litigation. It is inexplicable why the Department of Justice is not filing its affidavits and papers to the High Court and is not taking the steps necessary for the review litigation to start. It thereby deliberately hinders the criminal trial from resuming.

8. *The Blani Case*

In October 2004, Buyile Ronnie Blani, at that time a 40 year-old member of the SANDF, was tried for his involvement in the killing of two people in the Eastern Cape in 1985.[293] Blani had been a member of the Addo Youth Congress during the 1980s, an organisation loosely affiliated to the ANC and UDF.[294] Blani's involvement with the liberation movement was, however, of a basic and minimal nature. He came from a poor and uneducated background and was one of many militant youths who were mobilised and politicised by the wave of mass movement activities during the 1980s.[295] However, in response to a call of

[292] Interview with Jan Wagener in Pretoria (May 8, 2006).

[293] *ANC member charged with murder of farm couple* Cape Times, July 7, 2004.

[294] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 42.

[295] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

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the UDF in the mid-1980s to render the country ungovernable, Blani and other members of the youth congress raided a local farm and killed the elderly farmer couple.[296] Various items were stolen.

In 1985 the case was prosecuted. Blani managed to escape to exile in Angola. Most members of the group were tried and either sentenced to death or to long jail terms. Two death penalties were executed and two were later commuted to live imprisonment. During the negotiation period in the early 1990s, all remaining convicts in the case received either presidential pardons in 1993 or indemnity under the laws of 1990 and 1992.[297] One of Blani's accomplices who had also fled to exile successfully applied for amnesty for his participation in the killings after his return.[298] Blani, however, neither seemed to have recognised the indemnity laws of 1990 and 1992 nor of the TRC as he failed to apply for amnesty after his return from exile in 1992.[299]

When auditing the TRC dockets, Ackermann came across the docket of the Blani case. The case against Blani had already been investigated fully and the evidence was clear and compelling.[300] It was obvious that the case would not require a great effort for the prosecution. Blani was arrested in June 2004 and granted bail. On 12 October 2004 he was charged at the High Court of Grahamstown with two counts of murder and one count of housebreaking with intent to commit robbery and robbery with aggravating circumstances for his part in the conspiracy and execution of the raid and killings.[301] The case was not affected by the said moratorium on all TRC-related prosecutions of November 2004. Whereas the PEBCO-Three case was still in the pre-trial stage, the Blani trial had to continue because by November it was too advanced

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[296] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 42.

[297] See for the indemnity laws of the early 1990s: J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 37–49.

[298] Application no. AM/2707/96; Decision no. AC/99/0264.

[299] *Feud builds up over Kirkwood murders* The Herald, available at http://www.theherald.co.za/herald/2004/07/08/news/n06_08072004.htm.

[300] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[301] *S. v Buyile Ronnie Blani*, indictment.

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to be stopped.[302] The prosecution was conducted by M. Mhaga and directed by the PCLU.

The parties agreed on a relatively lenient sentence. On 25 April 2005 Blani was convicted on all charges and sentenced to five years imprisonment, four of which were suspended for five years.[303] The judge took into account the fact that, in contrast to all of his accomplices, Blani neither benefited from the indemnity laws of the early 1990s nor the TRC amnesty legislation. This was due to a lack of legal advice, for which Blani clearly lacked the resources to obtain. Upon returning from exile he basically assumed that the 1992 Further Indemnity Act[304] automatically indemnified him from criminal liability. Had he understood the provisions correctly, he would not have had to face charges at all. He obviously did not have proper access to legal counsel. Even at his trial in 2004, he only obtained legal representation through the legal aid scheme shortly before the trial was to start.[305] Against the background of these mitigating circumstances, the Court considered it to be inappropriate to sentence Blani to a long jail term.[306] The Court further acknowledged the political implications of the matter and took into account the fact that a number of co-perpetrators only benefited from indemnity and amnesty regulations since the crimes in question were associated with a political objective.[307] The prosecutors concurred with this consideration and pleaded for a mild sentence.[308]

There were many critical reactions to the Blani trial.[309] However, the trial shows that the PCLU is intent on prosecuting across the political spectrum by focusing mainly on the availability of evidence and the

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[302] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[303] *S. v Buyile Ronnie Blani* (Eastern Cape division) Case no. CC 81/2004 25 April 2005, unreported.

[304] Act 151 of 1992.

[305] D. Bruinders *Postponement granted in 1985 Kirkwood murder case* The Herald, available at http://www.epherald.co.za/herald/2004/10/13/news/n05_13102004.htm.

[306] *S. v Buyile Ronnie Blani* (Eastern Cape division) Case no. CC 81/2004 25 April 2005, unreported.

[307] Ibid.

[308] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[309] See *infra* Chapter 3(1.2.3).

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strength of the case. As stated above, the evidence in the case was very strong and the crimes in question, murder and robbery, were serious. Blani's trial was not, however, without political consequences, as it contributed to a debate on priorities and also to the above mentioned moratorium.

9. *The Attempted Murder of Frank Chikane*

In early November 2004, the PCLU was ready to carry out the arrests of three former officers of the South African security police on charges relating to the attempted murder of Frank Chikane in 1989.[310] Frank Chikane, who is now the Director-General of the President's Office, had been the Director-General of the South African Council of Churches, which was the leading organisation in the Protestant opposition to apartheid.[311] He was also a leading member of the UDF and generally a very vocal and popular opponent of the apartheid government.[312] The security forces perceived him to be a considerable threat to the regime.[313] It is believed that there were several attempts to kill him.[314] At his trial in 1995, former Vlakplaas commander Eugene de Kock alleged that the SADF and police had attempted to kill Chikane in a planned and premeditated operation.[315]

The three former policemen, former Major-General Christoffel Smith, Gert Otto and Johannes "Manie" van Staden, were to appear in Pretoria High Court on charges of attempted murder led by the PCLU.[316] They were also to face an umbrella charge of conspiracy to kill a number of unknown opponents of the apartheid state.[317] The accused persons had

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[310] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[311] P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 33.

[312] Ibid.

[313] *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57, para. 2.

[314] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[315] P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 34.

[316] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[317] Interview with Jan Wagener in Pretoria (May 8, 2006).

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not applied for amnesty in relation to the charges. The facts concerning the involvement of the three accused in the attempted murder in 1989 emerged during the investigations against Wouter Basson,[318] who himself had been charged in 1999 for his alleged involvement in the murder attempt.[319] The case against the policemen had been almost completely investigated in the course of the Basson investigations.[320] The three had allegedly managed to get access to Chikane's luggage at the airport of Johannesburg in April 1989, when he was about to go on a trip to Namibia. On this occasion Chikane's clothing was apparently saturated with Paraoxon, a lethal nerve poison. The poison had been produced under the supervision of Basson in military laboratories and had been provided to the three accused under his instruction. After putting on his cloths, Chikane experienced severe health disturbances but survived the attack. His condition only improved once he had received hospital treatment and had taken off his clothing. Directly afterwards he went on a scheduled trip to the USA where he again experienced severe health problems after wearing his clothes. When he was treated in hospital the chemicals were eventually detected in his body and it was clear that an attempt on his life had been made.[321]

However the accused never appeared in court in November 2004 and the planned prosecution took a remarkable turn.

9.1 *The arrest suspension*

After the accused persons were informed by the PCLU of their imminent arrest the arrest warrants were suddenly withdrawn and the bail hearing, which was scheduled for the following day, was suspended.[322] The decision was reportedly taken by senior members of the NPA.[323]

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[318] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[319] *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57.

[320] T. Pretorius *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[321] See *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57, paras. 3–10.

[322] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[323] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

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The most likely scenario is that the NDPP Bulelani Ngcuka directed the PCLU to stop the proceedings.[324]

The NPA's official reason given for the sudden reversal of the PCLU's decision to prosecute was that the NPA realised that there was not a clear strategic plan on how to deal with TRC prosecutions and, thus, specific guidelines for these kinds of cases were needed.[325] The events in the case contributed to and are closely linked to the imposition of the said moratorium on all TRC-related investigations and prosecutions in late November 2004.[326] The exact implications of this will be outlined below.[327] However, there is more to the reasons for why the step was taken than what has been officially presented by the NPA. Although the NPA tried to argue that the reasons for the suspension of the arrests were not political,[328] the suspension of the arrests was mainly the result of a political settlement behind the scenes.[329] After the PCLU informed the accused persons of their arrest, their attorney Jan Wagener took immediate steps to prevent this from happening. Wagener intervened at the Office of the President and pressed for a suspension of the arrests.[330] According to Wagener it was President Mbeki who then decided that the proceedings be put on hold. Ngcuka was apparently directed to take the necessary steps. However, there must obviously have been convincing political arguments to influence the decision.[331]

Chikane, who holds a central position in the President's Office, played an active role in the events. In 2003, Chikane wrote letters to the alleged

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[324] The NDPP has great influence on all prosecutorial decisions. According to section 22(1) of the NPA Act, the NDPP exercises directive control over all duties, functions and powers assigned to the prosecuting authorities. According to section 22(2)(c) of the NPA Act, he can review any decision taken by a Director of Public Prosecutions to lay charges.

[325] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[326] E-mail from Anton Ackermann (Oct 18, 2005).

[327] *Infra* Chapter 3(3.1).

[328] *Chikane poison case not closed, say Scorpions* SAPA, Nov 11, 2004.

[329] Interview with Jan Wagener in Pretoria (May 8, 2006).

[330] Ibid.

[331] The political influences and considerations of the government will be analysed in Chapter 3(4.).

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perpetrators, urging them to come and disclose to him their deeds in order to be liberated from their guilt.[332] Then in late 2006, he announced that they were ready to meet with him and ask for forgiveness.[333] He was convinced that it was more important that the perpetrators tell their story rather than be prosecuted.[334]

The NPA assured at the time that once the question of strategy had been settled, the prosecution would definitely continue[335] and later confirmed that the case was still being considered.[336]

9.2 *The indictment and plea bargain*

It took until early 2007 for new developments on the case to occur. The said moratorium came to an end by January 2006 since the question of strategy had apparently been settled. From then on, the prosecution was subject to a consultation process between the attorney of the accused and the NPA.[337] The NPA and government had meanwhile drafted new prosecution policy guidelines for the exercise of prosecutorial discretion concerning the decision of whether to prosecute TRC-related cases, which will later be analysed in greater detail.[338] The policy document outlines criteria according to which a procedure can be implemented that requires the alleged perpetrator to make full disclosure on the criminal acts in question, which then can lead to a decision of the NDPP not to institute criminal proceedings. Although the NPA made no public announcements whatsoever, it is clear that the three accused in the Chikane case were subject to the new procedure apparently mainly in September 2006.[339]

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[332] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[333] *I know who tried to kill me—Chikane* SAPA, Oct 2, 2006.

[334] E. Naidoo *No general amnesty for apartheid crimes* The Sunday Independent, July 3, 2005.

[335] *Chikane poison case not closed, say Scorpions* SAPA, Nov 11, 2004.

[336] *Chikane's would-be assassins on NPA's list* SAPA, Jan 24, 2005.

[337] Interview with Jan Wagener in Pretoria (May 8, 2006).

[338] See *infra* Chapter 3(3.).

[339] See for the implications of the prosecution guidelines for the Chikane case: *infra* Chapter 3(3.4).

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It later emerged that the case would also concern two formerly high-ranking officials of the security forces and government. In mid-2007 the NPA announced that Adriaan Vlok, who had been Minister of Law and Order in the apartheid government from 1986 to 1991, and Johan van der Merwe, who had been head of the SAP security branch from 1986 to 1988, deputy National Commissioner of the Police from 1988 to 1990 and National Commissioner of the Police from 1990 to 1995, would be indicted.[340] Vlok and van der Merwe had been linked to a number of criminal activities of the security police due to their previous positions. Vlok had apparently already admitted earlier to having played a central role in the crime and had in 2006 apologised to Chikane.[341]

Although no official announcements were made concerning the aforementioned, it is clear that during 2006 Vlok and van der Merwe had joined the three former security police officers, who were initially to be charged, in terms of the guideline's disclosure procedure in order to make representations on their involvement in the case.[342] The fact that they came forward, however, was allegedly not prompted by imminent charges or the discovery of implicating evidence against them, but was done entirely voluntarily.[343] Their motives for this move will be outlined below. However, in January 2007 the NPA eventually informed the three alleged perpetrators that their prosecution would go ahead and apparently intended to also focus on Vlok and van der Merwe,[344] which obviously means that the guidelines procedure did not result in a decision of the NPA against prosecution. In August 2007, van der Merwe, Vlok, Otto, van Staden and Smith were charged with one count of attempted murder of Frank Chikane, alternatively with the conspiracy to murder Chikane in contravention of section 18(2)(a)

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340 *Court date for Vlok expected Tuesday: NPA* SAPA, June 25, 2007.

341 *Vlok apologises for atrocities* SAPA, Aug 26, 2006; *I know who tried to kill me—Chikane* SAPA, Oct 2, 2006.

342 E-mail from Jan Wagener (Sep 13, 2007).

343 Ibid.

344 W.J. da Costa and T. Mtshali *Prosecuting apartheid's soldiers 'divisive'* Pretoria News, Feb 8, 2007.

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of the Riotous Assemblies Act, and with one count of conspiracy to murder various unknown persons.[345] Both acts of conspiracy allegedly also concerned Wouter Basson and his accomplice André Immelmann from Project Coast. The indictment is based on the facts that emerged during the Basson prosecution. It was allegedly together with Basson and Immelmann from Project Coast conspired to murder Chikane. Otto, van Staden and Smith allegedly carried out the poisoning at Johannesburg airport. Vlok and van der Merwe are claimed to have been involved in the command level underlying the actual implementation of the attempted murder.[346]

It was soon seen as likely that the accused would agree on a plea and sentence agreement, a so-called plea bargain, with the PCLU.[347] Indeed in June 2007 a plea bargain was agreed upon. On the scheduled trial date on 17 August 2007, the Court only had to decide on the validity of a plea and sentence agreement concerning the charges in terms of section 105A of the Criminal Procedure Act. According to section 105A(1)(a) of the Criminal Procedure Act a plea bargain contains an agreement between the State and the accused on a plea of guilty and a just sentence. Plea-bargaining is therefore a procedure under which the accused forgoes his right to a full trial in exchange for a reduced sentence.[348] There is extensive room to negotiate the exact terms and details of the agreement.[349] However, judicial approval of the plea and sentence agreement is required and the terms must be documented and presented in court.[350] According to section 105A(8) of the Criminal Procedure Act, the court has to adjudicate on whether the agreement is just and thereafter convicts and sentences the accused in terms of the sentence agreement.

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[345] *S v Johannes Velde van der Merwe en andere*, akte van beskuldiging.

[346] Ibid., opsomming van wesentlike feite.

[347] E. Momberg and C. Terreblanche *Alleged NPA deal may let Vlok off the hook* The Sunday Independent, Feb 25, 2007.

[348] E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–5.

[349] Ibid., 15–6.

[350] Ibid., 15–7.

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The Court approved the plea and sentence agreement. In terms of the agreement, the five accused persons pleaded guilty to the charge of attempted murder. The charge of conspiracy to murder various other opponents of apartheid, whose identities are unknown to the State, was withdrawn by the PCLU. Vlok and van der Merwe were, according to the sentence agreement, sentenced by the Court to ten years imprisonment, wholly suspended for five years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the same condition.[351]

9.3 *Terms of the plea bargain*

The plea and sentence agreement contains various admissions regarding the crime and lists aggravating and mitigating circumstances. Initially reference is made to the political backgrounds of the crime and the implication with the SADF project led by Basson, which allegedly had been engaged in developing toxic substances to be supplied to the various security branches.[352] It then turns to an account of the events constituting the crime of attempted murder, which confirms what had been alleged in the charges:[353] At a meeting in 1987 that had been arranged by the SADF, Johan van der Merwe 'took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.'[354] Van der Merwe and other senior security force officials were given a list containing names of such high profile activists, among them Frank Chikane. Van der Merwe and Vlok discussed the implementation of the order and decided to set up a group of security policemen for this purpose.

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[351] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007.

[352] Ibid. at paras. 14–35.

[353] Ibid. at paras. 35–49.

[354] Ibid. at para. 36.

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Otto and van Staden became members of this special unit and Smith later served as the unit's commander. On the orders of General Sebastiaan Smit, who had meanwhile been appointed head of the security police branch, Christoffel Smith contacted Wouter Basson for the supply of substances for the special unit's purposes 'that could be applied against the enemy'.[355] Thereafter Smith, Otto and van Staden met with André Immelmann, a scientist working for Basson's project, who had been ordered by Basson to instruct the policemen in the use of chemicals against enemies of the state. For Chikane a lethal substance was requested. Immelmann provided the three with the nerve poison Paraoxon and instructed them in how to apply it to Chikane's clothing.[356] The order to kill Frank Chikane was eventually issued by security branch head General Smit to Smith 'in terms of an order of' van der Merwe and Vlok.[357] Smith and Otto on 23 April 1989 intercepted Chikane's luggage at the airport and applied the poison to his underwear and clothing.

The plea bargain then points out various aggravating circumstances. The following are the most important:[358]

- Both van der Merwe and Vlok held high positions in the police and government.
- The only motive to kill Chikane was to prevent him from further political activities.
- None of the five accused applied for amnesty at the TRC with regard to the attempted murder of Frank Chikane.
- On 10 July 1997, van der Merwe testified before the TRC that he was not aware of a list containing names of opposition members to be targeted, which was obviously not true considering the facts of the Chikane case.
- Vlok only approached Chikane to apologise and attempt a reconciliation after it had emerged in November 2004 that the PCLU had a *prima facie* case against Smith, van Staden and Otto.

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[355] Ibid. at para. 42.

[356] Ibid. at para. 43.

[357] Ibid. at para. 49.

[358] Ibid. at paras. 50–62.

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- In the trial against Wouter Basson Smith, van Staden and Otto were approached on many occasions by the prosecutors to cooperate as state witnesses in terms of section 204 of the Criminal Procedure Act. They persistently refused to do so, gave false accounts on the events and chose instead to cooperate with Basson's legal team.
- Chikane had written to Smith, van Staden and Otto after the Basson trial, asking them to tell the full truth and to reconcile with him, which persistently was ignored by them.

However, also a number of mitigating circumstances are identified, which are apart from certain personal circumstances mainly the following:[359]

- The accused all pleaded guilty. With respect to Vlok and van der Merwe, otherwise a conviction would not have been possible, since no sufficient evidence against them was available.
- The original project to neutralise specific apartheid opposition members was not initiated by the accused but by the SADF.
- Van der Merwe and Vlok allegedly had no knowledge of the specific plan and operation to kill Chikane. Vlok was not informed, although he had given instruction to be informed should the killing of anyone on the list be considered.
- Smith and Otto were only subordinates. They later came forward to disclose their roles in the incident and have since shown remorse.
- Van der Merwe encouraged members of the security forces to apply for amnesty during the TRC process. Regarding the attempted murder of Chikane, he allegedly tried to persuade the responsible officials of the SADF to apply for amnesty together with him in this incident.
- As part of the plea bargain, the accused have undertaken to cooperate with the PCLU as witnesses in a possible prosecution of General Sebastiaan Smit.

[359] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007, at paras. 63–80.

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The official positions of the accused, which generally obliged them to protect the state, were obviously seen as mitigating. As such, it was emphasised that the three accused officers acted in their professional positions in defence of a 'lawfully elected government' to which they had sworn an 'oath of allegiance'.[360] It was further pointed out that the offence was committed during a period of intense political conflict in which violent acts by the liberation movement to overthrow the government were prevalent. The plea and sentence agreement took into account that the security police played a vital role in warding off the onslaught and that the distinction between lawful and unlawful means became increasingly blurred. It was further pointed out that due to his position of leadership, Chikane played a key role in causing unrest and mobilising resistance to apartheid.

9.4 *Conclusion*

The prosecution in the Chikane case is high profile and of great significance due to the rank and political position of Vlok and van der Merwe but also due to the political position of the victim, Frank Chikane, who was at the forefront of apartheid opposition and is now an influential political figure within the government. After the suspension of the arrests in 2004 it appeared as if no further progress on the matter would be made. However, after a lapse of almost three years, caused by the moratorium and various political developments,[361] the proceedings were concluded.

The eventual convictions in the case concern not only the three security police agents who were initially to be charged, but also van der Merwe, who was the highest ranking security policeman at that time and later the leading policeman of the country, and Vlok, a former minister of the apartheid government, who during the years of the most intense struggle had, by virtue of his portfolio, been politically responsible for the police's efforts to counter the apartheid opposition.

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[360] Ibid. at para. 71.

[361] See *infra* Chapter 3(3.).

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Only once before, with the former Minister of Defence Magnus Malan, had a minister of the apartheid government been charged with an apartheid crime. Vlok was the first political leader to be held accountable for the criminal practices of the apartheid state. Van der Merwe was the first high-ranking general of the security police to face charges in a court of law. Previously, charges predominantly concerned the rank and file operatives of the security police. This was the case during the 1990s and, as has been shown above, was the case after the TRC. For the first time, sentences were handed down to people who gave orders and who forged the policies under which the security forces acted. Two of the highest ranked protagonists of the apartheid state or its security forces were publicly put on trial and admitted to criminal acts, which obviously originated from specific orders given at the highest levels of the state and government. This unprecedented event alone is a very significant achievement.

Nevertheless, the plea bargain in the case was strongly criticised by victims organisations. It was rejected as being a merely symbolic public relations event, which did not reveal any substantial new information.[362] The sentences were considered to be far too mild and there has been criticism that they were agreed on behind the scenes. This practice fails to uphold the principle of restorative justice and diminishes victims' trust in a fair legal system. The critique indicates that the trial, especially regarding Vlok and van der Merwe, was seen as a broader and general reckoning with apartheid crimes. This fails to take into account that the prosecution only concerned one specific case, that of Frank Chikane, who himself was very satisfied with the plea agreement.[363]

However, the suspended sentences indeed appear lenient since the aggravating circumstances are strong. This is particularly true since Smith, Otto and van Staden, who actually carried out the poisoning, in terms of the plea bargain did not show proper remorse and rejected Chikane's requests to come forward. Another grave and aggravating

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[362] Khulumani Support Group, press statement *Khulumani Support Group rejects the finding of the Pretoria High Court today* (Aug 17, 2007).

[363] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007, at para. 6.

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fact is that they refused to take up the offer of indemnity by cooperating with the NPA in the prosecution of Basson. Instead they chose to support the defence of Basson, who had also been implicated in the murder attempt of Chikane. Neither of them applied for amnesty. The fact that they eventually came forward to disclose the particulars of their involvement to the PCLU can certainly be attributed to their imminent prosecution. However, consideration must be given to the fact that the three operatives were only the ones who carried out orders. Those behind the crime bear greater responsibility for it. In this regard, it is an achievement that the prosecutors managed to secure convictions of members of the higher echelons of power.

The suspended sentences of Vlok and van der Merwe can probably be attributed to the nature of their involvement and the PCLU's inability to present a strong case against them. It must be borne in mind that a plea bargain essentially depends on the State's assessment of the probable outcome of the case.[364] It has been pointed out that without the admissions of Vlok and van der Merwe, it would have been impossible to prosecute them. It has also been pointed out that their involvement was allegedly confined to passing on the order in its broadest sense to act against the listed apartheid opponents and setting up a group for this purpose. The murder attempt, however, only happened years later in 1989. Allegedly, van der Merwe and Vlok did not have knowledge of the actual operation against Chikane.[365] Furthermore, the PCLU was allegedly not even aware of their involvement. Likewise, the police officers Smit, van Staden and Otto could not have had knowledge of Vlok's and van der Merwe's involvement as commanders in the background in 1987, and, thus, could not have implicated them.[366] The PCLU, thus, had two choices: first, they could pursue charges against the three officers with uncertain prospects for securing a conviction in court and without charges being brought against Vlok and van der Merwe; second, they could go with the plea and sentence agreement

[364] E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–8.

[365] E-mail from Jan Wagener (Sep 13, 2007).

[366] Ibid.

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including all five. Obviously, the second choice seemed more promising. The suspended sentences of Otto, van Staden and Smith, thus, have to be seen as part of this overall agreement that included Vlok and van der Merwe. The whole plea bargain must further be seen in conjunction with the disclosure procedure in terms of the prosecution policy including all five concerned persons and the voluntary admissions of Vlok and van der Merwe.[367] Thus, on the one hand, the plea bargain was a by-product of this disclosure process and on the other hand it was a compromise since sufficient evidence was not available to sustain charges against Vlok and van der Merwe in a criminal trial.

Furthermore, there is not a compelling reason why suspended sentences should be detrimental to the principle of restorative and transitional justice. With regard to the three operatives, the prosecution of killings at the inner German border carried out by wall guards of the GDR proves that in terms of dealing with the systematic crimes of a past regime, it can be perfectly appropriate to hand down suspended sentences. 88.8% of custodial sentences that were handed down with regard to human rights violations at the border, such as manslaughter of persons illegally trying to cross the border, were covered by suspended sentences.[368] Specifically, in many manslaughter convictions, the sentence was suspended.[369] Suspended sentences were commonplace in cases where a low ranking officer was convicted. Sentences of high-ranking officers from the political and military spheres, however, were generally not suspended.[370] However, as has been pointed out, Vlok's and van der Merwe's inclusion to the plea agreement must be seen in the context of its own special circumstances.

The facts brought to bear raise the following questions: why did Vlok and van der Merwe admit to their involvement at all and why did they agree to plead guilty if there was not any solid evidence against them available to the NPA. According to their lawyer Jan Wagener, the two

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[367] See further on the connections with the guidelines procedure *infra* Chapter 3(3.4).

[368] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 212.

[369] Ibid. 214.

[370] Ibid. 24.

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took this step voluntarily and out of a moral urge to do so.[371] The police investigation only concentrated on the events of 1989. Allegedly Vlok and van der Merwe did not want to leave the three police officers to face charges alone as if there had not been any involvement in the background at the leadership level. Since they knew that there had been indications that there was involvement from those at a very high level before the murder attempt, they apparently felt it was the just thing to disclose the information, at least to a certain degree. In this regard, it is also important to note that at least van der Merwe and two of the accused former police officers are engaged together in an organisation acting on behalf of former security police members, which was also occasionally supported by Vlok.[372] This underlines the fact that it was their desire to help each other. The motivation was not to be included in a plea bargain but to support the three officers facing charges in their disclosure effort so that they would all be covered by a decision of the NDPP not to institute a prosecution as is permitted under the prosecution policy. The details of which will be dealt with below. It is difficult to see why there was not a decision against prosecution in the end since the NPA did not make any public announcements, which could have clarified the backgrounds of the proceeding. Van der Merwe and Vlok apparently had also intended and hoped for other former apartheid era security force authorities to follow their example and disclose their roles.[373] It should also be pointed out that the two were likely candidates for cooperation with the State since they were two of the very few apartheid era officials who had already cooperated during the TRC to a comparably high degree.[374] In a press statement Vlok and van der Merwe, accordingly, also announced that they had actually intended to apply for amnesty in this regard. However, since they only had limited knowledge of the incident and the main

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[371] E-mail from Jan Wagener (Sep 13, 2007).

[372] See *infra* Chapter 3(1.1.2).

[373] E-mail from Jan Wagener (Sep 13, 2007).

[374] Vlok was the only apartheid minister to apply for amnesty. He applied for amnesty for the bombing of the South African Council of Churches, Khotso house and the COSATU trade unions headquarters (decisions no. AC/99/0349 and AC/99/0349).

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authors of the order, authorities from the SADF, strongly refused to cooperate with the TRC, an application was not considered possible in this regard.[375]

Nevertheless, the benefits of the plea bargain are very limited with respect to its potential to reveal more information about the background of criminal activities at the governmental and military command level. The plea bargain states that an order was issued to van der Merwe to act against apartheid opponents, possibly by killing them, which emanated from the SADF, acting on higher authority. The exact terms of the order were not disclosed. Also, the specific background is in no way clarified. There is no clarification about which authorities concretely issued the order concerning the hit list or on whose higher authority the SADF officials acted. Thus, the specific political background concerning the targeting of certain prominent opposition members is only dealt with peripherally, but is not fully clarified at all and the information contained in the document, in this regard, is absolutely minimal. Furthermore, regarding Vlok's and van der Merwe's involvement, all that is stated is that the implementation of the order was discussed and a special unit was set up. There is not any mention of the exact brief of the unit and the terms for the implementation of the order, which possibly might have entailed the systematic killing and/or intimidation of those contained in the list.

In a press release issued on the day the plea agreement was presented in court, Vlok and van der Merwe indicated that they had not known who exactly worked out and issued the order to act against certain opposition members and that their limited knowledge was fully disclosed to the PCLU and completely included in the plea agreement.[376] Nevertheless, one would expect that more details could certainly have been presented in the plea bargain document since there are no particulars at all on, for instance, those who participated in the meeting of 1987. It appears strange that Vlok, who was a minister and not someone simply obeying orders, did not have further information on the real

[375] A. Vlok, J. van der Merwe, C. Smith, G. Otto and M. van Staden, press statement (Aug 17, 2007).

[376] Ibid.

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authors of the plan. It remains unclear whether another recognisable authority transmitted it to them. All that is stated is that the initial instructions were presumably issued by the then President PW Botha. It is also claimed that no other person except Chikane was injured or killed on the basis of this order.[377]

The fact that so little information has reached the public domain certainly leaves a bitter aftertaste. It is also rather disconcerting that none of the information seems to have been tested in court. Many questions remain unanswered. The proceeding only sheds marginal light on the basic fact that systematic criminal acts were based on concrete policies and orders at the highest state levels. Since the plea bargain nevertheless clearly indicates that other people with more authority were involved in this specific matter, one must expect the PCLU to conduct further proceedings in order to deal with the case in its entirety. However, for the reasons presented above and under the circumstances, the case is at least a positive step forward in terms of establishing accountability for crimes committed during apartheid.

10. *Conclusion*

The prosecution of apartheid era political crimes after the conclusion of the TRC is characterised by delay. During the roughly eleven years that have passed from the end of the TRC in 1998 up to the time of publishing, prosecutions have been sporadic and few in number. Only seven criminal proceedings have as yet been concluded, four of which resulted in a conviction, three in an acquittal of the accused. The PEBCO case is currently pending. Its prospects for a swift continuation are bleak due to the review litigation. Considering the number of cases arising from the TRC that could potentially have been pursued in the interim period of almost a decade, the results have been minimal.[378] A

[377] Ibid.

[378] Although the circumstances are certainly not easily comparable it is nevertheless interesting to note that the process of dealing with systematic crimes after the fall of the east German GDR has led to 420 judgments, including 289 convictions and 131 acquittals. A large proportion of the convictions, at least 98 concerning the

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concentrated process of prosecutions to dispose of the matter within a restricted timeframe has not taken place.

As far as the central units are concerned, structural problems and minimal funding and resources accounted for the complete lack of progress on prosecutions between 1998 and 2003. While the D'Oliveira Unit of the 1990s constituted a well equipped team of experienced prosecutors and investigators with strong political support, support for TRC-related prosecutions after 1998 declined drastically. There was also a clear lack of continuity as none of the prosecutors of the Human Rights Investigative Unit had been involved with TRC cases before and there was not any interaction with the predecessor unit. Thereafter, as outlined above, the responsibility for TRC cases was assigned to inappropriate structures in the DSO.

It was also put forward by NPA officials that the many still running amnesty proceedings prevented the prosecutors from moving ahead. This, however, does not appear compelling, since there must also have been a number of cases, which were not the subject of amnesty proceedings, such as the Basson matter. Also, as the Amnesty Committee had finished its work in 2001, there still were no trials initiated for over two years. NPA officials then maintained that they would have to wait for the political response from the President to the TRC Report of 2003. However, there was no discernable legal obligation to halt criminal proceedings pending a political announcement, especially considering that as far back as 1998, both the TRC and President Mandela had clearly recommended prosecutions to take place.

After 2003 and with the inception of the PCLU the situation indeed improved. The senior members of the unit are very experienced in prosecuting political crimes committed during apartheid and were determined to push ahead with trials. Nevertheless, investigative resources and funding remain a major obstacle. Furthermore, the promising advances made by the PCLU were halted by political interventions in

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crimes at the inner German border, concerned gross human rights violations of state organs (See K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 210).

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late 2004. Thus, between its inception in 2003 and early 2008 only three cases were concluded, two of which, the Blani and Terre'Blanche cases, required very little effort.

Generally, two types of prosecutions can be identified. The first concerns those that were initiated independently by the regional prosecution offices, i.e. the Basson, Bisho-massacre, Luff and Tyani and Gumengu cases. Apart from the Basson matter, which emanated from an investigation that had been conducted by the D'Oliveira team in the 1990s, all of these trials resulted from criminal proceedings, which had already been initiated before or during the TRC and then suspended pending the disposal of amnesty applications. The proceedings were simply resumed by the regional prosecution offices at a later stage, without the involvement and sometimes even without the knowledge of the central units in Pretoria. The other set of cases was prosecuted by the PCLU. The unit initiated proceedings in the Terre'Blanche, PEBCO-Three, Blani and Chikane cases.

In fact, as far as a centralised effort to tackle post-TRC prosecutions is concerned, there have only been these four proceedings initiated by the PCLU. Thus, the assessment of prosecutions that resulted from a political or governmental effort to cope with post-TRC prosecutions through the centrally established units, is especially negative. During the interim period of almost one decade since the end of the TRC in 1998, such efforts only lead to those four proceedings being initiated, only three of which have been concluded thus far. It must also be pointed out that two of those were concluded as part of a plea and sentence agreement and a third, the Blani case, required very little effort. The achievements of the central units on post-TRC prosecutions, and thus, the achievements of the centralised approach, are therefore hardly noteworthy.

In four cases, the accused parties had not applied for amnesty for the crime in question. In all other cases amnesty had been applied for but denied. The prosecutions in the Basson, PEBCO-Three, Tyani/ Gumengu and Chikane cases are of specific significance since they concern cases of systematic state violence against opposition members.

Due to the small number of proceedings and the even smaller number of convictions, it cannot be said that accountability for apartheid era

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political crimes has been furthered to any significant degree. In contrast to the trials before 1998, however, proceedings overwhelmingly concerned politically motivated criminal conduct. Nevertheless, no substantial amounts of new information on systematic crimes during the apartheid era were discovered.

The Basson case was of special importance since it dealt with a wide range of exceptionally egregious, politically motivated, gross human rights violations, which emanated from a systematic SADF programme. Victims range from hundreds of SWAPO captives and Mozambican citizens to high profile ANC members in exile. From the mere scope of the charges the proceedings had the potential to mark a very significant step forward in revealing facts on systematic apartheid crimes. However, the prosecution did not secure a conviction. The validity of the accusations was not confirmed. Definite conclusions, therefore, cannot be drawn from the trial. Moreover the case certainly had a deterrent effect on the general willingness to approach more cases, since the huge amount of resources and money, which was invested, eventually proved to be futile. Nevertheless, the case was dealt with by the Constitutional Court, which, to a certain degree, set out guidelines for the prosecution of TRC-related cases and at least tentatively analysed the matter in the context of international human rights and humanitarian law.[379]

The PEBCO-Three case concerned acts of torture, abduction and murder, in many instances committed by the security police. A number of similar cases had been investigated by the TRC. Most of the facts in this case had already been revealed during amnesty hearings. The

[379] M. Swart 'The Wouter Basson prosecution: the closest South Africa came to Nuremberg?' (2008) 68/1 *Heidelberg Journal of International Law* 225–26, however, points out that the importance of international law in the judgment of the Constitutional Court should not be overestimated, since the legal substance of international law was still largely very foreign to the Court and to the prosecution, was in fact introduced to the litigation in a "last minute" move and handled rather awkwardly generally. Accordingly the Court has been criticised for missing a perfect opportunity to acknowledge the status of international law in South Africa and to apply it completely.

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potential for new information to emerge in a trial is rather limited, should the case continue.

Although the judgment concerning the Bisho-massacre trial also resulted in an acquittal, it nevertheless dealt extensively with the facts concerning the events and made statements regarding where responsibility lay for the crimes. However, the TRC also analysed the matter intensively. The findings of the TRC and of the Court conflict strongly, especially regarding the responsibility for the massacre. Thus, although additional analysis of the events has been made in the trial, it is now even more difficult to evaluate the events and the authority of both findings is, to a certain degree, rendered compromised.

The convictions in the Chikane case, however, were highly relevant to the political backgrounds and policies formed by high-ranking state and government officials concerning the practice of combating the liberation movement by criminal means. Concrete findings on the chain of command, linking government organs to criminal acts, were hardly established by the TRC. Unfortunately, the plea bargain in the Chikane case stops short of shedding light on the exact political responsibilities concerning the order to act against liberation movement leaders. It only indicates that the command stated that consideration should also be given to killing opponents. Nevertheless, the case indicates that criminal proceedings can generally contribute to clarifying the specific chain of command behind apartheid crimes. It remains to be seen if this development is taken further in other cases in order to clarify the responsibility of those at the command level.

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Chapter Three

The Politics of Prosecutions

The question of how to deal with the legacy of the TRC in terms of criminal accountability is part of the overall process of transitional justice in South Africa. The issue is, as is generally the case with matters of transitional justice, to a great extent driven by and charged with political considerations. A former minister in the ANC government even demanded that the matter should be dealt with solely through political channels and not left to the courts.[1] Obviously, the success or failure of prosecutions in the wake of the TRC depends to a large degree on the political support for such proceedings. Moreover, prosecutions have an impact on society, are perceived totally differently politically and have consequences for reconciliation. As the political factors clearly have consequences for the overall process of criminal trials, any assessment of post-TRC prosecutions has to take account of the political context within which such trials find themselves. The following chapter will do just this by touching on the discussions and players, but mainly by focussing on consultations of the government with certain groups of perpetrators and the government's decisions and general policy on the issue.

1. *Overview*

The following subchapter will describe the main political and social interest groups engaged in advocacy for or against prosecutions. Also, a cursory overview of the political discussions and public debates along

[1] *Apartheid crimes a political issue—Maharaj* SAPA, Aug 1, 2007.

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with a collection of government's most important statements on the subject will be given.

1.1 *Interest groups*

During the operation of the TRC a wide range of NGOs, especially from the human rights sector, actively took part in the process. The number of organisations engaged with the issue of post-TRC prosecutions after 1998 is minimal compared to this. However, especially groups and networks acting on behalf of former members of the state security forces continue to exist and remain influential. The most important organisations will be described briefly to provide a background to their involvement of different forms, which will be focussed on at a later stage.

1.1.1 *Human rights organisations*

Most NGOs, which are engaged in promoting human rights in South Africa and which supported the TRC and the transition to democracy, deal only occasionally with issues of criminal accountability in the wake of the TRC.

The Khulumani Support Group[2] is the NGO most actively engaged in advocacy efforts on post-TRC prosecutions. The Khulumani group, which was founded in 1995, represents about 54,000 victims of apartheid era violence. During the work of the TRC its efforts were aimed at helping victims to take part in and benefit from the TRC process. Nowadays, the organisation seeks the implementation of proper reparations[3] for apartheid victims, the full-scale prosecution of apartheid operatives and generally the recognition of victim interests in the wake of the TRC. Khulumani calls for apartheid criminals to be held accountable since only then can victims attain justice for their endurance of gross human

[2] See http://www.khulumani.net.

[3] See on the reparations for apartheid victims as envisaged by the TRC scheme: K. Koppe *Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika* (2005).

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rights violations.[4] Generally, the amnesty process was perceived as a very generous offer to perpetrators and they suggest that it is now time for victims to demand their share of justice. Khulumani presses for more trials and gathers affidavits of victims including accounts of the human rights violations they had to endure and information on the respective perpetrators.[5] Such affidavits are intended for possible use in criminal trials. Moreover, these efforts are aimed at conserving the records on human rights violations which have yet to be accounted for.[6]

Another significant organisation involved in advocacy on post-TRC prosecutions is the Foundation for Human Rights.[7] The Foundation for Human Rights is a grant-supplying organisation, distributing funds to various human rights and social work projects in South Africa. It is involved in funding legal actions aimed at effecting the implementation of proper trials. The executive director of the Foundation for Human Rights, former TRC commissioner Yasmin Sooka, is one of the most vocal and active advocates for the implementation of post-TRC trials.

Apart from this, there are few human rights NGOs actively involved in advocacy efforts on post-TRC prosecutions. As such, the Centre for the Study of Violence and Reconciliation in Johannesburg[8] (hereinafter CSVR) and the Cape Town-based Institute for Justice and Reconciliation[9] are worth mentioning.

1.1.2 *Security forces side*

There are two organisations or structures representing former members of the security forces. Neither group has been represented often in the media or public. However, their influence on and involvement in consultations with the government is or was significant. One organisation was an alliance engaged in support for former members of the SADF. The other organisation is acting on behalf of former members of the

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[4] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[5] Ibid.

[6] Ibid.

[7] See http://www.fhr.org.za.

[8] See http://www.csvr.org.za.

[9] See http://www.ijr.org.za.

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security police. Both groups were founded between the completion of the negotiations on the transition to democracy and the beginning of the TRC process. It was sensed that in the period of transitional justice it would be vital to form organised structures to react to prosecutions and TRC inquiries.

a. Kontak Buro

With regard to the SADF, an elite group of formerly high-ranking generals was formed to support former members of the military.[10] The group consisted of at least five to seven SADF generals, among them the former Chief of the SADF, General Jan Geldenhuys,[11] in a leading position and other prominent generals such as "Kat" Liebenberg and Georg Meiring. Also, the former Minister of Defence, General Magnus Malan and the former Chief of the SADF, General Constand Viljoen, occasionally took part in meetings of the group, apart from other former officers.

The group developed a structure to provide support for former soldiers of the SADF who, in connection with their occupation in the army, became involved with the TRC either because they were the subjects of investigations, implicated through amnesty applications, wished to apply for amnesty themselves, or were, directly or indirectly, affected by criminal investigations. The facility was called the *Kontak Buro* (Afrikaans for contact office). The *Kontak Buro* was basically a staffed office that could provide access to a certain support network, organise legal advice or counsel, provide financial support and advice SADF soldiers whether or not to apply for amnesty.[12]

The generals perceived the inquiries of the TRC into the activities of the SADF merely as a one-sided attack on the integrity of the SADF and

[10] Unless otherwise stated, the following information concerning the SADF group is taken from an interview with Jan Geldenhuys in Pretoria on 10 May 2006.

[11] General Geldenhuys was Chief of the South African army from 1980 to 1985 and of the SADF from 1985 to 1990.

[12] The organisation was criticised by the TRC of having urged SADF members not to cooperate with the TRC, thus contributing to the general lack of cooperation with the TRC on the side of the SADF (See *TRC Report*, vol. 6, s. 3, chap. 1, paras. 22–23).

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its former members. The TRC was considered to be biased, unjust and untrustworthy.[13] Instead of cooperating with the process, the former SADF leadership felt responsible to defend themselves and their former colleagues against the perceived attack. Thus, apart from the initial focus on providing support to former SADF members, after the completion of the TRC in 1998 the group became involved in consultations with the government on the implementation of a further amnesty scheme in the wake of the TRC.

b. Foundation for Equality before the Law

For former members of the apartheid security police and generally for members of the police who had been involved in political conflicts, an organisation called the Foundation for Equality before the Law is actively engaged in support and advocacy efforts concerning prosecutions.[14] As the transition to democracy in South Africa was underway, and the decision had been reached to examine the atrocities of the apartheid past at the TRC, a support network was founded to react to the anticipated challenges for security force members. It contributed to this development, that the security police strongly felt that their former political superiors in the apartheid government had turned away from them and support was largely absent. Van der Merwe points out that F.W. de Klerk and Adriaan Vlok were exceptions in that they continued to support the interests of former security police operatives.

The members of the Foundation for Equality before the Law consist largely of former security police operatives.[15] It has reduced in membership size from considerably higher numbers during the TRC to about 30. Gideon Nieuwoudt, who was a main suspect in the PEBCO-Three case, was also a member of the Foundation for Equality before the Law. The management board consists mostly of formerly high-ranking

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[13] See also *TRC Report*, vol. 6, s. 1, chap. 4, paras. 31–32.

[14] Unless otherwise stated, the following information on the organisation acting for former police members is taken from an interview with Johan van der Merwe in Pretoria on 5 May 2006.

[15] Yet the organisation is open to every state security force member who participated during the apartheid years in fighting the liberation struggle.

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officers of the SAP, among them apparently with van Staden, Otto and van der Merwe, three of the accused in the Chikane matter.[16]

As the organisation's name suggests, according to its mission declaration, the Foundation for Equality before the Law wants to ensure equality before the law for its members.[17] More precisely, according to the constituting mission declaration, the organisation's aim is to ensure for security force members and anyone who had been involved in the counter-revolutionary struggle comprehensive protection and fair treatment in the face of the TRC and criminal trials.[18] In practical terms, this means that the organisation, similar to the *Kontak Buro*, is aimed at providing legal and financial facilities to security police members who were concerned by amnesty applications or who have to face charges for their activities in the police. Thus the Foundation for Equality before the Law was most active during the operation of the TRC, when it advised and assisted former security police members with amnesty applications. Thereafter, its activities were increasingly directed at helping those avoid prosecution who had been denied amnesty or had not applied for amnesty. Since the TRC processes, the Pretoria-based advocate and former state attorney of the apartheid government Jan Wagener has been an important supporter and advisor, both legally and politically, on the organisation's purposes.[19] The political advocacy efforts of the Foundation for Equality before the Law are directed at pressing for the permanent cessation of any TRC-related prosecutions

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[16] However, the Foundation's chairperson Johan Botha comes from the civil sector. His deputy is General Johan van der Merwe. The Foundation's secretary is Major-General J.A. Steyn, formerly a high-ranking security police official in Natal. Other members of the management committee are J.H. le Roux, C. Colyn, H.D. Stadler, P.D. Uys, J.H. van Staden, D. Davidson, I.P. Minnaar, G. Otto and W.D. Pelser.

[17] That principle was unfortunately not pursued by the Foundation's members with equal vigour during the days of apartheid.

[18] Constitution and Mission Declaration of the Foundation for Equality before the Law.

[19] Jan Wagener very successfully acted as lawyer for many security police members seeking amnesty before the TRC. He continues to be the lawyer of a number of police who are in danger of being charged or who have already been charged and is politically involved to a significant extent.

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and for finding a solution as to how to avoid further trials. To this end, as will later be shown, after 1998 it engaged in discussions with the government.

The motivation to avoid prosecutions also derives from the deep-rooted conviction that the crimes, which were obviously committed by the police, occurred in warlike circumstances during which it was a just obligation to defend the state against the 'terrorist onslaught' of the liberation movement. Although it is often accepted that in many instances boundaries of legality were overstepped, there is little recognition that the security forces' measures could not be justified, since their very purpose, the maintenance of a system and state based on the racist suppression of millions of people, was deeply unjust and unlawful.[20] Against this background, many aligned to the Foundation for Equality before the Law perceive the TRC and prosecutions as biased and unfair and a simple case of victor's justice.

Obviously, the viewpoints and activities of the two organisations are largely similar. Yet there was never any attempt to coordinate their efforts, although the Foundation for Equality before the Law's doors are open to former SADF members. This separation was intended by the military generals, who maintained it on the basis that different legal circumstances applied for the operations of SADF members, who mostly operated abroad in situations where rules of international conflicts and war applied, whereas the security police mostly operated under secret circumstances in South Africa and were bound by South African laws.[21] Furthermore, the military felt less vulnerable to prosecutions and accordingly did not want to side with the police.[22]

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[20] This conclusion derives from interviews with Jan Wagener in Pretoria on 8 May 2006 and Johan van der Merwe on 5 May 2006 in Pretoria as well as from H.D. Stadler *The other side of the story* (1997).

[21] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). Compare also the question whether South African courts have jurisdiction to try crimes abroad (see *supra* Chapter 2(2.3)).

[22] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). This is also reflected by the fact, that far lesser SADF members applied for amnesty at the TRC than members

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1.2 *Public debate*

The public discussion in the aftermath of the TRC on accountability for politically motivated human rights violations has generally been very muted and was largely confined to a few interested and concerned NGOs.[23] Public awareness of issues concerning transitional justice in South Africa has markedly declined. Some commentators suggested that after the end of the TRC, the Commission's recommendations and the tasks arising out of its work, such as prosecutions and reparations, were almost completely disregarded and largely disappeared from the political agenda.[24] In public discussions on the matter, it is necessary to distinguish generally between the conservative faction, which is opposed to prosecutions, and the human rights faction, which is calling for more trials. However, specific debate often erupted on occasions of specific prosecution events. The two factions will be discussed in turn below.

1.2.1 *The conservative spectrum and the call for even-handedness*

The conservative political spectrum and parties representing a mainly white constituency assume a generally dismissive position towards prosecutions. Many, like the right wing Afrikaner party Freedom Front Plus, reject prosecutions completely.[25] Importantly, many organisations, such as the Democratic Alliance, the conservative F.W. de Klerk Foundation or the Freedom Front Plus constantly demand that prosecutions, should they take place, be 'even-handed' and equal.[26] Prosecutions as such must not only focus on former security force members but must also include

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of the security police, who were far more often concerned by prosecutions (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 312–14).

[23] Interview with Piers Pigou in Johannesburg (May 6, 2006); N. Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 46.

[24] M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al., (eds.) *State of the nation* (2003) 78 at 86.

[25] Freedom Front Plus, press statement *FF Plus says NPA must prosecute Mbeki and other ANC* (Jan 25, 2006).

[26] Interview with Sheila Camerer in Cape Town (March 30, 2006); Freedom Front Plus, press statement *FF Plus says NPA must prosecute Mbeki and other ANC* (Jan 25, 2006); D. Stewart *Panel presentation at the Institute for Justice and Reconciliation*

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ANC and other liberation movement members, maybe even President Mbeki himself. Even-handed prosecutions and applying equal standards is allegedly demanded by the constitution's principle of equality before the law.[27] The fact that between 1984 and 1994, thousands of people were killed as a result of liberation movement activities would have to be taken into account.[28] If prosecutions are one-sided, post-TRC trials could be perceived by the white population as an act of vengeance and as being political trials. This, thus, could lead to further alienation between the ethnic groups and impact negatively on reconciliation and nation-building.[29] The NPA's list of priority cases is cited as foundation for the suspicion that prosecutions will remain one-sided, as it allegedly does not contain members of the ANC and hardly any of the liberation movement.[30]

The request to halt TRC-related prosecutions is further substantiated with the negotiations and indemnity laws in the early 1990s.[31] There, the NP representatives were convinced that legislation for a general amnesty was possible. A conditional amnesty allegedly came unexpectedly and was found to be in conflict with the Interim Constitution. Furthermore, the former NP government had conceded to far-reaching indemnity laws on the basis of which thousands of ANC members had been released from prison or were indemnified for often very serious crimes. It is argued that this should also be used as a precedent for former security force personnel. However, against this background it would now be totally unjust to prosecute former apartheid security force members on a broad basis.[32] It was also suggested that trials

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conference 'The TRC: ten years on' (April 20, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[27] D. Stewart *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[28] Ibid.

[29] Ibid.; *Nieuwoudt case will drive home a message* Cape Times, Feb 13, 2004.

[30] E-mail from Sheila Camerer (June 13, 2006).

[31] F.W. de Klerk *Amnesty rules for all* Financial Mail, July 27, 2007 and D. Stewart *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[32] Ibid.

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could impact negatively on the national project of reconciliation since it might be perceived by the white population as a one-sided process and would certainly revive the conflicts of the past.[33]

1.2.2 *Human rights and victim sector*

After 1998, a very prominent member of the human rights sector made a very controversial comment on post-TRC prosecutions. In 1999, the former chair of the South African Human Rights Commission, Reverend Barney Pityana, called for all TRC-related prosecutions to be abandoned and for legislation to be enacted to impose a moratorium on all trials.[34] He suggested that trials would be likely to fail, thus be futile, such as the Malan trial. Trials would only open up old wounds of the past and would accordingly not serve the purposes of reconciliation and nation-building and would only consume time and resources far more urgently needed to tackle the high current crime rate. Although such statements are rather rare, it is likely, nevertheless, that they express typical and widespread concerns regarding prosecutions, especially of those in political circles.

However, after 1998 the former chairperson of the TRC, Archbishop Desmond Tutu, called strongly for the institution of criminal trials. He has continuously emphasised his view that the TRC legislation requires prosecutions to go ahead and that justice must be served concerning the rights of victims, who, in accepting the amnesty scheme, accepted a significant concession and are now entitled to demand accountability.[35] He is of the opinion that failure to prosecute those who had been denied amnesty subsequently would foster a culture of impunity and undermine the rule of law.[36] In 2004, Tutu also warned against the introduction

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[33] Interview with Jan Wagener in Pretoria (May 8, 2006).

[34] Comments cited in D.B. Ntsebeza 'The uses of truth commissions' in R.I. Rotberg and D. Thompson *Truth v. justice* (2000) 158 at 166 and J. Battersby *Call to stop apartheid prosecutions* The Sunday Independent, July 24, 1999.

[35] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[36] Ibid.

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of any kind of further indemnity or amnesty mechanism.[37] He accordingly welcomed the arrests in the PEBCO-Three case in early 2004 but, however, was critical in saying that generally, much more needed to be done on prosecutions.[38] The TRC's former deputy chairperson, Alex Boraine, in late 2006 also lamented the slow progress stating that the NPA and the government are far too slow and undedicated in their approach to post-TRC prosecutions.[39]

Generally, most organisations and people working in the human rights sector strongly call for prosecutions to take place and argue that more needs to be done to properly achieve accountability after the TRC. They are very aware of the slow and minimal progress of prosecutions and are extremely critical of the government's approach.[40] The government is often accused of being too hesitant, reluctant and unwilling to initiate prosecutions. The victim support organisation Khulumani has strongly criticised the government for utterly ignoring victims' interests in its approach to prosecutions.[41] It argues that far more criminal trials needed to be instituted[42] and that prosecutions are generally delayed too much and are taken haphazardly.[43] The Foundation for Human Right's executive director, former TRC commissioner Yasmin Sooka, has also criticised the government heavily for the delay in pushing ahead with

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[37] C. Terreblanche *Tutu warns against blanket amnesty* The Sunday Independent, April 18, 2004.

[38] *Tutu slates SA's lack of apartheid prosecutions* SAPA, Dec 15, 2005.

[39] *SA 'should try apartheid-era torturers'* SAPA, Nov 25, 2006.

[40] A great number of the unanimous and wide-ranging points of criticism were voiced at a conference in 2006 commemorating the 10th anniversary of the first Human Rights Violations Committee hearing of the TRC (*The TRC: ten years on*, conference organised by the Institute for Justice and Reconciliation in Cape Town from 20 to 21 April 2006. See Institute for Justice and Reconciliation, *Statement: the IJR conference on the TRC: ten years on* (2006)). See for criticism of human rights organisations also: *infra* Chapter 3(3.5).

[41] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[42] M. Jobson *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[43] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

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prosecutions.[44] She has argued that the lack of prosecutions is contributing to a culture of impunity.[45] Moreover, both organisations demand that prosecutions focus to a greater extent on higher echelons of the apartheid regime, i.e. politicians and generals of the old regime, rather than ordinary rank and file activists, such as Ronnie Blani.[46] As such, the former President FW de Klerk should also be held accountable for his presumed knowledge and involvement in apartheid crimes.[47] Criticism of the government's supposedly lame response to the TRC recommendations was even voiced by international organisations, such as Amnesty International and Human Rights Watch.[48]

The request for even-handed prosecutions and the proposition that it would amount to a gross injustice should the NPA focus primarily on prosecuting former security forces and apartheid government representatives is strongly rejected by organisations and people from the human rights sector.[49] It would be totally disingenuous to lament one-sided prosecutions since liberation movement activists were prosecuted extensively during apartheid. Thousands were tried and imprisoned because they fought for their liberation, over 100 were even executed for politically motivated offences.[50] In contrast, criminal accountability for the atrocities of the apartheid state has, as yet, been absolutely

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[44] Y. Sooka *Letter to the minister of justice and constitutional development* (Sep 8, 2005) (on file with author).

[45] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[46] Ibid.; Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[47] Ibid.

[48] Amnesty International and Human Rights Watch, briefing paper *Truth and justice: unfinished business in South Africa* (Feb 2003).

[49] Interview with Madeleine Fullard in Pretoria (May 4, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Piers Pigou in Johannesburg (May 6, 2006). See also C. Villa-Vicencio *The TRC still has lessons for our future* The Sunday Times, April 23, 2006.

[50] See M. Coleman (ed.) *A crime against humanity* (1998) 81–84 and *TRC Report*, vol. 2, chap. 3, paras. 21–37 on death penalty; M. Coleman (ed.) *A crime against humanity* (1998) 77–80 on political imprisonment and M. Coleman (ed.) *A crime against humanity* (1998) 43–53 on detention without trial.

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minimal.[51] Against this background the priority of prosecuting crimes of the apartheid state needed to be far higher than for ANC and liberation movement members. It is also important to consider that Ronnie Blani, one of the first convictions in a post-TRC trial, was a former liberation movement member.

1.2.3 *Debate erupting on the occasion of specific prosecutions*

Public debate on the issue of post-TRC prosecutions in the media and political sphere always intensified around significant events, such as the presentation of the last TRC Report volumes in 2003 or the start of specific prosecutions. Tensions and debate at the time of prosecutions on a regional level were commonplace. For example, during the proceeding in the Luff case,[52] debates between the ethnic groups on ethnic and apartheid-related issues in the specific area were prevalent.

During the first proceedings in the PEBCO-Three case against former security police officers in 2004, some political representatives of the Afrikaner population criticised the arrests, claiming they were vindictive and could harm reconciliation.[53] Others from the victim and human rights sector welcomed them as the first major step towards post-TRC accountability.[54] However, the former head of the TRC research department and executive director of the NGO Institute for Justice and Reconciliation, Charles Villa-Vicencio, on the occasion of the PEBCO-Three prosecution also warned of certain dangers connected to prosecutions. In this regard, he was quoted as stating that the PEBCO-Three prosecution could cause unrest and could have serious implications for the process of nation-building and reconciliation.[55] As the accused persons in that case were ordinary rank and file officers, logically, the whole chain of command up to those who actually gave the orders, thus, those truly responsible, needed to be pursued in order

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[51] See also *supra* Chapter 1(4.).

[52] See also *supra* Chapter 2(4.).

[53] *'Nieuwoudt case will drive home a message'* Cape Times, Feb 13, 2004.

[54] Ibid.

[55] J.J. Joubert and A. Muller *Versoening in gedrang* Beeld, Feb 12, 2004.

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to do justice.[56] He substantiated these concerns by stating that although prosecutions were right in principle, if they failed to focus on all possible perpetrator groups and ranks, they could be regarded as one-sided and unbalanced, which could have implications for reconciliation between the ethnic groups.[57]

Ronnie Blani's trial and the judgment of April 2005 were criticised from various sides. Ackermann was heavily criticised by the relatives of the deceased for having agreed to a soft sentence.[58] The PCLU was also criticised by the ANC, former liberation movement activists and members of the human rights sector for having prosecuted Blani at all.[59] Such critics consider that Blani's prosecution should not have been a high priority. Considering his personal circumstances laid out above[60] and the fact that he was probably on the lowest tier of the liberation movement command structure, critics claim that the PCLU should make other cases a much higher priority, especially if they involve persons from the upper echelons of the security forces with far greater responsibility and individual guilt who in many cases are still not sentenced.[61]

There was also intense public scrutiny at the beginning of the court proceedings in the Chikane case in 2007. The Khulumani support group and many apartheid victims protested against the decision as being too weak and called for extended criminal trials for those responsible for the crimes committed by the apartheid security forces.[62] On the other hand, victims of ANC attacks and/or their relatives and other mem-

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[56] C. Villa-Vicencio *Let apartheid-era perpetrators be heard* The Sunday Independent, Jan 29, 2006.

[57] E-mail from Charles Villa-Vicencio (May 31, 2006).

[58] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[59] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004; Interview with Madeleine Fullard in Pretoria (May 4, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[60] See *supra* Chapter 2(8.).

[61] N. Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 44–45. Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[62] *Vlok trial: different conclusions drawn* SAPA, Aug 20, 2007; *Theatre of differences outside Vlok trial* SAPA, Aug 16, 2007.

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bers of organisations supporting the interests of the white population protested against the trial and demanded that ANC leaders should also be held accountable.[63]

1.3 *Government and ANC statements*

The South African government and the ANC have only rarely made public statements on the issue of post-TRC prosecutions. When the TRC's operation had come to an end in 1998, President Mandela strongly emphasised that criminal trials must start within a fixed time frame[64] which

> …needs to be realistic, taking into account how long it takes for evidence to be secured and preparations made for successful prosecution. Yet a time frame for this process is necessary; for we cannot afford as a nation and as government, to be saddled with unending judicial processes which can easily bog down our current efforts to resolve problems of the present.[65]

Mandela added that:

> These matters will of course be handled by the Office of the National Director of Prosecutions. And we believe that in discharging this responsibility the Director will take into account not only the critical need to establish accountability and the rule of law, but also to advance reconciliation and the long-term interests of our country.[66]

He further pointed out that:

> …[W]e are not contemplating a general amnesty under any guise. Such an approach would go against the grain of the very process that we all

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[63] Ibid.

[64] See text accompanying *supra* Chapter 1 note 58.

[65] Opening address by President Nelson Mandela in the special debate on the report of the Truth and Reconciliation Commission (National Houses of Parliament) (Feb 25, 1999).

[66] Ibid.

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> agreed upon; it would undermine the culture of accountability that we seek to engender.[67]

Thereafter government politicians were rather reticent on the subject. However, the then Deputy President, Thabo Mbeki, had already indicated in early 1999 that a new amnesty could nevertheless be considered as he stated in an address to parliament his dismissive view towards prosecutions that:

> Quite a lot of people in KwaZulu-Natal did not apply [for amnesty] and with the level of violence that took place in that province, if you dig and dig and dig, you are going to have to arrest a lot of people. That can't be right. A number of generals in the SA Defence Force are very keen that this matter be dealt with, because their own sense, too, is that there may very well be significant numbers of people in the former SADF who didn't apply, and again, with regards to them, it would not be right week after week to charge people with something that happened in 1987.[68]

Moreover in May 2002, Mbeki, who had meanwhile become president, pardoned 33 prisoners who were aligned to the ANC and PAC.[69] Most of them had been sentenced for politically related offences, two-thirds had either been denied amnesty or not applied for amnesty.[70] At the ANC's national conference in December 2002[71] the discussion of guidelines for a broad national amnesty, possibly in the form of presidential pardons, was scheduled.[72] According to the head of the ANC presidency, Smuts Ngonyama, the ANC generally supported the idea to introduce a new amnesty law.[73] However the proposals on the ANC's national conference were strongly motivated by the volatile situation in KwaZulu-Natal and

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[67] Ibid.

[68] Cited in J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265.

[69] S. Ngesi 'The presidential pardons and the media' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 294 at 294.

[70] Ibid.

[71] The ANC's 51st national conference took place from 16 to 20 December 2002 in Stellenbosch.

[72] P. Dickson *ANC to seek broad national amnesty* Cape Times, Dec 11, 2002.

[73] Ibid.

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the fact that many IFP members did not receive amnesty.[74] Ngonyama nevertheless subsequently declared that his party was generally against running trials in the style of the Nuremberg trials, since this would occur at the cost of nation-building.[75]

Such developments and statements triggered speculation in the public that the government intended to enact another amnesty law in the wake of the TRC.[76] Some even claimed a general amnesty for the crimes relating to the apartheid conflict was considered.[77] However, in his speech at the tabling of the TRC Report in April 2003, Mbeki eventually ruled out the possibility that a general amnesty would be introduced and took up a strong and seemingly unequivocal stance for prosecutions as he stated that

> …there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society.[78]

He went further to stress that 'Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were the receiving end of gross human right violations.'[79] He stated that it is 'in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it

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[74] Ibid.

[75] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 71.

[76] J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265; J. Steinberg *Amnesty quandary looms for judges* Business Day, June 8, 1999.

[77] P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; *Victim's to fight amnesty* Mail & Guardian, June 7, 2002.

[78] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[79] Ibid.

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believes deserve prosecution and can be prosecuted.'[80] However, he also made rather vague remarks, which indicate that other political factors will have to be considered in any approach to post-TRC prosecutions, stating that the government

> …should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.[81]

The President concluded that the NPA

> …will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.[82]

He further stated that 'in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining

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[80] Ibid.

[81] Ibid.

[82] Ibid. This announcement has led to considerable confusion. In its wake various media reports referred to a new deal on indemnity provisions for apartheid era perpetrators and a new mechanism of disclosure (See e.g. C. Terreblanche *New deal for apartheid abuse perpetrators* The Sunday Independent, April 20, 2003). In fact no specific arrangement had been made. Van der Merwe shortly after the speech contacted the NPA in order to find out what new process could be meant. The NPA was totally unaware of any new arrangements and what the President was actually referring to (Interview with Johan van der Merwe in Pretoria (May 5, 2006)). The NPA obviously had not been advised on the intentions behind the announcement. The arrangements Mbeki was referring to probably concern the normal instruments of plea-bargaining and state witness arrangements (see sections 105A and 204 of the Criminal Procedure Act). As such it is noteworthy that, only years later, with the Chikane case for the first time a plea bargain arrangement was entered into, which also included that the accused disclose information and cooperate in further trials (see *supra* Chapter 2(9.)).

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the appropriate course of action.'[83] Such statements will later be put into context with regard to the governmental perspective concerning its actual approach towards prosecutions.

In 2007, there were announcements made regarding yet another pardon process concerning liberation movement members convicted of political crimes related to the apartheid conflict.[84]

2. *Bargaining Over the TRC's Legacy*

In 2002, rumours on secret consultations between former generals of the SADF and the government were highlighted in the media.[85] The South African government and the ANC did indeed engage in secret talks and consultations with representatives of the SADF and the security police over a long period from the end of the TRC in 1998 until about early 2004. Two separate processes of consultations concerning the two factions of the former security establishment took place.[86] Details of the secret meetings were never disclosed to the public.[87] As will later be outlined, the common denominator of the talks was that a legislative solution should be reached on how to avoid prosecutions in the wake of the TRC. The consultations are indicative of the real motivations and political considerations of the government during the years after the end of the TRC in 1998 and also provide valuable background information for the evaluation of later developments.

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[83] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[84] *Presidential pardons in the spotlight* SAPA, Nov 15, 2007.

[85] M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 93; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

[86] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[87] P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

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2.1 *Consultations with the security police*

During and after the operation of the TRC, the Foundation for Equality before the Law occasionally conducted talks with the government concerning the amnesty proceedings and general questions of accountability.[88] Especially after the main work of the TRC was completed in 1998, consultations concerning post-TRC accountability were conducted, which mostly involved high-ranking members of the government. On behalf of the former apartheid state employees and the Foundation for Equality before the Law, former President F.W. de Klerk assumed a central role in the consultations. De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government. Apart from that the organisation was in contact with various other government officials and submitted proposals.

The Foundation for Equality before the Law's aim in the consultations was to find a solution to avoid the prosecution of former members of the security police who had not received amnesty. Allegedly, legislation for a general amnesty was never requested. A general amnesty would certainly have served the organisation's purposes in avoiding trials. However, it was clear that a general amnesty was not an option since it would have seriously damaged the TRC process and its scheme of conditional amnesties and would thus not have been feasible politically. Accordingly other legislative options had to be explored. After 1998, the Foundation for Equality before the Law initially advocated a procedure, which envisaged that indemnity from prosecution could be granted, if all details regarding the crime in question were disclosed. This would therefore have reproduced the TRC's precondition of amnesty subject to a full disclosure. The proposal was later altered so that the granting of indemnity would be dependent only on the crime in question falling within the legal ambit of section 20(1) of the TRC Act. This would mean that the act was associated with a political objec-

[88] Unless otherwise stated, the information laid out in this subchapter comes from an interview with Johan van der Merwe in Pretoria on 5 May 2006. The consultations were conducted in strict confidentiality. Apart from the broad framework, details concerning negotiations with security police members could thus not be provided.

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tive and was committed in the course of the conflicts of the past.[89] The proposal was quite similar to the indemnity laws of the early 1990s.[90] It was proposed that a full disclosure in terms of the TRC Act should not be required since the amnesty proceedings had shown that there were still many uncertainties as to when a full disclosure was in fact made.[91] According to the proposal, such indemnity proceedings should be conducted before a judge.[92]

Although among members of the Foundation for Equality before the Law the government had raised expectations that a solution according to the proposals was desirable, no agreement was reached. The talks continued until about 2004. The consultations had allegedly highlighted the government's lack of political will to adequately react to the TRC's recommendations on prosecutions, which also explains the huge delay in initiating trials.[93]

2.2 *Consultations with the generals*

More or less concurrently with the consultations with the police representatives, starting in 1998, the government conducted talks with a group of high-ranking former generals of the SADF.[94] Initially, the former chief of the SADF, General Constand Viljoen[95] was approached by one of the leading members of the ANC and government at that time, Jacob Zuma,[96] with the aim of consulting over questions of criminal

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[89] E-mail from Johan van der Merwe (May 31, 2006).

[90] See *supra* Chapter 2 note 297.

[91] E-mail from Johan van der Merwe (May 31, 2006).

[92] Ibid.

[93] Interview with Jan Wagener in Pretoria (May 16, 2006).

[94] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[95] After his career in the SADF, Viljoen went into politics as the co-founder and leader of the right-wing Afrikaner party *Vryheitsfront* (the predecessor of the Freedom Front Plus) and was a member of parliament (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 83–84 and 302–3).

[96] The later deputy President of South Africa was at the time mainly involved in regional politics of his home province KwaZulu-Natal (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317–18).

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accountability in the wake of the TRC.[97] Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the *Kontak Buro*,[98] who were, thus, already working intensely on amnesty issues and prosecutions. He immediately referred Zuma to the network group of generals around Geldenhuys.[99]

2.2.1 *The process of meetings*

General Geldenhuys agreed to meet with Zuma. A series of frequent meetings, negotiations and consultations ensued from 1998. The main process of consultations was conducted over four years until early 2003.[100] A small number of meetings, however, infrequently continued until 2004.[101] The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms.[102] The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who is closely connected to leading ANC members, especially to Jacob Zuma. All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.[103]

Zuma was asked to conduct the talks on behalf of the government or ANC.[104] Apart from him, various other high-ranking members of the ANC, such as the then Minister of Justice Penuell Maduna or Mathew Sposa, Sidney Mufamadi and Charles Nqakula also participated occasionally. On various occasions Thabo Mbeki was also present, as Vice

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[97] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[98] See *supra* Chapter 3(1.1.2).

[99] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[100] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[101] Ibid.

[102] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[103] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[104] Interview with Jürgen Kögl in Johannesburg (May 12, 2006). Since in practice the distinction between ANC and government concerning the negotiations was often blurred, the two expressions will be used synonymously.

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President and later in his capacity as the President.[105] On the side of the generals, Jan Geldenhuys assumed a leading role. He participated along with two to four other generals belonging to their support group. Both sides were accompanied by legal advisors. The main process of consultations came to an end in or about early 2003. Only as a matter of courtesy did a few meetings continue to take place until 2004.[106]

2.2.2 *Motivation of the government*

The main catalyst for Zuma's approach to the generals was the still very volatile political situation in KwaZulu-Natal, which was due to prolonged political tensions between supporters of the ANC and IFP during the late 1990s.[107] Zuma was at that time successfully conducting mediation and appeasement efforts between the two political factions of the ANC and IFP in order to contain possible fresh occurrences of violence.[108] The question of accountability for political crimes in the wake of the TRC was considered to be a critical issue in this regard.[109] As a great amount of politically motivated human rights violations had occurred in the conflict between IFP and ANC, especially during the negotiation period between 1990 and 1994, and considering that many IFP members accused of such crimes had not applied for amnesty, it was feared that the release of the TRC Report and prosecutions in its wake could stir up conflict again and be a constant source of unrest in the region.[110] On top of that, the second democratic elections were imminent and it was crucial to avoid new conflicts flaring up.[111] The initial intention was, thus, to create an amnesty scheme which would specifically cover the political crimes that happened between ANC and

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[105] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[106] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[107] Ibid.

[108] P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317. See also *supra* Chapter 1(2.).

[109] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[110] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[111] Telephone interview with Jürgen Kögl (June 14, 2006).

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IFP supporters in KwaZulu-Natal.[112] Yet it was clear that, regarding the constitutional framework and the political implications for the TRC amnesty scheme, a purely local solution would be almost impossible to implement. The generals also categorically refused to support a regionally confined amnesty process.[113]

They were contacted on this specific issue for various reasons. According to Kögl, the government intended to ensure support of other influential groups and important role-players of the apartheid regime, such as the generals, in order to put any possible solution, even if initially mainly focussing on KwaZulu-Natal, on a wider national basis.[114] The generals were already dealing with amnesty issues, had legal expertise, and as such, were relevant candidates to be canvassed for such support.

There was also a range of other specific reasons why the generals were contacted. According to Kögl, one reason for the government's initiative was the SADF's, and therefore the general's alleged involvement in the KwaZulu-Natal conflicts between the IFP and ANC.[115] During the TRC process the former top command of the SADF was accused of having fuelled the conflict between the ANC and IFP during and before the negotiations towards a transition to democracy, in order to weaken the position of the ANC. Allegations were made that weapons and expertise had been supplied to Zulu fighters. There were strong signs that a so-called "third force", established and steered by the security forces, had fuelled the atrocities committed by IFP supporters against ANC supporters, not only in Natal but also to a great extent in the Transvaal areas.[116] There were strong indications of SADF involvement in such activities, such as had been thxe case when weapons were supplied to

[112] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[113] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[114] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[115] Telephone interview with Jürgen Kögl (June 14, 2006).

[116] See *TRC Report*, vol. 6, s. 4, appendix, paras. 1–43; *TRC Report*, vol. 2, chap. 7, paras. 497–551; *TRC Report*, vol. 5, chap. 6, paras. 126–29.

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the Inkatha Caprivi trainees.[117] Geldenhuys and other generals had been charged in 1995 for their alleged involvement in these Caprivi activities and the KwaMakutha massacre.[118] The government, when approaching the generals, was mindful of the fact that the SADF had supplied the Zulu fighters with weapons on a large scale and that the locations of a number of the hidden weapons caches, which had been established in the region during the last apartheid years, remain as yet unknown.[119] Government officials were wary that the generals could still possess knowledge of such still hidden and unknown weapons caches, established during the late 1980s and early 1990s, that they could, thus, still exercise negative influence on the peace process between IFP and ANC and that they could generally, through the possible third force networks, in some way thwart appeasement attempts or contribute to a re-ignition of the conflict.[120] These factors were allegedly a major reason for integrating the generals in any future approach to post-TRC accountability, to contain their potentially negative influence.[121] Such considerations are also clearly indicated in the aforementioned speech by President Mbeki.[122]

It was also considered that the TRC process suffered from a lack of sufficient findings on SADF activities, especially concerning those that took place in South Africa.[123] Very few SADF members had applied for amnesty, despite the fact that the SADF was involved in many gross human rights violations.[124] The SADF leadership practically refused

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[117] *TRC Report*, vol. 6, s. 4, appendix, para. 18.

[118] See *supra* Chapter 1(4.).

[119] Telephone interview with Jürgen Kögl (June 14, 2006).

[120] Ibid.; Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[121] Ibid. Whether the generals really had any potential to thwart the appeasement attempts in KZN remains unclear. Geldenhuys insists that the generals neither would engage in any kind of violent activity nor would they have any special knowledge of weapons caches or have the resources to exercise negative influence on mediation efforts in KwaZulu-Natal.

[122] See text accompanying *supra* Chapter 3 note 81.

[123] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Telephone interview with Jürgen Kögl (June 14, 2006).

[124] *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

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completely to cooperate with the TRC. There were no disclosures made on the involvement in violence during the negotiation period.[125] In this regard the TRC also referred to certain networks with access to weapons and resources.[126] As it was unable to establish the extent of such networks, the TRC stated that it would be essential to investigate the involvement of the police and military in third force activities more closely.[127] The government had this in mind when it approached the generals. The aim was also to work out proposals to satisfy the generals' desire to avoid prosecutions of SADF members and to create mechanisms for cooperation and disclosures on still uncovered secret SADF activities, in order to compensate for the lack of TRC findings in this regard.[128]

Another factor was the government's fear that South Africa could be exposed to claims for reparation and damages by countries, which had been attacked by the apartheid state.[129] The territorial integrity of various neighbouring countries had frequently been violated by illegal invasions of the SADF.[130] Angola, for instance, suffered enormous damages due to the war that was waged by South Africa and due to the massive support the apartheid government provided to the rebel movement UNITA.[131] Apparently, during the late 1990s neighbouring governments had discussed the issue of reparation claims against South Africa concerning the activities of the SADF. The government, thus, tried not to fuel such discussions by prosecuting SADF members for

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[125] Ibid., s. 4, appendix, para. 7.

[126] Ibid., para. 33.

[127] Ibid., paras. 42–43.

[128] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[129] The TRC found that the military strategy of South Africa during the times of Apartheid was guided by the principles of pre-emptive interventionism and counter-revolutionary warfare (*TRC Report*, vol. 2, chap. 2, para. 6). It further for instance found that the SADF committed a great amount of gross human rights violations e.g. in its war against Angola (*TRC Report*, vol. 2, chap. 2, para. 72).

[130] *TRC Report*, vol. 2, chap. 2, para. 48.

[131] Ibid., paras. 70–72.

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the atrocities caused in other countries.[132] In this regard, the aim was to make sure that full-scale criminal trials did not go ahead.

Yet another aspect was that the government tried to avoid a drain of military competence and intelligence from South Africa to other African countries.[133] In the process of establishing an effective army for the new democratic South Africa, it was absolutely vital to ensure the support and expertise of former officers and generals of the apartheid state's SADF. Moreover, a number of other African countries were apparently very keen to engage officials of the SADF as advisors on improving their respective armies.[134] The South African government thus wished to avoid former SADF generals and military experts being driven away from South Africa, should SADF activities be investigated and tried on a large scale.[135]

Furthermore, the intention was to avoid setting precedents concerning criminal liability for military operations.[136] The army of the new democratic South Africa, the SANDF, at that time had increasingly become involved in peace keeping and military operations throughout Africa. The government was concerned that trials concerning military operations of the former apartheid-state's defence force, the SADF, could negatively impact on SANDF operations, in that they might lead to legal uncertainty concerning the legality of certain measures.[137] Precedents in terms of what actions by soldiers engaged in conflict situations can lead to criminal liability were to be avoided.[138] The government wanted to ensure that the effectiveness of the South African army and its capacity to act was not tainted by any kind of legal uncertainty.[139] Thus, military operations were to be generally kept out of criminal trials. However, the notion that the SADF generals would in any way be

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[132] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Telephone interview with Jürgen Kögl (June 14, 2006).
[138] Ibid.
[139] Ibid.

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willing and capable of instigating any kind of violent uprising against the new South African state is, allegedly, completely unfounded.[140]

The consultations generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.[141] According to Geldenhuys, Zuma underlined this quite clearly when during one of the meetings he emphasised that prosecutions were not in the interest of the government as this could destroy some of the good effects the TRC had on nation-building and reconciliation. The issue needed to be dealt with in a political manner, rather than by the NPA.[142]

In summary, the government tried to work out some kind of legal mechanism, by which to generally avoid convictions, specifically concerning crimes committed in the conflict between IFP and ANC and concerning the SADF and simultaneously to create a mechanism by which to uncover more information that was not uncovered by the TRC.

2.2.3 *Interest of the generals*

Regarding the interest of the generals in the negotiations, it has often been claimed that, considering the many atrocities and criminal offences of the SADF which have not yet been dealt with properly, a general amnesty or convenient deal had been requested.[143] Yet a general amnesty was allegedly neither proposed nor discussed, especially not one that

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[140] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[141] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); E-mail from Jürgen Kögl (June 26, 2006).

[142] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[143] Interview with Yasmin Sooka in Pretoria (May 3, 2006); *Victims to fight amnesty* Mail & Guardian, June 7, 2002; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; C. Carter *No truth for the thousands of apartheid dead* Cape Argus, April 8, 2006.

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would only cover the generals.[144] From the outset it was rather clear that a general amnesty would not square with the TRC scheme on amnesty. A less overt and again, somehow conditional indemnity scheme was also in the generals' interest.[145] However, the generals were obviously interested in securing a convenient agreement in the interest of their former subordinates and in their own interest, which would diminish the chances that former SADF members would be charged for their involvement in SADF operations.[146] As most SADF members had been very suspicious of the TRC process, which was perceived to be biased, the generals sensed they could now take part in working out a, in their eyes, fairer procedure.[147] Furthermore, after the TRC, the general attitude towards the activities of the SADF was perceived to be unreasonably negative and hostile. The TRC's findings in its report were perceived to be an unjustified attack on the SADF's integrity.[148] When entering into consultations with the government the generals were motivated by the opportunity to correct the perceived wrong image of their activities in another forum.[149]

2.2.4 *Results*

The aim of the government was to take the amnesty legislation of the TRC as a reference point and try to establish a new mechanism adapted to the previous amnesty legislation.[150] The mechanism had to apply to the whole of the country and could not be limited to the province of

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[144] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[145] Telephone interview with Jürgen Kögl (June 14, 2006).

[146] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[147] Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[148] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). The top commanders never made an effort to acknowledge the brutal atrocities which had been caused by the SADF. It also never properly participated in TRC hearings which would have given the SADF command an occasion to defend against perceived unjustified allegations.

[149] Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[150] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

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KwaZulu-Natal. By the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism practically amounting to a new amnesty law.[151] It envisaged a legal concept according to which a special plea on amnesty would be introduced as an amendment to the Criminal Procedures Act.[152] The solution on how to deal with criminal accountability in the wake of the TRC should, thus, be embedded in the normal court procedures. After the agreement was reached, the consultations were practically concluded and only continued with the participation of Zuma and Minister of Justice, Maduna, on an infrequent basis as a matter of courtesy and to conduct a rather general exchange of thoughts on the topic until 2004.[153]

The solution provided that perpetrators of politically motivated offences falling within the ambit of the TRC Act should not principally be exempted from criminal liability.[154] In case they are criminally charged, an alleged perpetrator who had not received amnesty by the TRC could then in the criminal trial launch a special plea on amnesty. Once such a plea was launched, a special inquiry by the judge embedded in the normal public criminal trial should ensue. Should the plea for amnesty succeed, the trial needed to result in an acquittal of the accused.[155] The envisaged preconditions for a successful plea on amnesty were that the criminal offence in question needed to satisfy exactly the same test which was outlined as a precondition to the granting of amnesty according to the TRC Act. It, thus, had to be committed within the fixed time frame applicable for the TRC Act and had to be connected with a political objective and committed in the course of the conflicts of the past etc.[156] Furthermore, the alleged perpetrator would then have to make a full disclosure before the court in order to succeed with the plea.[157] Whether the criteria are satisfied should be

[151] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[152] Ibid.
[153] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).
[154] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[155] Ibid.
[156] Ibid.
[157] Telephone Interview with Jürgen Kögl (June 14, 2006).

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subject to the scrutiny of the judge and other participants as is normal procedure in a criminal trial.[158] If the plea would not succeed, the trial would resume.[159]

The solution that was agreed upon at the consultations of the generals and the government, thus, embodied an exact replication of the TRC amnesty scheme. The only difference was that the competence to decide on the granting of indemnity would rest with an ordinary criminal court and not with a special committee such as the Amnesty Committee of the TRC. The idea to introduce a special plea on amnesty to criminal procedure law was not at all new. Before the TRC process began, the NP launched a similar proposal aimed at extending the amnesty regime by the same means.[160]

By late 2002 the proposal had been worked out in great detail by the Justice Department and was practically ready to be presented to Parliament for enactment.[161] The public was neither informed of the existence of the proposal nor of details thereof. By the end of 2002, it was first put forward for the consideration of President Thabo Mbeki. The implementation of the proposal depended on the decision of President Mbeki.[162] In early 2003 it was eventually rejected by President Mbeki.[163] The President apparently did not expressly communicate to the consultation group of generals and ANC government representatives that he rejected the draft law. However, his announcements in the speech at the tabling of the TRC Report in Parliament in April 2003 effectively and unmistakably signalled to the consulting parties a rejection of their proposal on another round of indemnity legislation.[164] As mentioned above,[165] Mbeki had announced that it would be up to

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[158] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[159] Ibid.

[160] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 143.

[161] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] See *supra* Chapter 3(1.3).

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the NPA to pursue post-TRC prosecutions according to its normal procedures and that any approach such as general amnesty will not be considered, which of course means that the specific indemnity procedure proposed would, at least at the beginning, not be implemented. What exactly motivated Mbeki to turn away from the proposal at that stage cannot be established. However, it is implicit from his speech that he apparently did not consider such an obvious legislative introduction of another amnesty mechanism similar to that of the TRC as appropriate, since he expressly stated that any new amnesty approach, whether applied regionally or nationally, would harm the TRC process. However, elements of the consultations did, as will be shown below, reappear in later policy decisions.

3. *A Prosecution Policy for TRC-Related Cases*

It becomes clear from the consultations with the security forces that the government attempted to introduce new legal mechanisms aimed at avoiding trials directly after 1998. As has been outlined in the preceding paragraphs, the solution, which had been reached by late 2002, was in early 2003 not found fit by the President to provide a sufficient new indemnity mechanism. However, the urge to introduce a satisfactory mechanism persisted. It took until late 2004 for the government to start a new process of developing a solution. Eventually in early 2006, a new legal approach to post-TRC prosecutions was introduced. On 24 January 2006 the NPA presented a set of new guidelines to the public, which were supposed to apply specifically to prosecutions of political crimes connected with the conflicts of the apartheid past.[166] The so-called 'prosecution policy and directives relating to the prosecution of offences emanating from the conflicts of the past and which were

[166] See NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

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committed before 11 May 1994' were an amendment to the general prosecution policy of the NPA.[167]

Traditionally, prosecutors in South Africa have wide discretion on the decision on whether or not to initiate a prosecution.[168] According to section 179(5)(a) and (b) of the Constitution and 21 of the NPA Act, the NDPP, with the concurrence of the Minister of Justice, has to determine and issue policy directives, which have to be observed by the prosecutors in the prosecution process.[169] In guiding the prosecutors' discretion, this generally tries to achieve fair, transparent, consistent and predictable processes.[170] The directives are not a statute but outline binding guidelines for the exercise of the prosecutors' discretion. As section 21(2) of the NPA Act states, they have to be tabled in parliament. According to sections 179(5)(a) of the Constitution and 21 of the NPA Act, the prosecution policy is drafted by the NDPP. However, in this case it was in fact not the NDPP but the government, more precisely the Department of Justice, which entirely drafted the guidelines and only formally were they issued by the NDPP.[171] Although the policy amendment was only presented to the public in January 2006, it had already come into effect on 1 December 2005.[172] It has given rise to

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[167] Prosecution Policy, appendix A.

[168] M. Schönteich *Lawyers for the people* (2001) 19–20; F.G. Richings 'The prosecutor's discretion: a plea for circumspection' (1977) 1 no. 2 *South African Journal of Criminal Law and Criminology* 143 at 143–44.

[169] The section reads:

> (5) The National Director of Public Prosecutions
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
>
> (b) must issue policy directives which must be observed in the prosecution process.

Section 21 (1) of the NPA Act repeats this instruction.

[170] M. Schönteich *Lawyers for the people* (2001) 52.

[171] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[172] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

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considerable controversy and was suspended by the High Court of Pretoria in December 2008.

3.1 *Previous history*

After the conclusion of the consultation processes and the establishment of the PCLU in early 2003, no political interventions occurred for over one year. This situation changed significantly in late 2004, when the first prosecutions were initiated by the PCLU. The PEBCO-Three prosecution had been initiated in early 2004, Ronnie Blani had been charged in October 2004 and in November 2004 the PCLU was ready to effect arrests in the Chikane case.

The events in the Blani and Chikane cases had triggered the decision to develop specific guidelines. With regard to the indictment of Ronnie Blani, many criticised that priority was put on such a case, considering that apartheid officials were rarely forced to account for their crimes.[173] This decision to prosecute a former liberation force cadre raised concerns and unease in high echelons of the government and in ANC circles as well as in local ANC structures.[174] In addition to this, the arrests in the Chikane case were imminent. As outlined above, the accused' attorney Jan Wagener immediately intervened politically and apparently put great pressure on the government to stop the proceedings.[175] Following this and in an extraordinarily swift move, the NPA was advised on behalf of President Mbeki to suspend the arrests,[176] which it did. The NPA's official explanation for its action was that it had realised that there was no strategic plan as to how to deal with TRC-related cases and that it was necessary to approach them on a

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[173] See *supra* Chapter 2(8.).

[174] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004.

[175] See *supra* Chapter 2(9.1). The imminent arrests according to Ackermann decisively contributed to the decision to work out guidelines (E-mail from Anton Ackermann (Oct 18, 2005)).

[176] Interview with Jan Wagener in Pretoria (May 8, 2006).

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holistic and uniform basis.[177] The events reportedly prompted meetings of the Minister for Justice and the Minister of Safety and Security with high-ranking NPA and police officials, at which appropriate political and policy approaches to post-TRC prosecutions were discussed.[178] In November 2004, they eventually resolved to impose a moratorium on all TRC-related prosecutions and investigations pending the composition and approval of guidelines.[179]

It took more than a year until the moratorium was resolved in January 2006. During the presentation of the completed prosecution guidelines, the NPA announced that prosecutions would go ahead.[180] On 17 January 2006, representatives of the NPA tabled the guidelines in Parliament's portfolio Committee on Justice and Constitutional Development.[181] The portfolio committee was given only short notice on the scheduled presentation and was convened for an ad hoc meeting.[182] Although the guidelines are of great significance for the further conduct of post-TRC prosecutions, there was no parliamentary participation in their drafting and proper parliamentary discussion at their presentation was also impossible due to the ad hoc nature of the presentation.[183]

During the process of drafting the guidelines it was also not possible for the public and civil sector to participate in any way. None of the major South African NGOs, such as the victim organisation Khulumani,

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[177] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[178] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004.

[179] E-mail from Anton Ackermann (Oct 21, 2005). The acting NDPP Bulelani Ngcuka had advised the PCLU to stop all further investigations and prosecutions (E-mail from Anton Ackermann (Oct 18, 2005)).

[180] *NPA apartheid-era prosecutions to start* SAPA, Jan 24, 2006.

[181] See Justice and Constitutional Development Portfolio Committee *Briefing and deliberation on the amendment of the prosecuting policy to provide for directives for the prosecution of matters before 11 May 1994*, Jan 17, 2006 (protocol of minutes available at http://www.pmg.org.za).

[182] Interview with Sheila Camerer in Cape Town (March 30, 2006).

[183] Ibid. However, sections 179(5) of the Constitution and 21 of the NPA Act do not provide for parliamentary participation apart from the mere tabling of the completed policy.

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could give any input or were in any way consulted on the contents of the document.[184] Moreover, although the Foundation for Human Rights and Khulumani had constantly requested that the Department of Justice issues information about the guidelines and eventually furnishes a copy thereof, they were not heard or adhered to.[185] The government was generally extraordinarily reluctant to issue information.[186] More precise details on the contents were only reported in the media shortly before the guidelines came into effect.[187] The former security force members were also allegedly not properly involved in the process of developing the guidelines.[188] However, according to the attorney Jan Wagener on a very occasional and infrequent basis representatives of this side were consulted informally.[189]

3.2 *Contents*

The amendments to the prosecution policy shall be applicable to the prosecution of crimes arising out of the conflicts of the past, which

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[184] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[185] Ibid.

[186] The Foundation for Human Rights and Khulumani learned only in late 2004 from a journalist that a policy amendment was drafted at all. There were signs that the guidelines would reintroduce an amnesty scheme similar to that of the TRC. A coalition of human rights and victim NGOs then in December 2004 and September 2005 wrote letters to the NDPP and Minister of Justice requesting further information and cautioning against the repetition of the TRC amnesty scheme. All requests remained unanswered. Again only through hints of a journalist did the NGOs learn in December 2005, that the policy amendment had been completed (Interview with Yasmin Sooka in Pretoria (May 3, 2006)). Moreover, the victim organisation Khulumani, although having contacted the NPA continuously for information, was not even informed of the scheduled press conference in January 2006, on which the guidelines were presented. Only through journalists was the organisation informed of the presentation shortly beforehand.

[187] C. Terreblanche *Back door amnesty plan revealed* The Sunday Independent, Nov 27, 2005.

[188] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[189] Interview with Jan Wagener in Pretoria (May 8, 2006).

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were committed before 11 May 1994, i.e. crimes that also fell within the jurisdiction of the Amnesty Committee.[190] On the one hand, the document lays out a procedure that must be strictly adhered to regarding persons who want to make representations to the NDPP in relation to TRC crimes.[191] On the other hand side, the amendment lays out a catalogue of material criteria which, in addition to the general criteria outlined in the normal prosecution policy, govern the discretionary decision of the prosecutors on whether or not to prosecute a case.[192] It was further determined that the regional Directors of Public Prosecutions must refer all post-TRC prosecutions to the NPA, thus, all TRC-related cases are centralised in the office of the PCLU.[193]

The procedural part of the policy amendment determined, apart from a number of negligible formal requirements, that any person possibly facing prosecution may submit an affidavit containing representations on the alleged criminal offence, if he wished to enter into arrangements with the NPA.[194] Such affidavit must contain

> …a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.[195]

The material criteria governing the prosecutor's decision to take a case to trial are of critical importance. There are basically three sets of criteria. The first set is based on the preconditions for granting amnesty as stated in the TRC Act.[196] First, it must be taken into account 'whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances' concerning the alleged offence.[197] The next

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[190] Prosecution Policy, appendix A.

[191] Ibid., para. B.

[192] Ibid., para. C. The criteria expressly shall be applicable besides the general criteria governing the discretion of the NDPP set out in paragraph 4 of the general prosecution policy.

[193] Prosecution Policy, appendix A, para. B.5.

[194] Ibid., para. B.3.

[195] Ibid.

[196] See section 20 of the TRC Act.

[197] Prosecution Policy, appendix A, para. C.3.(a).

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factor is whether the offence was associated with a political objective and committed in the course of the conflicts of the past, which needs to be determined on the basis of a number of factors: the motive; the object or objective; whether the offence was committed in furtherance of an order or with the approval of an organisation, institution or liberation movement of which the accused offender was a supporter, agent or member; and finally, the relationship between the offence and the objective pursued and the proportionality in respect thereof, which does not include objectives of personal gain and personal malice, ill-will or spite.[198]

The second set of criteria encompasses factors relating to the personal circumstances and behaviour of the alleged offender:[199]

- the degree of cooperation of the alleged offender, including his endeavours to disclose 'the truth of the conflicts of the past, including the remains of victims; or possible clandestine operations […] including the exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.'
- the health of the alleged offender and other humanitarian considerations;
- 'the credibility of the alleged offender';
- the offender's 'sensitivity towards the need for restitution';
- 'the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation';
- the 'renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender'; and
- 'the degree of indoctrination to which the alleged offender was subjected'.

[198] Ibid., para. C.3.(b).

[199] Ibid., paras. C.3.(c) and (d).

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The final set of criteria contains a range of rather general factors:[200]

- 'whether the offence is serious';
- the extent to which the prosecution or non-prosecution may positively or negatively affect the national project of nation-building through transformation, reconciliation, development and reconstruction;
- 'whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place';
- 'if relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general';
- 'considerations of any views obtained for purposes of reaching a decision' and any other criteria deemed relevant.

The NDPP must obtain the views of concerned victims before reaching a decision and consult with victims in any further process concerning the perpetrator.[201] Any decision to continue or discontinue investigations or proceed with prosecutions must be approved by the NDPP.[202] Furthermore, the Minister of Justice must be informed of all decisions taken or imminent in respect of procedures under the amendment.[203] A decision not to prosecute and the reasons thereof must be made public.[204] The NPA and other agencies shall not use any information obtained from the alleged offender in the procedure in any possible subsequent criminal proceeding against the person who made the disclosure.[205]

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[200] Ibid., paras. C.3.(e)–(j).
[201] Ibid., para. B.9. and 13.
[202] Ibid., para. B.7.
[203] Ibid., para. B.11.
[204] Ibid., para. B.10.
[205] Ibid., para. B.15.

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3.3 *Rationales*

The policy amendment was intended to give effect to the aforementioned announcements of the President from 2003.[206] Generally, it was stated that it was necessary to standardise the dealings with all post-TRC cases in terms of specifically defined criteria, and that the normal policy would not have sufficed for this purpose.[207] As such, to ensure consistency and also considering the complexities of the cases, the amendment determined that all post-TRC prosecutions are centralised at the PCLU. Consistency was especially necessary to avoid undermining the project of nation-building. Thus, the guidelines were designed to provide a uniform, rational, effective and reconciliatory basis on which the cases will be dealt with in the future.[208] A more detailed justification for the guidelines was not provided. Another motive underlying the guidelines, however, seems to be the perceived sensitivity that such cases require in terms of reconciliation and nation-building.[209] Apparently, the guidelines were generally designed to allow the NDPP to stop a prosecution wherever it is deemed detrimental for the overall progress of reconciliation and nation-building.

3.4 *Practical implementation*

Soon after the policy amendment was introduced, the Foundation for Equality before the Law approached the NPA attempting to discover

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[206] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006). See also Prosecution Policy, appendix A, para. A.1.

[207] Ibid.; Presentation at the tabling of the prosecution policy amendment in the Justice Portfolio Committee, Jan 17, 2006, para. 5.3 (available at http://www.pmg.org.za); Justice and Constitutional Development Portfolio Committee *Briefing and deliberation on the amendment of the prosecuting policy to provide for directives for the prosecution of matters before 11 May 1994* Jan 17, 2006 (protocol of minutes available at http://www.pmg.org.za).

[208] Prosecution Policy, appendix A, para. A.5.

[209] Ibid., paras. C.3.(f) and (g).

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how the guidelines would be implemented in practice.[210] Various clients of the organisation's attorney, Jan Wagener, were willing to launch an application with the NPA under the policy procedure, should a prosecution target them.[211] Apparently, a satisfactory answer could not be given, which indicates that the practical scope and implementation had yet to be worked out.

As far as the records show, up to the completion of this research in April 2009, only one set of proceedings had been completed under the guidelines. As has already been outlined above, soon after the guidelines came into effect, applications according to the policy amendment were tendered by the three former security police officers, Otto, van Staden and Smit, accused of having attempted to murder Frank Chikane.[212] Shortly thereafter, Vlok and van der Merwe also entered into a disclosure proceeding in terms of the guidelines.[213] The five subsequently made representations during September 2006 and possibly thereafter concerning the crime as required by the policy. In January 2007, the NPA announced that it would push ahead with the charges against the three accused,[214] which obviously meant that it had not decided against initiating a prosecution after conclusion of the guidelines procedure.

For the attorney of the accused, Jan Wagener, the decision to proceed with the charges came unexpectedly.[215] The attorney was absolutely adamant that his clients made full disclosure of their knowledge of the events as required by the guidelines.[216] Vlok, van der Merwe and Smith even submitted themselves to a polygraph test that allegedly proved they had told the full truth.[217] Indeed it is expressly pointed out in the plea

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[210] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[211] Interview with Jan Wagener in Pretoria (May 16, 2006).

[212] See *supra* Chapter 2(9.2).

[213] E-mail from Jan Wagener (Sep 13, 2007).

[214] J.J. Joubert and W. Jordaan *Cops up for apartheid crimes* Beeld, Feb 7, 2007; W.J. da Costa and T. Mtshali *Prosecuting apartheid's soldiers 'divisive'* Pretoria News, Feb 8, 2007.

[215] E-mail from Jan Wagener (Feb 12, 2007).

[216] E-mail from Jan Wagener (Sep 13, 2007).

[217] A. Vlok, J. van der Merwe, C. Smith, G. Otto and M. van Staden, press statement (Aug 17, 2007).

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agreement that the accused approached the NPA immediately to take part in the procedure under the guidelines and made disclosure. The plea bargain ambiguously states in Afrikaans that the accused have '*oop kaarte gespeel*', which means that they have played with their cards on the table.[218] Although it is not expressly stated that there was full disclosure, the expression nevertheless logically indicates that the accused did not hide anything. Furthermore, the accused eventually asked for forgiveness and showed remorse. Chikane had previously indicated that he is not really interested in their prosecution.[219] In a spectacular symbolic act of repentance Vlok publicly washed Chikane's feet in August 2006 at the Union Buildings in Pretoria,[220] which coincided with and was certainly connected with the guidelines procedure. Vlok and van der Merwe cooperated with the TRC to a considerably higher degree than other leading apartheid officials. All of these factors are explicit criteria of the guidelines, which logically can only lead to one decision: not to prosecute. This is especially true for Vlok and van der Merwe who came forward voluntarily. On the basis of the guidelines, it is therefore not clear why the NDPP nevertheless decided to prosecute. The decision might have been taken for obscure political reasons.

However, the NPA refused to furnish reasons for its decision to the public or the accused and did not provide any information whatsoever on the proceedings.[221] On the occasion of the presentation of the plea bargain arrangement, the guidelines proceeding was also not properly investigated, although it was obviously closely connected to the plea agreement.

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[218] *S v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms 15 August 2007 at para. 80.

[219] E. Naidoo *No general amnesty for apartheid crimes* The Sunday Independent, July 3, 2005.

[220] M. Swart 'Sorry seems to be the hardest word: apology as a form of symbolic reparation' (2008) 1 *South African Journal on Human Rights* 50 at 64.

[221] E-mail from Jan Wagener (Feb 16, 2007).

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3.5 *Reactions to the guidelines*

The reactions from within the sector of human rights, victim organisations and activists to the guidelines and the process of their drafting were overwhelmingly critical. As the criticisms have common features, the main points can be summarised here:[222]

- The guidelines effectively amount to a replica of the amnesty procedure as was laid out in the TRC Act. As the NDPP is entitled to decide against an indictment if the perpetrator makes a full disclosure, the policy confers powers on the NPA, which were formerly exercised by the Amnesty Committee. This continuation of the TRC's legal regime on amnesty is unacceptable since the amnesty process had taken place in a carefully confined and negotiated framework, which was not meant to be extended.
- Perpetrators were deliberately given a second chance to achieve impunity, although many shunned the TRC process in the first place by rejecting the very generous offer of amnesty or presented untruthful versions of their crimes. This is totally unacceptable considering the great concession the amnesty scheme demanded of victims.
- The process outlined by the policy amendment totally lacks transparency. In stark contrast to the TRC legislation, the new guidelines do not make provision for the publication of information deriving from perpetrator testimonies or the records thereof. The procedures will be carried out *in camera*. The public does not even have to be informed if a procedure according to the guidelines is taking place.

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[222] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006); Memorandum of Howard Varney on discussion concerning the prosecution policy amendment attended by Yasmin Sooka, Marjorie Jobson, Howard Varney, Ahmed Motala (executive director of the CSVR), Jody Kollapen (chair of the South African Human Rights Commission) (Dec 9, 2005) (on file with author); Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'the TRC: ten years on'* (April 20, 2006); M. Jobson *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006); Institute for Justice and Reconciliation *Statement: the IJR conference on the TRC: ten years on* (2006).

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– Sufficient provision is not made for a satisfactory involvement of victims in the process. There are not even provisions for concerned victims to be given an exact record of the representations made by the relevant perpetrator.
– Although the policy amendment fundamentally concerns the rights and interests of many victims of apartheid era crimes, there was regrettably no consultation or cooperation with victim organisations in their drafting. While the TRC process was always accompanied by extensive public participation and discussion, the drafting of the guidelines took place entirely behind closed doors. This contravenes the spirit of openness and democratic debate, which had been established during the TRC process.
– The centralisation of all TRC cases in the office of the PCLU needs to be accompanied by a huge increase in the provision of resources, if the unit is to be capable at all of dealing with all possible cases. Otherwise the result would be a de facto amnesty for most cases.
– The NPA's contention that victims should not feel aggrieved if a prosecution is not pursued, since they can seek civil redress or prosecute privately,[223] is utterly disingenuous.[224] It is absolutely clear that neither private prosecutions nor civil claims are a realistic option. Generally, according to section 7 of the Criminal Procedures Act anyone with a substantial interest in a case can institute a private prosecution, in the event that the NDPP has issued a certificate stating that the State declines to prosecute the matter.[225] The privately prosecuting party must carry out the complete investigation for the case.[226] The NPA is not even obliged to hand over evidence and incriminating material it has already prepared.[227] The private litigant is also without investigative

[223] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006). See also Prosecution Policy, appendix A, paras. A.3.(d) and A.4.
[224] Interview with Howard Varney in Johannesburg (May 6, 2006).
[225] *Nolle prosequi* certificate. See sections 7–16 of the Criminal Procedure Act.
[226] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 218.
[227] Ibid.

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rights similar to those of the NPA and police.[228] Furthermore a private prosecution imposes a great financial onus and risk on the litigant, since they must finance the investigation and, in the event of an acquittal, not only incur their own legal costs but also those of the accused's defence team.[229] Victims and NGOs certainly cannot meet these demands.[230] Furthermore, the time limit to pursue civil claims has lapsed in most cases and is thus also not a realistic option.[231]

Right after the amendments entered into force a number of human rights organisations have asked the government to set the guidelines aside.[232] Various international NGOs have also joined in criticising the guidelines. For example, the International Bar Association expressed deep concern over the policy, since it replicates the TRC amnesty legislation, seriously violates victims' rights and could foster a culture of impunity for the human rights violations committed under apartheid.[233] A number of African human rights organisations, the International Centre for Transitional Justice and former Constitutional Court Judge Richard Goldstone voiced similar concerns in a letter to the President.[234] It is also noteworthy that the policy was also rejected by senior members of the PCLU.[235] Some prosecutors requested civil society to

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[228] Ibid., 46.

[229] Ibid.

[230] Interview with Howard Varney in Johannesburg (May 6, 2006); Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[231] Interview with Howard Varney in Johannesburg (May 6, 2006).

[232] Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[233] Letter from Mark S. Ellis, executive director International Bar Association, to Brigitte Mabandla, Minister of Justice and Constitutional Development (March 14, 2006) (on file with author). See also International Bar Association, press statement *IBA critical of amendments to South Africa's prosecution policy* (March 29, 2006). The International Bar Association is a leading international organisation of legal practitioners, bar associations and law societies.

[234] Letter to President Thabo Mbeki, President of South Africa (April 7, 2006).

[235] T. Pretorius *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

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monitor the processes carefully to see that the guidelines are not being misused.[236] They argued that the guidelines did not add any practical value to their work and are simply not necessary to conduct effective and successful prosecutions.[237]

Considering the strong rejection of the amendments by human rights and victim groups, it is rather surprising that the representative of perpetrators, the Foundation for Equality before the Law, also strongly rejected the guidelines. They believed that the criteria's vagueness and obscurity make them highly unpredictable.[238] They also suggested that prosecutors will not be able to conduct the procedure in an impartial way, since they will have already investigated the case and have prepared an indictment.[239] They, thus, will have reached specific conclusions on the course of events in the specific case. Regardless of whether such conclusions are correct or not, the prosecutors will inevitably judge the credibility of a perpetrator's 'full disclosure' on the basis thereof. It would have been important and far better, if such a procedure had been placed before an independent forum, such as a court, as had previously been suggested in the consultations with the government.[240] Some have nevertheless identified positive potential for the guidelines' procedure, as perpetrators who had been denied amnesty unjustly at the TRC would get a second chance and generally the probability of criminal trials would be diminished.[241] However, representatives of perpetrators had expected, on the basis of the apparently promising negotiations with the government, a clear legislative solution providing for an independent and foreseeable indemnity mechanism, which would lay out clear preconditions and a strict obligation to grant indemnity. However, the guidelines did not meet this expectation. Against this

[236] Ibid.

[237] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[238] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[239] E-mail from Johan van der Merwe (May 31, 2006); E-mail from Johan van der Merwe (June 4, 2006).

[240] Ibid.

[241] Interview with Jan Wagener in Pretoria (May 8, 2006).

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background, to some in the Foundation for Equality before the Law the guidelines were rather unexpected.[242]

3.6 *Court challenge of the guidelines*

In July 2007, various relatives of victims of crimes committed by the apartheid security forces as well as human rights NGOs launched an application at the Pretoria High Court against the amendment of prosecution policy. The application sought an order of the High Court to suspend and stay the operation of the prosecution guidelines and to eventually declare the policy amendments to be inconsistent with the South African Constitution, and therefore unlawful and invalid.[243]

The applicants were Thembisile Nkadimeng, the sister of MK activist Nokuthula Simelane, who was abducted, tortured and probably murdered by the security police in 1983,[244] Nyameka Goniwe, Nombuyiselo Mhlauli, Sindiswa Mkhonto and Nomonde Calata, the widows of the four liberation movement activists known as the Cradock-Four, who were murdered by members of the Eastern Cape security police in 1985[245] as well as three human rights organisations, the Khulumani Support Group, the CSVR and the International Centre for Transitional Justice in New York.[246] The respondents were the NDPP, the Minister of Justice, the alleged perpetrators in the Cradock-Four murder case, Eric

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[242] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[243] *Thembisile Nkadimeng and others v National Director of Public Prosecutions and others*, Notice of Motion, Case no. 32709/07 (T) July 2007 (on file with author).

[244] See *infra* Chapter 4(5.1.1).

[245] See *infra* Chapter 4(5.2).

[246] The applicants were represented by lawyers from the Legal Resources Centre in Johannesburg and the Foundation for Human Rights has contributed to the funding (Interview with Howard Varney in Johannesburg (May 6, 2006)). The victims' relatives brought the application in their own interest as family members of the deceased persons in terms of section 38(a) of the Constitution, the organisations' application was based on their own interest and the representation of the public interest in terms of section 38(d) of the Constitution. All applicants also based their interest on the overall interest of the group of all apartheid victims possibly concerned by the Prosecution Policy in terms of section 38(c) of the Constitution.

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Taylor, Johannes Lotz, Johannes van Zyl and Hermanus du Plessis as well as the alleged perpetrators in the Simelane case, Willem Coetzee, Anton Pretorius, Frederick Mong and Msebenzi Radebe.

The applicants expect the prosecution of the alleged perpetrators, since they were refused amnesty either completely, as in the Cradock-Four case, or for parts of the crimes, as in the Simelane case. They argue that the prosecution policy potentially prevents this from happening, should the alleged perpetrators successfully apply for indemnity under the procedure, a result that they seek to prevent.[247] It is submitted that the policy amendment allows for the NDPP to grant de facto indemnity to perpetrators and thereby infringes the right to dignity according to section 10 of the Constitution, as the protection of perpetrators from prosecution is at the expense of victims and victims' families who are thereby denied justice and whose quest for closure is prevented. Their respect, dignity and value in the wider community is undermined and the constitutional pact underlying the agreement on amnesty, on which many victims relied, is demeaned. The right to life according to section 11 of the Constitution would be violated, as murderers remain unpunished. As the impunity mechanism also encompasses acts of torture and abduction, the right of an individual to his/her freedom and security, as stated under section 12 of the Constitution, would also be violated. Moreover, there would also be a violation of section 9 of the Constitution, the right to equal protection and equality before the law, since the policy discriminates against victims of a crime committed with a political objective before 11 May 1994 and perpetrators who participated in the amnesty process in good faith and were granted amnesty as well as those who did not participate at all or were refused amnesty but who now get a second offer of indemnity. The unlawfulness of the policy is further highlighted in two ways: first, by the fact that it is not a law of general application, which is required by section 36(1) of the Constitution for any limitation of the Bill of Rights; and second, by the rule of law as enshrined in section 1 of the Constitution, since the

[247] *Thembisile Nkadimeng and others v National Director of Public Prosecutions and others*, Founding Affidavit, Case no. 32709/07 (T) July 2007 (on file with author).

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policy grants selective impunity in a manner that lacks transparency and prevents sufficient participation of interested parties. The policy guidelines would also constitute an infringement of South Africa's international law obligations as it violates the International Covenant for Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The respondents answered the criticism that the policy amendments would not allow for decisions not to prosecute in cases where there is sufficient evidence. Furthermore, it could not amount to effective indemnity in any event, because perpetrators would still be exposed to private prosecutions and civil claims. During the court hearings, the NDPP counsel submitted that representations in terms of the amendments would have no other purpose than to be used for plea and sentence or state witness arrangements in terms of sections 105A and 204 of the Criminal Procedure Act.

With the judgment on 12 December 2008 of judge Legodi, the High Court of Pretoria declared the policy amendments to the National Prosecution Policy to be inconsistent with the Constitution, unlawful and invalid and therefore suspended them.[248] The Court found that representations by perpetrators as envisaged by the policy amendment are not sanctioned by the Constitution. Section 179(5)(d) of the Constitution only provides for representations in cases where a decision to institute a prosecution has already been taken. However, in the view of the Court, representations in terms of the amendments apply to persons who are still facing possible prosecution.[249] The Court went on to point out that representations in terms of the guidelines cannot be the representations which are required in terms of sections 105A (plea bargaining) or 204 (state witnesses) of the Criminal Procedure Act, because both provisions apply only to situations where a prosecution has already been initiated. Furthermore, in terms of section 204

[248] *Nkadimeng and others v The National Director of Public Prosecutions and others* (Transvaal Provincial Division) Case no 32709/07, unreported, at para. 18.1.

[249] Ibid., at para. 15.3.1.1 and 15.3.1.2.

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of the Criminal Procedure Act, indemnity is granted by a court and not by the NDPP.[250]

The Court accordingly concluded that the policy amendments could only mean that perpetrators be granted indemnity in cases of full disclosure, because otherwise the making of representations would not make sense. There would also be no incentive for perpetrators to come forward and make representations on their deed, if they would not afterwards be rewarded with a decision by the NDPP not to prosecute.[251] Consequentially, there would be simply no need for the disclosure procedure if it was not intended to result in indemnity.[252] Against this background the Court labelled the amendments in drastic terms as a "recipe for conflict and absurdity".[253] Accordingly, the Court confirmed the position of the applicants in that it views the amended guidelines as a copy of the TRC amnesty mechanism. It also pointed out that there cannot be any systematic connection between criteria such as the degree of remorse, the effects on reconciliation etc and a decision whether to prosecute or not.[254] The Court considered that the NPA has to prosecute where there is sufficient evidence to secure a conviction and a decision not to do so under such circumstances would be unconstitutional.[255] In this context it referred to a constitutional obligation of the NPA to prosecute.[256] The Court stated that it is not for victims to investigate crimes but much rather the responsibility of police and prosecutors to do so.[257] The making of representations directed at allowing for decisions

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[250] Ibid., at para. 15.3.1.4.

[251] Ibid., at para. 15.5.3.1. The court apparently presumed that there is no protection mechanism for self-incriminating disclosures. It either did not consider paragraph B.15. of the amendment, where it is stated that no state agencies shall use information stemming from perpetrator disclosures in any proceedings against the person at a later stage, or did not consider that provision to sufficiently rule out the use of self-incriminating evidence, since it is not a law.

[252] Ibid., at para. 15.5.4.

[253] Ibid., at para. 15.5.3.

[254] Ibid., at para. 15.14.3.

[255] Ibid., at para. 15.4.4.

[256] Ibid., at para. 15.5.2.1.

[257] Ibid., at para. 16.2.3.3.

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not to prosecute would accordingly be unlawful but in light of sections 105A and 204 of the Criminal Procedure Act also totally unnecessary. The normal prosecution policy is sufficient to provide guidelines for the decision whether to prosecute or not.[258]

Thus, in strong terms the Court declared the amendments to be unconstitutional. However, the judgment lacks supportive legal analysis. The Court did not base the conclusions it reached on a systematic legal interpretation and application of the respective explicit or implicit constitutional provisions at all. The NPA has lodged an appeal against the High Court ruling at the Supreme Court of Appeal, which had still not been heard or concluded upon the publication of this book.

3.7 *Evaluation*

The amendment of the prosecution policy reveals a great deal on the political viewpoints of the government and the developments on post-TRC prosecutions behind the scenes. They will therefore be evaluated in the following paragraphs.

3.7.1 *The guidelines criteria*

The criteria are rather vague. This is especially the case with respect to those criteria relating to a perpetrator's personal circumstances, such as the degree of remorse and his/her attitude towards reconciliation, the willingness to abide by the Constitution, etc. The same is true for criteria concerning the possible impact of a trial on society such as its effect on nation-building and reconciliation. It appears very unlikely that prosecutors will be in a position to determine such implications properly and with certainty so as to be able to apply the criteria in a consistent manner. Furthermore, the policy document does not specify how the individual preconditions that make up the criteria relate to each other in practical application. According to the NPA, there is no

[258] Ibid., at para. 15.3 and 15.4.

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hierarchy in the catalogue.[259] Thus, what if the accused makes a full disclosure before the NDPP, yet shows no inclination to effect restitution? What if a victim demands prosecution, but the perpetrator has complied with all other criteria? The policy amendment does not even outline what the specific result of the process must be, if the alleged perpetrator has complied with most criteria. It is only stated that the criteria must be applied in a balanced way before reaching a decision on whether or not to prosecute.[260] The final decision remains in the NDPP's discretion.

However, even though the implementation in the Chikane case provided a different example, in theory, regarding the logic of the guidelines, one would expect that the satisfaction of the disclosure and political offence requirements in particular were intended to lead to a decision to preclude prosecution. Also, should the NDPP be convinced that a specific prosecution will have a negative impact on reconciliation, lead to renewed trauma or that the perpetrator cooperated satisfactorily, such circumstances were also meant to lead to a non-prosecution. What sense would it, in terms of the guidelines, make to press for a prosecution, if such a case would obviously harm the reconciliation effort in a specific case? Or why should one decide to prosecute an alleged perpetrator if he came forward and made a full disclosure and cooperated with the authorities in unearthing the truth? Thus, in theory the catalogue of criteria essentially outlines a whole range of reasons on which a decision not to prosecute can be based.

Furthermore, most criteria seem rather out of place for that particular stage of a criminal procedure. For one, with regard to the general prosecution policy, it is incomprehensible why factors like the accused's willingness to abide by the Constitution should contribute to a decision to forego prosecution, especially in the context of such serious crimes as murder or torture. Secondly, personal factors, such as the degree of indoctrination, should be considered by the trial court in handing

[259] *Presentation at the tabling of the prosecution policy amendment in the Justice Portfolio Committee*, Jan 17, 2006, para. 5.3 (available at http://www.pmg.org.za).

[260] Prosecution Policy, appendix A, para. C.3.

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down a just sentence but should not have a connection to the question of whether a trial should be initiated in the first place.

It also seems inappropriate to place such a procedure before the NDPP. The NDPP's sole purpose in terms of section 179(2) of the Constitution is to hold perpetrators of crimes accountable. However, prosecutors would be required by the guidelines to consider a range of criteria on behalf of the perpetrator, which are outside the normal criteria outlined in the general prosecution policy. A conflict of interest between exercising the duty to prosecute and assessing wide-ranging factors for the perpetrators is inevitable. Obviously, a court would have been better charged with conducting such a process, as it would resemble more closely its usual tasks in a criminal trial of assessing mitigating and aggravating circumstances on the side of the accused.

3.7.2 *A copy of the amnesty process?*

The policy amendment more or less repeats verbatim the preconditions for granting amnesty through the Amnesty Committee according to the TRC Act. As such, the requirement for the crime to be associated with a political objective and to be committed in the course of the conflicts of the past,[261] including the catalogue of factors determining this,[262] is repeated, as well as the requirement to make a full disclosure of all relevant facts, factors and circumstances concerning the crime.[263] The major difference to the TRC Act is that the policy amendment does not provide an outline for attaining a strict resolution. Whereas the Amnesty Committee was legally obliged to grant amnesty once it was satisfied that the preconditions had been met, the decision in terms of the guidelines still remains at the discretion of the NDPP. However, it is clear that under the terms of the amendment the NDPP may refuse to prosecute once a full disclosure has been made and the offence can be deemed political. As also the High Court of Pretoria has pointed out, this might logically even be a decision intended for such cases by

[261] See section 20(1)(b) of the TRC Act.

[262] See section 20(3) of the TRC Act.

[263] See section 20(1)(c) of the TRC Act.

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the authors of the prosecution policy guidelines. Also, since private prosecutions are not a realistic option, a decision by the NDPP not to prosecute grants the perpetrator a *de facto* indemnity or amnesty. Thus, in essence the amendments repeat the basic TRC amnesty scheme of a trade-off of impunity for a full disclosure, yet at the full discretion of the NDPP. The NPA was, however, at pains to stress that the guidelines were not meant to be a rerun of the TRC amnesty process, which is also emphasised in the policy amendment.[264] The strong resemblance of the guidelines to the TRC Act suggests otherwise.

However, there are major differences between the policy process and the TRC amnesty process with regard to victim and public participation. While the Amnesty Committee hearings relating to gross human rights violations took place in public,[265] and the records of hearings and decisions were published, the process outlined by the policy amendment could take place completely *in camera*. Confessions made on a specific crime could not necessarily be published. Also, while at TRC amnesty hearings concerned victims could be present, testify, adduce evidence or submit other relevant material,[266] no such provisions were made in the policy amendment. Obviously the interest was to ensure the procedures received as little public attention as possible. Moreover, there are other fundamental differences. While the run-up to the amnesty legislation was accompanied by large-scale public participation and gave ample opportunities for victim interest groups to give their input, the drafting process for the guidelines did not involve public participation at all and numerous demands of the major victims organisation, Khulumani, for information were simply totally ignored.

These facts contradict the President's statements, in which he maintained that the involvement of victims would be crucial in determining the future course of action and specific agreements between perpetrators and the NPA. He also stated that the matter could not be dealt with

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[264] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006); Prosecution Policy, appendix A, para. A.3.

[265] See section 33(1)(a) of the TRC Act.

[266] See section 19(4)(b) of the TRC Act.

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by another amnesty process as this would fly in the face of victims, considering their concessions made in the first amnesty process.

3.7.3 *A political instrument and product of the consultations?*
The political consultations with representatives of the former security forces, which preceded the enactment of the guidelines, indicate that the amendment of the prosecution policy was designed merely to meet the political concerns, highlighted at the meetings. Any discernable similarity between the two processes would underline this perception that the guidelines were intended to be a tool to pursue a political agenda driven by the concerns and motivations, which surfaced at the talks.

However, there was not a direct continuity between the drafting of the guidelines and the consultations, which came to an end by 2004. The meetings with the generals resulted in a specific legislative proposal, which was not enacted in the form agreed upon. Thereafter, the process of drafting the policy amendment was conducted without the proper involvement of the former security forces. The generals were not even involved.[267] Thus, the policy amendment was not a direct product of the consultation processes. Nevertheless, it was certainly influenced by it to a great extent, since there are significant similarities between what was discussed or agreed upon in the consultations and what was incorporated in the policy. The policy amendment reproduces the basic scheme, which already formed the core of the draft legislation worked out in the SADF consultations, i.e., that a full disclosure of a political crime can result in non-prosecution. Equally, the negotiations with former police members envisaged the granting of indemnity, if some kind of disclosure was made and if the crime satisfied the political offence requirement according to the TRC Act criteria. Accordingly those who participated in the consultations or had insight into their operation, maintain that the guidelines contain a number of central features from the negotiations on how to avoid full-scale prosecutions

[267] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

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in the wake of the TRC.[268] Thus, although the guidelines even go beyond that, the repetition of central preconditions for the granting of amnesty contained in the TRC Act is a feature, which emanates from and was worked out in the consultations with perpetrator groups. One must therefore conclude that the guidelines' enactment was obviously part of, and was in a way the conclusion of a broader political process that was characterised by the secret consultations with the perpetrator groups, which were already underway in 1998.

There are, however, two major differences. While both proposals of the security forces envisaged that any further indemnity process should be outlined by specific legislation, the guidelines are not a law but merely a directive for prosecutorial practice. Secondly, while the proposals envisaged that the indemnity process must take place before a court or in the course of a trial and must be conducted by a judge, the policy amendment places the decision concerning a non-prosecution in the discretion of the prosecutor. This point in particular makes the guidelines, in terms of how the public can benefit from further perpetrator disclosures and in terms of what should be required for a consistent and reliable process of post-TRC prosecutions, even less attractive than the proposals from the consultations. The proposals would have guaranteed public transparency as the process would have taken place in a criminal trial or at least before a court. Through the court records and possibly the reasons given by the judge for his decision, the information deriving from the perpetrator testimonies would have been retained and could have contributed to the compilation of a public record on apartheid atrocities. Furthermore, if indemnity had been granted in the course of an ordinary criminal trial, there would have been fixed rules for victim participation according to the normal provisions of criminal trials. Accordingly the solutions would have ensured more reliability and independence since indemnity would have been granted by a judge and in the course of a criminal trial. Thus, the

[268] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

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proposals from the consultations clearly had some significant advantages over the guidelines.

The decision to turn away from these specific features of the proposals was certainly for concrete reasons. By not enacting the indemnity scheme as a law, the intention may have been to shield the guidelines, to a certain degree, from scrutiny according to the constitutional principles outlined by the Constitutional Court concerning the constitutionality of the TRC Act's amnesty legislation, which had also set out guidelines for the validity of any future legislation on amnesty.[269] This speculated goal was not reached, at least in the High Court litigation. Furthermore, placing the decision to prosecute at the discretion of the NDPP retains a much greater degree of influence for the government on criminal proceedings. The events in the Chikane case have clearly shown that the government is in a position to influence decisions of the NDPP and that its position is not entirely independent from political influence. The NDPP followed the instructions of the government to revoke a specific prosecutorial decision, although the preconditions for a prosecution of the accused had certainly been fulfilled. Although the Minister of Justice has final word on the NPA in terms of section 179(6) of the Constitution, the government is by no means entitled to interfere with the actual conduct of specific prosecutions and may not influence a specific discretional decision to prosecute. The NDPP is also by no means obliged to obey instructions by the government in respect thereof.[270] However, with regard to post-TRC prosecutions, the situation is obviously different. This was shown by the imposition of the moratorium on all post-TRC prosecutions and the political intervention in the scheduled arrests of the three security police officers in the Chikane case.

Also, it was often suggested that the position of the NDPP was generally strongly exposed to political influence and that the NDPP

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[269] See *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996. See also infra Chapter 4(1.1.1).

[270] J. de Waal and I. Currie *The new constitutional and administrative law* vol. 1 (2001) 313.

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had thus far been very loyal to the government.[271] The legislative setup of the restructured prosecution authority has given rise to criticisms concerning the position of the NDPP in conjunction with politics. On the one hand, it provides for the appointment of the NPA's head by a totally independent decision of the President,[272] and on the other hand it gives the NDPP a very powerful position; it can review any decision to prosecute and has generally great influence on practically all prosecutors and criminal proceedings[273].[274] Considering the appointment process of the NDPP, which is entirely in the discretion of the President, there were doubts that the NDPP would be sufficiently independent and thus subject to politics.[275] The appointment of a highly political figure as the first NDPP has further fuelled such apprehensions.[276]

The policy amendment foresees that the decision-making process as to whether to prosecute a post-TRC case is entirely up to the NDPP since it is empowered to make any final decision. Due to this, and the fact the policy is, to a certain degree, the conclusion of the political process of consultations it is probable that the guidelines were meant to serve as a political instrument. One can assume that the process was drafted to give the government a tool to exercise political influence in situations where it is deemed necessary, such as in the Chikane case and eventually to pursue the agenda discussed at the consultations of keeping the number of trials to a minimum.

3.7.4 *Conclusion*

The prosecution policy amendment for TRC-related cases was certainly driven by the government's motivations arising out of the consulta-

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[271] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Jan Wagener in Pretoria (May 8, 2006).

[272] See section 179(1)(a) of the Constitution and section 10 of the NPA Act.

[273] See section 179(5)(d) of the Constitution and section 22 of the NPA Act.

[274] D. van Zyl Smit and E. Steyn 'Prosecuting authority in the new South Africa' in *Centre for the Independence of Judges and Lawyers Yearbook* vol. 8 (2000) 137 at 146.

[275] Ibid., 151 and 153; M. Schönteich *Lawyers for the people* (2001) 44 and 46.

[276] Ibid.

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tions with various representatives of the former apartheid security forces, which were aimed at finding solutions to keep the number of post-TRC trials as low as possible. The guidelines for their setup and criteria create wide-ranging opportunities to forego prosecuting the crimes of apartheid and had the potential to easily prevent a number of cases from reaching the stage of indictment.

The first case considered under the guidelines did not lead to impunity. Although *prima facie* a number of the most important criteria were complied with, the NDPP decided to prosecute. However, it cannot be determined with certainty what the NPA's reasons were for deciding to lay charges in the Chikane case after all, since no information was made public on the guidelines procedure preceding the plea and sentence agreement. It also cannot be ruled out that the decision was essentially political and thus not representative. The Chikane procedure at least shows that the guidelines are a highly flexible means according to which arbitrary decisions can be made without any public participation or reasoning. It also shows that, contrary to what one would expect on the basis of the theoretical setup of the policy amendment, one cannot assume with certainty that the guidelines procedure automatically resulted in a *de facto* indemnity of the alleged perpetrators, in cases where its criteria were complied with.

Since the concept of the process is lacking transparency and public participation, neither victims nor the public could be certain to benefit in terms of publishing more information regarding the truth about apartheid era atrocities. Generally, the practical value of the procedure would be very limited. The main reasons for the guidelines put forward by government officials were that a holistic approach was necessary and that effect should be given to the President's speech to reveal more information on possibly dangerous networks.[277] However, in terms of

[277] The proposition that secret networks at all still pose a latent danger to the state is strongly rejected by many but cannot be answered conclusively in this book (Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006)). The existence of a range of weapons caches which are still hidden is, however, not doubted.

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giving incentives to perpetrators to reveal more information, it would also be possible to use the two legal mechanisms of plea and sentence and state witness agreements according to sections 105A and 204(2)(a) of the Criminal Procedure Act. Both mechanisms encourage perpetrators to come forward and disclose in exchange for a complete or partial indemnity.[278] Since it is unlikely that perpetrators who thus far deliberately refused to cooperate will now come forward voluntarily, the basic precondition of the threat of an imminent prosecution is the same. Moreover, plea-bargaining and state witness arrangements, which take place within a clear legislative framework and are independently adjudicated by a court, might also be far more convenient for perpetrators, especially considering the Foundation for Equality before the Law's strong critique concerning the vagueness and unpredictable nature of the guidelines. The proceedings in the Chikane case are also indicative with regard to the apparent lack of practical necessity, since it is not comprehensible why the accused first underwent the new procedure and apparently made extensive disclosures, if they were eventually convicted via a plea and sentence agreement.

By enacting the guidelines, which could potentially prevent further trials, the government contradicted the recommendations of the TRC and the overall scheme of conditional amnesties, which foresaw prosecutions in cases where amnesty was not granted. Furthermore, a setup which allows for the granting of *de facto* indemnity on a regular basis in cases where a full disclosure is made, as the High Court asserts the function of this amendment to be, is an essential reproduction of the amnesty process, which would have grave consequences for the legitimacy and reputation of the TRC's amnesty process and for the interests of victims in the amnesty process. The TRC Act provided for a definite and specified time frame for the amnesty process. This was the result of extensive discussions and part of a broad consensus. It was never meant to be extended in any form. This would be totally unacceptable for victims who relied on the fixed framework of the

[278] See for both mechanisms also *infra* Chapter 4(3.3).

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amnesty legislation.[279] Furthermore, the drafting process has led to further alienation of official politics from the civil sector, human rights and victim organisations.

As a result, one must conclude that the guidelines marked a grave step backwards in the process of establishing accountability for apartheid era crimes after the conclusion of the TRC; a step which has been reversed by the High Court in Pretoria. However, the great delay and uncertainty in prosecuting apartheid era crimes which has been caused by the enactment is irreversible.

4. *Conclusion on Government's Political Considerations*

As shown above, the issue of criminal accountability in the wake of the TRC is, to a large extent, charged with political influences and considerations. In the following subchapter the political motivations and considerations on the part of the government will be summarised and evaluated. New aspects will be highlighted.[280]

Although in 1998 President Mandela called for trials within a fixed timeframe, the subsequent government under President Mbeki was clearly reluctant to create the appropriate conditions to institute trials on a general basis. Instead it engaged in working out solutions on how to avoid further trials and on how to enact new indemnity legislation, stopped a promising prosecution and imposed a moratorium, which further delayed the proper start of trials for more than one year. The approach indicates a clear lack of political will.

Key reasons for the government's generally dismissive attitude towards prosecutions lie in the motivations for entering into consultations with

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[279] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Desmond Tutu in Cape Town (March 22, 2006).

[280] It is important to mention that no comment or statement was made by government officials. The deputy Minister of Justice, Johnny de Lange and the Director-General of the President's office, Frank Chikane, were both unsuccessfully approached for comment by the author. The government's approach therefore had to be determined on the basis of the information laid out in the subchapters above.

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the SADF generals, which have been laid out above.[281] However, there are other factors that contribute to the generally dismissive attitude towards trials. Commentators and experts on the issue of post-TRC prosecutions see as a central factor the fact that former liberation fighters can also become the focus of the prosecution authorities.[282] Former liberation movement cadres who were not granted amnesty are legally as exposed to criminal liability as former security forces operatives. The trial of former activist Ronnie Blani highlighted discomfort among ANC and government members concerning the prosecution of liberation activists. Of course, not only ordinary rank and file but also members of the higher echelons of the ANC and government could be vulnerable to prosecution. A number of leading ANC members submitted 'collective' amnesty applications, which had been refused.[283]

In November 1997, 37 high-ranking members of the ANC submitted applications for amnesty. Among them were current President Thabo Mbeki,[284] former Deputy President Jacob Zuma and ministers such as Charles Nqakula or the National Commissioner of Police Jackie Selebi. In support of their application, all commonly referred to a declaration of the ANC formulated for this purpose.[285] As such the applications

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[281] See *supra* Chapter 3(2.2.2).

[282] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Desmond Tutu in Cape Town (March 22, 2006); Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006); J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265–66. Klaaren and Varney also suggested that the prospects of huge delictual claims against the state or political organisations such as the ANC following a conviction in a criminal trial could be a factor. However, since no further signs indicating the relevance of this issue could be made out and thus far no claims have been lodged, this issue can be left aside.

[283] See further L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 39–44; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 15 and 214; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 140; *TRC Report*, vol. 1, chap. 7, para. 95 (Practically all sources only deal with the political and legal implications of the applications and not with the contents thereof.).

[284] Application no. AM/5506/97.

[285] Decision no. AC/99/0046.

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stated that collective responsibility was assumed for all criminal acts committed by ANC members in the execution of the ANC's strategic and policy decisions during the struggle against apartheid.[286] It was further stated that none of the applicants had been aware of or involved in any crimes and could not have knowledge of all particular acts committed on the basis of their policy directives. Accordingly no particular acts or specified incidents were mentioned in the applications.[287] Although they obviously contravened section 20(1) of the TRC Act, which requires that a particular crime should be disclosed in any application for amnesty, the Amnesty Committee granted amnesty for the 37 applications.[288] The decision was challenged by both the TRC and the NP.[289] The Cape Town High Court in May 1998 reversed the decision to grant amnesty and ordered that the applications be considered anew.[290] Meanwhile, over 70 other applications by high-ranking ANC members had been tendered, which were also based on the common declaration.[291] Eventually, in the second run, the Amnesty Committee refused to grant amnesty in any of the applications since no specific conduct, which could constitute a crime, had been disclosed.[292]

However, since no particular acts were disclosed in the applications it does not automatically mean that a prosecution concerning the application has to follow. Nevertheless, the mere fact that top ANC members had been denied amnesty was politically exploited

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[286] *TRC Report*, vol. 1, chap. 7, para. 95.

[287] Decision no. AC/99/0046; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 16.

[288] *TRC Report*, vol. 1, chap. 7, para. 95.

[289] See L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 41. Due to section 5(e) of the TRC Act, the TRC could not instruct the Amnesty Committee to withdraw its decision. The NP accused the Amnesty Committee of bias.

[290] *The National Party of South Africa and James Marren Simpson v The Chairperson; Committee on Amnesty of the Truth and Reconciliation Commission and 38 others* (C) Cases no 3626/98, 3859/98, 3729/98 8 May 1998, unreported.

[291] Decision no. AC/99/0046; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 276.

[292] Decision no. AC/99/0046.

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and used to pressure the government. As mentioned above, various political parties and organisations called for 'even-handed' prosecutions, 'equally' targeting ANC members.[293] As most of the advocates of such calls rejected the idea of prosecutions and preferred the concept of a general amnesty, it is obvious that the call is intended to pressure the government into stopping further trials. The Foundation for Equality before the Law, represented by its attorney, Wagener, even went so far as to compile complete dockets supporting the prosecution of top ANC members, including about five of the top ANC leadership, among them President Mbeki.[294] An attorney, Jaap Cilliers, who had also been the attorney of Wouter Basson, had been approached to evaluate the dockets. It was claimed the dockets contained sufficient evidence to support charges.[295]

The PCLU even requested the Foundation for Equality before the Law to hand over the dockets since it intended to investigate the matters and evaluate the possibility of pressing charges.[296] The organisation refused. It of course had no interest in the conviction of top ANC members, since its preference was for the preclusion of all prosecutions.[297] Only in the event of further trials, especially if such prosecutions focused only on the former apartheid side and not on liberation movement crimes, was there an intention to use the gathered information as a means to exercise political pressure and to publish the information and, only theoretically, to eventually engage in private prosecutions, all with the aim of preventing any further trials.[298] In 2004, when the arrests in the Chikane case were suddenly suspended on the directions of the President, the issue apparently played an influential role. According to Wagener, he used the matter successfully to pressure the govern-

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[293] See *supra* Chapter 3(1.2.1).

[294] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[295] Ibid.

[296] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 75.

[297] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[298] Ibid.

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ment to stop the arrests.[299] Thus obviously the matter weighs heavily in the government's considerations. In July 2008 representatives of the Foundation for Equality before the Law publicly reiterated their willingness to act against leading ANC officials by instituting private prosecutions, should the state move ahead with criminal proceedings against their members.[300]

The former SADF generals also view the issue of potential criminal liability of ANC members as a major consideration for the government. Moreover, if any of the generals had been charged after the TRC, they were willing to pressure the government with exactly the same means, politically exploiting the issue by calling for the prosecution of ANC members.[301]

Advocates of even-handed prosecutions suggest that criminal liability could concern various orders given through the specific direct command structure of the ANC in exile.[302] During the apartheid years the ANC directed violent struggles against the South African state from abroad. The top command structure of the ANC at the time was the National Executive Committee (hereinafter NEC), which exercised direct responsibility over any sizeable militant ANC organisation or cell operating in South Africa.[303] The NEC also directed the ANC's armed wing, MK. Most of the 37 ANC amnesty applicants who were denied amnesty are former members of the NEC.[304] The past conduct of the ANC and its organs was also subject to investigations and hearings by the TRC. The TRC later in its report emphasised that the ANC was an internationally recognised liberation movement involved in a just war against apartheid, which was considered a crime against humanity.[305] Nevertheless, it found that ANC organs at times used means that resulted in unjustifiable

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[299] Interview with Jan Wagener in Pretoria (May 8, 2006).

[300] B. Webb *Tit-for-tat threat by apartheid generals* Sunday Tribune, July 20, 2008.

[301] Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[302] Interview with Jan Wagener in Pretoria (May 16, 2006).

[303] *TRC Report*, vol. 2, chap. 4, appendix, page 393.

[304] Ibid.

[305] *TRC Report*, vol. 2, chap. 4, para. 2.

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gross human rights violations.[306] These conclusions were drawn especially with regard to the bombing and the landmine campaigns, both of which were launched by the ANC to target state facilities and security force personnel and equipment in South Africa.

Now, advocates of even-handed prosecutions claim that these campaigns, especially the landmine campaign, which was instructed by the NEC and carried out by MK, could form the basis for a criminal liability of former NEC members.[307] The TRC pointed out that it had been the declared aim not to harm civilians in such campaigns[308] but that inevitably and foreseeably bombs directed at other targets also killed civilians.[309] The landmine campaign was also designed and ordered by the NEC. During the mid-1980s, MK was given the task of planting landmines in rural areas of northern South Africa and other border regions to target military patrols.[310] According to the TRC this inevitably led to many civilian casualties, which was also the reason that the ANC quickly abandoned the campaign.[311] From the findings of the TRC it is clear that bomb attacks, such as the Church Street bomb, and the landmine campaign were directly attributable to orders given by the NEC. It is further clear that in many cases it was obvious and foreseeable, even though clearly not intended, that civilians would be harmed by such actions.[312] These circumstances might potentially provide the basis to

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[306] Ibid. See further *TRC Report*, vol. 3, chap. 6, paras. 500–12; *TRC Report*, vol. 2, chap. 4, paras. 13–45.

[307] Interview with Jan Wagener in Pretoria (May 16, 2006).

[308] *TRC Report*, vol. 6, s. 5, chap. 3, para. 30.

[309] *TRC Report*, vol. 2, chap. 4, para. 37. The most prominent of such bomb attacks was the explosion of a car bomb in front of the South African Air Force headquarters in Church Street, Pretoria, in 1983, which killed 21 people, 10 of whom were civilians. Another prominent attack was that in 1986 on the Magoo's Bar/'Why Not' Bar, a bar in Durban popular among security force members. It resulted in three deaths (see *TRC Report*, vol. 2, chap. 4, paras. 13–37).

[310] *TRC Report*, vol. 2, chap. 4, para. 38.

[311] Ibid., para. 45.

[312] *TRC Report*, vol. 6, s. 5, chap. 3, paras. 30, 39, 40, 42–43. See also *TRC Report*, vol. 2, chap. 7. The TRC report illustrates that lower and local ANC parts of the organisation also account for numerous deaths in the course of the struggle. Equally

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establish the criminal liability of high-ranking ANC and government members who were involved in the NEC or other command structures at that time and who had been refused amnesty.

The NPA had, however, announced in 2004 that there was not sufficient evidence warranting criminal investigations against the 37 ANC members who had been refused amnesty.[313] Regardless, it seems highly unlikely that it would be easy for the PCLU to institute criminal proceedings against leading politicians of the ANC, such as former President Thabo Mbeki. Nevertheless, the more crucial factor is that the side of the security forces, police and military alike, can use their influence to exercise political pressure, stir up significant political conflict and unrest and to damage the reputation of leading ANC officials by publicly linking them to criminal acts and claiming they could be charged for murder or other crimes. This would of course affect the stability of the government. Furthermore, the opponents of prosecutions will continue to claim that post-TRC prosecutions are unjust and harm reconciliation if they only concentrate on former security force members. These circumstances must certainly contribute to the government's reluctance to promote post-TRC prosecutions and to their desire to consult with the perpetrator groups.

A range of other factors certainly also contribute to the lack of political will to pursue post-TRC prosecutions. It has been mentioned above that one of the ANC leaders stated that prosecutions were not in the country's interest.[314] It is likely that this represents a common position among many government members. As such, sources from the Justice Ministry were reported in the media as mentioning that the government had no interest in South African politics being dominated and disrupted by a series of spectacular trials relating to the apartheid era.[315]

Underlying this are probably concerns, which were also voiced in the public debate on post-TRC prosecutions. Post-TRC trials would

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many gross human rights violations resulted from decisions of MK operatives, taken independently from any official command structures.

[313] *NPA won't prosecute ANC 37* SAPA, June 2, 2004.

[314] See text accompanying *supra* Chapter 3 note 75.

[315] J. Steinberg *Juggling justice, practically* Business Day, June 21, 2001.

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constantly highlight accounts of the injustices, atrocities and crimes of the apartheid past over a period of several years. It is most probably feared that this could result in the recurrence of rifts between the ethnic groups and fuel alienation and accusations concerning the apartheid past.[316] As mentioned above, compared to the period when the TRC was in session, during which the media reported almost daily on the TRC and its revelations and findings on the violent conflicts of the past, public debate has generally become rather quiet and sporadic. The government probably welcomes this since it indicates that the ethnic groups might have left the conflicts of the past behind. The government certainly fears that this quiet could be changed by a row of TRC-related trials.[317] The recent prosecutions, especially that in the Chikane case, the PEBCO-Three and Ronnie Blani cases, have shown that such occasions inevitably also give rise to renewed public discussion and conflicts based on ethnic grounds. The Afrikaans speaking white population in particular might perceive prosecutions as part of an overall attack on their ethnic group and might therefore further feel alienated from the new South African state.[318] The concern is, thus, that old wounds might be opened up and that some of the good effects the TRC had on nation-building might be tainted. Thus, as far as South African society is concerned, the government is surely anxious that prosecutions will be a serious obstacle in the process of leaving the past behind and moving forward towards a reconciled nation with harmony reigning between the various ethnic groups. The government's sensitivity towards such issues is also obvious from the amended policy guidelines, as it is stated there that the NDPP needs to take into account how a prosecution could impact on the 'national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society' and whether the prosecution could cause renewed trauma and conflict where reconciliation has already taken place.[319]

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[316] Interview with Desmond Tutu in Cape Town (March 22, 2006); Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006).

[317] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[318] Ibid.

[319] See *supra* Chapter 3(3.2).

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Simple issues of governance thereby also come into play as any government is interested in heading a stable society and not one constantly shaken by ethnic conflicts or alienation. There may also be an economic dimension as it is certainly more advantageous in this regard to signal to the international community that the conflicts of the past have ceased indefinitely and the multi-ethnic society and country have stabilised for good.

Apart from these general considerations, concrete practical factors also militate against further wide scale prosecutions. The process of post-TRC prosecutions starts with a legacy of failure.[320] At least as far as the high profile cases are concerned, two very extensive, costly and time consuming trials, the trial of former Minister of Defence Magnus Malan and others, and the Wouter Basson trial ended with acquittals. TRC cases have proved to be very arduous, time-consuming and expensive. The current government has to face an extremely high crime rate[321] and has limited resources for the police and prosecutors.[322] In this regard it is probably reluctant to assign sufficient resources to the prosecution of apartheid crimes, considering the pressing need to deal with current crime and the past examples of failed TRC prosecutions attempts.

On the other hand, the government is aware that the TRC amnesty scheme unequivocally demands prosecutions. It had been commonly acknowledged in the consultations with the apartheid security forces after 1998 that due to this a general amnesty would not be feasible politically.[323] It is clear that abstaining completely from pursuing prosecutions, which would, according to the above findings, suit the government,

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[320] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[321] In 2006 18,500 cases of murder, 55,000 of rape and 119,000 of armed robbery were recorded (crime statistics available at http://www.saps.gov.za).

[322] See L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 77–79. The later constitutional court judge Richard Goldstone had already in 1994 pointed out that the justice system of the new South Africa would simply not be capable to cope with all crimes committed during apartheid (P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 9).

[323] Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

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could seriously damage the legitimacy and the reputation of the TRC. Harming the TRC and its beneficial effects for the country is not in the government's interest. Thus, the government faces a dilemma regarding its obvious reluctance to foster prosecutions.

The guidelines were certainly intended to balance these conflicting factors. With them, the government decided that prosecutions would go ahead, turned away from strict indemnity procedures in a court, *prima facie* leaving it in the hands of the NDPP to decide whether to prosecute. At first glance, this satisfies the TRC's requirement for trials to go ahead. Nevertheless, the intention of the government to restrict the scope of prosecutions could also easily be satisfied by the policy amendment, since it provided for ample and flexible measures to influence any specific criminal proceeding. According to the design of the policy amendment, a prosecution, for example, may be rejected if it is deemed detrimental for reconciliation and nation-building, which is the factor that most obviously introduces political considerations into the prosecution process.

As a result of the considerations outlined above, one must conclude that the government had a tendency to prefer a course of partial and controlled forgetting about the past over comprehensively and unequivocally dealing with past political crimes through criminal proceedings.

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Chapter Four

Normative Standards and Practical Prospects for Further Prosecutions

The process of initiating and conducting criminal trials in the wake of the TRC for those who committed politically motivated gross human rights violations during the apartheid conflict has certainly not been dealt with exhaustively. During the decade succeeding the official end of the TRC in 1998, very few trials were initiated. The task to conduct post-TRC prosecutions is, thus, far from conclusion.

The following chapter will highlight the features of the applicable legal framework which must guide the official approach to establishing criminal accountability for politically motivated human rights violations in South Africa. This also includes dealing with statutory limitations and legally consistent prioritisation criteria. Concurrently, the practical prospects for further trials and the question of whether we may expect a significant number of further proceedings will be examined. Although it is not possible to assess here which cases could still be prosecuted, a short collection of cases will be presented, which were either announced by the NPA as exhibiting sufficient prospects for a successful prosecution, or which due to certain specific features are of extraordinary or exemplary relevance for victims and the issue of post-TRC criminal accountability as a whole.

1. *Constitutional and International Law Requirements*

Criminal proceedings concerning the politically motivated gross human rights violations of the apartheid era are invariably embedded in a legal framework. As such, norms and legal standards from both

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constitutional as well as international law place specific obligations on the government and also determine the legality of the current official approach and the actual conduct of prosecutions through the NPA. The South African government and the NPA must consider this legal framework and fulfil any legal requirements. The extent to which the State continues to fail to conduct a significant number of criminal trials and its policy of trying to prevent trials on a large scale might be seen as conflicting with such requirements. However, any possible legal obligations and South Africa's compliance therewith will be outlined in the following paragraphs.

1.1 *Constitutional law obligations*

The politically motivated crimes which were committed in the course of the apartheid conflict violated a range of fundamental human rights, which are meanwhile explicitly protected in the Constitution of democratic South Africa. Many apartheid opponents were abducted, tortured and killed by the security forces simply for their resistance to the inhumane regime. Many civilians also died through activities of the liberation movement. The relevant rights of the Constitution's Bill of Rights[1] concerned by such conduct are the right to the respect of human dignity of every human being, as enshrined in section 10 of the Constitution, the right to life, according to section 11 of the Constitution and the fundamental rights of freedom and security emanating from section 12 of the Constitution. Section 12 contains the rights not to be arbitrarily deprived of personal freedom, not to be detained without trial, to be free from all forms of violence regardless whether public or private, not to be tortured and not to be treated in a cruel, inhuman or degrading way, as well as the right to bodily and psychological integrity.

According to section 7(2) of the Constitution the state is obliged to protect, respect, promote and fulfil the Bill of Rights. This obligation is not confined to preventive measures but extends to punitive measures

[1] See sections 7 to 39 of the Constitution.

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if there has been a serious violation of a right contained in the Bill of Rights. Impunity for such serious violations would effectively render the rights meaningless. The prosecution of murder, thus, is a central means to protect the right to life and the prosecution of assault likewise is a central means to protect the right to bodily integrity.[2] The state is accordingly obliged to protect the life of its citizens through the enforcement of the criminal law to the best of the state's abilities.[3] The obligation arises, to the same extent, also for violations of other fundamental rights such as the right not to be subjected to violence and torture.[4] As a result, the state has a constitutional obligation to prosecute offences that threaten or violate the rights of citizens, and this obligation is of central importance in the overall constitutional framework.[5]

The importance of the institution of criminal proceedings where rights are violated is further underlined through section 179 of the Constitution, which establishes the prosecution service and outlines that it needs to exercise its functions without fear, favour or prejudice.[6] It is of specific relevance in the present context, that the prosecution service's obligations apply not only to violations of rights that occurred after the Constitution came into force but also to offences committed beforehand.[7]

1.1.1 *The AZAPO rationale*

However, according to section 7(3) of the Constitution, constitutional rights can be subject to limitations. The Constitutional Court has elaborated extensively on the limitation of rights in cases of indemnity from prosecution for politically motivated crimes committed in the course of the apartheid conflict. In 1996, the Court dealt with the constitu-

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[2] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 31.

[3] J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 242.

[4] Ibid., 259.

[5] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at paras. 31–32; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[6] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 33; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[7] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

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tionality of the amnesty legislation contained in the TRC Act in what commonly became known as the "AZAPO case".[8] The decision is of great significance for the general constitutional principles applicable to prosecuting past human rights violations.

The Court had to decide whether section 20(7) of the TRC Act, which exempts perpetrators who were granted amnesty from criminal and civil liability, contravened the Interim Constitution. It, thus, had to decide under which circumstances the non-prosecution of politically motivated human rights offenders of the apartheid era was constitutionally justified. The applicants in the case[9] argued that the relevant amnesty regulations of the TRC Act were unconstitutional since the state would thereby violate its constitutional duty to prosecute crimes committed during the apartheid regime.[10] Specifically, the applicants claimed that section 20 of the TRC Act would violate section 22 of the Interim Constitution, according to which '[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.' The respective provision is now enshrined in section 34 of the Constitution.

From the outset, the Constitutional Court made it clear that an amnesty, that is, the official granting of indemnity or factual impunity,[11]

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[8] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996. See on the judgment C. Braude and D. Spitz 'Memory and the spectre of international justice: a comment on AZAPO' (1997) *South African Journal on Human Rights* 269–82; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258–68; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 105–32; Z. Motala 'The Promotion of National Unity and Reconciliation Act, the constitution and international law' (1995) 28 *Comparative and International Law Journal of Southern Africa* 338–62; J. Sarkin 'The trials and tribunals of South Africa's Truth and Reconciliation Commission' *South African Journal on Human Rights* (1996) 617 at 625–39.

[9] The challenge was brought by the AZAPO, the widow of Steve Biko and relatives of Griffith Mxenge and Florence and Fabian Ribeiro who were murdered by the security police.

[10] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 106.

[11] Ibid., 7–9.

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impacts on fundamental rights since all persons are entitled to the protection of the law against unlawful invasions of the right to life, respect for and protection of their dignity and the right not to be subjected to torture.[12] The Court pointed out that in case rights are invaded, the victims must have the right to obtain redress before ordinary civil or criminal courts and that the perpetrators must account before such courts for the crimes they commit. The Court was obviously also then of the conviction that, although the Constitution only came into force at a later stage, it nevertheless demands redress for the crimes committed during apartheid. The Court stated that an amnesty effectively obliterates such rights.[13] In the Court's view therefore, the submission that an amnesty constitutes a violation of section 22 of the Interim Constitution, had considerable merits.[14] Accordingly the Constitution needed to authorise such a violation.[15]

In clarifying whether this was the case, the Court mainly focussed on a provision in the epilogue of the Interim Constitution. The part in question is the passage which provides for the enactment of a law on amnesty. As pointed out above, it says that 'amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.'[16] The Court found the epilogue to be of no lesser status than any other provi-

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[12] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 9.

[13] Ibid.

[14] Ibid., at para. 10. In this regard the decision contradicts with later decisions of the Constitutional Court where it explicitly ruled that section 34 of the Constitution, formerly section 22 of the Interim Constitution, only applies to non-criminal disputes (*S. v Pennington and Summerley* (CC) Case no. CCT 14/97 18 September 1997 at para. 46). Yet the Court in the AZAPO case obviously applied section 22 also to criminal disputes. See also M.E. Bennun 'Amnesty and international law' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 92 at 106 and J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 555.

[15] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 10. See section 33 of the Interim Constitution and 36 of the Constitution.

[16] See text accompanying *supra* Chapter 1 note 41.

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sion of the Interim Constitution and found that this section not only permitted the granting of amnesty but even obliged the legislature to pass an appropriate law on amnesty.[17] The Court found two subsequent reasons supporting the constitutionality of the amnesty provision.

First, the special political circumstances of the negotiation and transition period of the early to mid 1990s were taken into account.[18] The Court pointed out that the crucial factor for upholding the amnesty provisions was that without amnesty the 'historic bridge', as outlined in the epilogue, might never have been successfully erected.[19] Amnesty in this sense was, according to the Court, a vital means of effecting a successful and peaceful transition to a democratic society.[20] It stated that the negotiated hand-over of power to a democratically elected government with the full support of the former state forces and the agreement on a democratic constitution might not have been reached, was it not for the epilogue's provision on amnesty as a means to promote nation-building and reconciliation.[21]

Secondly, the Court took into account the fact that it would be of overwhelming importance for the victims of political violence, the nation as a whole as well as the project of nation-building to uncover the truth about the apartheid crimes in order to establish a better public record of the past atrocities. To achieve this only by means of criminal investigation would, due to the secretive methods involved, widespread cover-ups and the dearth of investigations during the apartheid era, be very difficult. Accordingly, it would be necessary to offer incentives

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[17] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 14.

[18] The Court made extensive reference at various points to the difficult task of negotiation, transition and the spirit of reconciliation encapsulated in the Interim Constitution (*The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at paras. 2–4, 17, 21, 48).

[19] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 19.

[20] Ibid., at para. 32.

[21] Ibid., at para. 19.

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to those who are aware of the information by means of amnesty to uncover the truth about past human rights abuses.[22]

The reasons can be summarised to the effect that amnesty was justified on the basis of the epilogue and was required by the objectives of effecting a peaceful transition to democracy and uncovering the truth about criminal acts committed during the apartheid era.

1.1.2 *The present approach and the constitutional framework*

In examining whether the State's present approach to post-TRC criminal accountability does justice to these constitutional requirements or to what extent it might be unconstitutional, we must recall once again two features which characterise this present approach.

For one, there have been very few criminal proceedings in TRC-related cases after 1998. After 2003, when proceedings were actually meant to be pursued by the centrally located PCLU, the number of proceedings declined even further. Only two significant prosecutions, those in the Blani and Chikane cases, have been concluded by the PCLU between 2003 and 2008. Only the prosecution in the PEBCO-Three case is currently pending. It has been pointed out that there are many practical restrictions that bar the PCLU from making greater progress in terms of the number of prosecutions. However, there have certainly not been as many prosecutions as were potentially possible,[23] even when the significant constraints on resources are taken into account. Thus, the NPA is, to a certain degree, simply refraining from investigating and prosecuting cases, thereby, to a certain extent, creating a state of *de facto* indemnity. The government contributes significantly to this state of impunity by not giving the NPA the support it would need to go further. Instead it has, as shown above, attempted to restrict prosecutions from progressing further. Although the NPA is independent under the terms of section 179 of the Constitution, the government restricted potential criminal proceedings and sought to put in place measures to further limit their potential.

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[22] Ibid., at para. 17.

[23] See for concrete practical prospects *infra* Chapter 4(5).

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It is certainly possible that the constitutional obligation to prosecute only extends to that which is reasonably and practically possible, and, thus, must also take account of the very limited resources available to the NPA and other pressing needs of the state. However, to the extent that the NPA deliberately refrains from instituting criminal proceedings in cases exhibiting sufficient prospects of success, it violates this constitutional obligation. The minimal progress in reaching anywhere near the maximum capacity for prosecutions does not do justice to these constitutional requirements and the NPA and the government are obliged to do more.

The other critical circumstances are discretionary decisions of the NDPP not to prosecute, either based on the ordinary prosecution policy of the NPA or on any possible amendment of the policy applicable to TRC-related cases. It has already been pointed out that, unlike countries that adopted the so-called Principle of Legality which obliges prosecutors to pursue every crime, in South Africa prosecutors generally have a wide discretion as to whether to indict a perpetrator or not.[24]

As already mentioned above, the High Court of Pretoria abstained from analysing the underlying constitutional provisions when coming to the conclusion that the policy amendment, which was intended to guide the use of discretion, is unconstitutional. However, the government's intended policy approach needs to be examined on a basis similar to the amnesty law during the 1990s. The fact that the amendments were not introduced as a law, that they do not outline a legally binding concrete result and that the NDPP's generally prosecutorial decisions according to the general prosecution policy neither effect criminal nor civil liability does not exempt them from constitutional muster similar to that of the TRC Act in the AZAPO litigation before the Constitutional Court. Once again without systematic constitutional law analysis, the High Court concluded accordingly when adjudicating the amendments. It confirmed that the guidelines create the possibility for the prosecutors to grant perpetrators *de facto* indemnity. What is generally crucial in this regard is that decisions of the NDPP not to institute a prosecution are

[24] M. Schönteich *Lawyers for the people* (2001) 19–20.

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tantamount to legal amnesty, as perpetrators would effectively receive impunity. It has already been pointed out that private prosecutions are simply not a realistic option for apartheid era victims.[25]

Moreover, according to section 8(1) of the Constitution, the Bill of Rights binds all state organs. Generally therefore, it cannot make a difference whether perpetrators are not prosecuted on the basis of a law or an administrative policy, as long as this results from a decision of a state organ and effectively grants the perpetrator immunity from criminal accountability. It also flows from section 179(2) of the Constitution, which states that '[t]he prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings', that the institution of criminal proceedings is a matter of importance to the state. Indeed, it is one of the primary tasks of the state connected to its constitutional duty to protect the Bill of Rights.[26] Thus, it is clear that the NDPP cannot simply justify a decision not to prosecute by referring to the possibility to prosecute privately. The High Court strongly confirmed this trite perception, when plainly stating that it is not for victims to investigate crimes.[27] Accordingly, it would be inappropriate to evaluate discretionary decisions not to prosecute differently to the amnesty law simply with reference to the fact that criminal and civil liabilities legally remain intact.

Decisions of the NDPP to preclude prosecution, whether based on specific guidelines or on the general prosecution policy, effectively obliterate the victims' rights to judicial redress and their human rights in the Bill of Rights in the same way recognised by the Constitutional Court in the AZAPO decision on the amnesty law.[28] Yet there is no constitutional provision in the current constitution which, like the epi-

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[25] See text accompanying *supra* Chapter 3 note 230.

[26] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 33; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[27] *Nkadimeng and others v The National Director of Public Prosecutions and others* (Transvaal Provincial Division) Case no. 32709/07, unreported, at para. 16.2.3.3.

[28] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at paras. 9–10.

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logue of the Interim Constitution, authorises the state not to prosecute gross human rights violations which occurred under apartheid.

However, item 22 of schedule 6 of the Constitution extends the provisions of the Interim Constitution's epilogue to the present constitution as it provides that:

> Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

However, commentators have pointed out that this section is only applicable to maintain the purposes of the TRC Act, thus, providing for the option of amending it only in terms of its defined scope and ambit.[29] Undoubtedly the section does not constitute a general extension of the epilogue's broad requirement to grant amnesty into the future. Thus, it is not possible to base a completely new process of indemnity on it. It is clear that it was not the intention of the legislator to provide for any new and separate indemnity process in the new Constitution.

Apart from the epilogue, the Constitutional Court's other main consideration in upholding the amnesty law were the necessities of the political situation during the negotiation period. The situation was very unstable and the country found itself on the brink of open civil war. The support of the security forces for the transition needed to be assured. Commentators consequently pointed out that an expiry of the transition period alters the evaluation of any further amnesty mechanism drastically.[30] There can be no doubt that at present the South African state has stabilised significantly and the new democratic order is well established. There are certainly no forces in the country, which are willing or capable of threatening the stability of South Africa

[29] J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 281.

[30] Ibid., 279.

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in any significant way.[31] Thus, there is no constitutional authority, which could now, some 13 years after the first democratic elections, justify the extended non-prosecution or indemnification of apartheid era political crimes.

However, the general prosecution policy concerning the prosecutor's conduct with regard to the exercise of prosecutorial discretion states in paragraph 4.(c), that in cases where a reasonable prospect for a successful prosecution was established, a decision not to prosecute might nevertheless be taken by the prosecutor if the public interest so demands. This test needs of course to be applied on a case by case basis, but nevertheless indicates that with regard to TRC-related cases the public interest might be used to justify non-prosecution in terms of the general prosecution policy in certain cases. Constitutional considerations must certainly be taken into account when applying the general prosecution policy, as a decision that is in blatant opposition to important constitutional principles can hardly be claimed to be in the public interest. The benefit of enhancing the public knowledge on past atrocities by offering perpetrators incentives to disclose was identified by the Constitutional Court as a major aspect of the public interest when upholding the legality of the amnesty legislation.

However, this factor was only one of many in the Court's considerations. When considered alone, it is clearly outweighed by the following considerations: the public interest in prosecution is strengthened by the mere gravity of the crimes in question. According to section 7(1) of the Constitution, the Bill of Rights is considered a cornerstone of South Africa's new democracy. Accordingly, it hardly seems possible, in general terms, to declare the non-prosecution of violations of its central values, such as the right to life, to be in the public interest. Furthermore, as made clear at the outset, the TRC's legal scheme on amnesty demands the prosecution of those who were not granted amnesty. Not only might the legitimacy of the whole mechanism be seriously harmed should prosecutions not follow, but victims who relied on the central proposition of post-TRC prosecutions when accepting

[31] Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006).

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the indemnification of perpetrators might justifiably feel betrayed. Furthermore, a central statement of the Constitution is, according to its section 1(a), that South African democracy is based on the values of the advancement of human rights, freedom and equality to which the Bill of Rights gives specific expression. Constitutional Court judge Albie Sachs has pointed out that:

> Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of state power to murder and dispose of opponents. It follows that any exercise of judicial power which has the effect of directly inhibiting the capacity of the state subsequently to secure accountability for such conduct goes to the heart of South Africa's new constitutional order.[32]

This statement forcefully demonstrates how important it is for the public interest to prosecute the crimes committed by the apartheid security forces. To do otherwise would be in blatant opposition to these principles, undermine the rule of law according to section 1(c) of the Constitution and would do nothing to promote a human rights culture. Any decision not to prosecute that is not prompted by practical realities, such as availability of evidence, thus, cannot be justified. Moreover, due to the aforementioned forceful assertion of constitutional rights and values, the Constitution implicitly prohibits the use of discretion in this regard altogether, as it would subtract from these fundamental legal pillars. In a legal sense and in the public interest the Constitution even obliges the NPA to prosecute violations of the Bill of Rights wherever possible.

The High Court of Pretoria accordingly and correctly declared the policy amendment unconstitutional. The government is barred from introducing a similar indemnity process in the future. Any discretionary decision of the NPA not to prosecute gross human rights violations, although there is sufficient evidence and a prospect of success is therefore unconstitutional. Furthermore, the lack of progress on criminal

[32] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 112 (separate opinion of Sachs J.).

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proceedings does not do justice to the Constitution's general requirement to protect the Bill of Rights by applying the criminal law. Thus, the government is obliged to provide more support and must refrain from restrictive interference.

1.2 *International law obligations*

The question whether the South African state's present conduct of criminal investigations and prosecutions of politically motivated human rights violations satisfies legal requirements also has implications under international law, as many of the crimes might constitute international crimes. The litigation at the Constitutional Court in the Basson case already highlighted that international law places obligations on the NPA and national courts regarding criminal accountability for past human rights abuses, which must certainly be considered to a far higher degree in the future than has thus far been the case.[33] The following subchapter seeks to outline in broad terms whether the South African state is obliged, under international law, to institute criminal proceedings when there is evidence supporting charges in cases of political human rights violations during the apartheid era, and likewise whether refraining from instituting criminal proceedings under such conditions violates international law. 'Prosecution' in this context refers to the criminal investigation, charging and possible sentencing of perpetrators alleged to have committed the type of crimes referred to previously, if there is sufficient evidence that there is a reasonable prospect of a successful conviction.[34]

In the South African context, academic research has focussed largely on the question of whether the TRC amnesty programme violated international obligations.[35] Although the question of whether states

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[33] See *supra* Chapter 2(2.3).

[34] See K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 163.

[35] J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001–15; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997)

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have a duty under international law to prosecute must be assessed under the same premises, determining the legality of an amnesty under international law must be done in a particular way. While a general and unconditional amnesty would not be acceptable under international law, the South African scheme on conditional amnesty needed to be judged in a differentiated manner.[36] A restricted amnesty was inevitably necessary and legally permissible for the restoration of peace in the transitional society.[37] As has already been outlined above, the TRC Act fulfilled these conditions. However, the same circumstances no longer apply with the passage of time. These specific national features which were considered with respect to amnesty laws, thus, cannot be considered when determining whether South Africa has a duty under international law to prosecute.

It is clear that under certain circumstances international law imposes an obligation on states to prosecute international crimes, such as crimes against humanity or war crimes.[38] Duties to prosecute derive first and foremost from international covenants but might also derive from customary international law.[39] It is necessary to consider whether the criminal acts of the apartheid forces committed abroad or in South Africa by SADF or police members constitute crimes under international law covered by international law obligations.

South African Journal on Human Rights 258–68; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 300–35; G. Werle *Principles of international criminal law* (2005) paras. 188–92; M.E. Bennun 'Amnesty and international law' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 92–114. See also *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996.

[36] G. Werle *Principles of international criminal law* (2005) paras. 190–91; J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1009–13; C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 167–68.

[37] Ibid.

[38] G. Werle *Principles of international criminal law* (2005) para. 177.

[39] Ibid., para. 179.

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1.2.1 *Treaty law*

Various statutory sources of international law impose specific duties on states to institute criminal proceedings if treaty obligations are breached. As such, the four Geneva Conventions of 1949[40] and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 26 June 1987 (hereinafter "Torture Convention") are of particular relevance.

Each of the four Geneva Conventions outlines a catalogue of prohibited grave breaches of prohibitions of the Conventions.[41] Common to them all are, *inter alia*, any wilful act of killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person. Apart from defining the breaches, each Convention explicitly obliges signatory states to provide for effective legal sanctions to prohibit grave breaches and 'to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches' and to 'bring such persons, regardless of their nationality, before its own courts'.[42] These provisions undoubtedly convey a duty to prosecute perpetrators of grave beaches.[43] South Africa acceded to the Geneva Conventions in 1952.[44] The Conventions' application is, however, according to Article 2 common to the four Conventions (hereinafter "Article 2"), primarily confined to international armed conflicts. Purely internal conflicts are generally excluded from the Conventions' ambit.

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[40] Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III relative to the Treatment of Prisoners of War; Convention IV relative to the Protection of Civilian Persons in Time of War; Geneva 12 August 1949.

[41] Article 50 Convention I, art. 51 Convention II, art. 130 Convention III, art. 147 Convention IV.

[42] Article 49 Convention I, art. 50 Convention II, art. 129 Convention III and art. 146 Convention IV.

[43] M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 44.

[44] J. Dugard *International law* (1994) 56.

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With regard to the South African context, three major fields of operation of the apartheid security forces need to be distinguished: first, the security police's activities in resisting the liberation movement's opposition efforts inside South Africa; second the state's actions against the guerrilla activities of the Namibian liberation movement SWAPO; and finally, the military operations conducted by the SADF in Angola, the war against the Angolan army and Cuban forces.

The South African conflict between the security forces and the national liberation movements is of a genuinely internal character, notwithstanding the fact that on various occasions the ANC was attacked outside South Africa's borders. The character of the conflict with SWAPO in Namibia is less obvious.[45] South-West Africa was, at the time, *de facto*, a part of South Africa. In 1920 the territory was entrusted to South Africa by the League of Nations and, although the United Nations (hereinafter UN) subsequently revoked the mandate, South Africa remained entirely in charge of the political and administrative instruments of the territory.[46] The country only gained independence in 1990. It is, thus, not possible to characterise Namibia of the time as a sovereign state.[47] Thus, the conditions of this conflict do not qualify it as an international conflict. The war fought against Angola, which was started during the 1970s and drastically intensified during the 1980s, however, must certainly be classified as an international armed conflict in terms of Article 2 of the Conventions. South Africa is under an obligation in terms of the four Geneva Conventions to prosecute possible grave breaches which occurred during this war.[48]

An obligation to prosecute human rights violations committed in Namibia and South Africa might, however, be established under article

[45] See for human rights violations committed during security force operations in Namibia: *TRC Report*, vol. 2, chap. 2, paras. 73–157.

[46] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 194–196.

[47] The Constitutional Court in the Basson matter explicitly refrained from exploring the precise characterisation of the conflict with SWAPO (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179).

[48] See for human rights violations committed by the SADF in Angola: *TRC Report*, vol. 2, chap. 2, paras. 10–72.

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3 common to the Geneva Conventions (hereinafter "Article 3"), which lays down minimum standards, which must be fulfilled in non-international armed conflicts. According to Article 3, persons not actively taking part in the armed conflict shall not be subjected to *inter alia* violence to life and bodily integrity, in particular, murder of all kinds, mutilation, cruel treatment and torture. The application of Article 3 to the conflict in South Africa and the SWAPO conflict would, however, mean that the threshold of an 'armed conflict' was reached. This is the case in protracted states of armed violence between governmental authorities and organised armed groups.[49] The fight against SWAPO guerrilla activities, which took place mainly in the northern border regions of Namibia's Owamboland but also in Angola, was conducted primarily by military means and certainly reached high levels of prolonged armed violence.[50] It has also been classified as an armed conflict by the Constitutional Court, which stated in the Basson judgment that, regardless of whether the conflict in Namibia was international or not, the minimum standard of Article 3 would apply.[51]

Whether the same can be concluded with regard to the conflict with the liberation movement, mainly ANC and PAC, in South Africa is rather doubtful. In contrast to riots and occasional disruptions and clashes, an armed conflict requires high levels of protracted violent conflict.[52] The apartheid conflict, however, never reached the stage of full-scale civil or guerrilla warfare. Although political unrest climaxed during the 1980s, it was largely confined to township areas and the liberation movement never seriously threatened the apartheid state by military means.[53] The Constitutional Court consequentially stated in its AZAPO decision of 1996 that it was not convinced that the conflict

[49] C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 117.

[50] See *TRC Report*, vol. 2, chap. 2, paras. 1–157.

[51] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179.

[52] M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 44.

[53] See also A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 323–24.

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reached levels required for an armed conflict in terms of Article 3.[54] Thus, Article 3 applies in the Namibian context but does not apply to the conflict within South Africa.

However, does this mean that South Africa has an obligation under the Geneva Conventions to prosecute the political crimes committed during the Namibian conflict? The Convention's formulation of an obligation to prosecute extends explicitly to cases of grave breaches and does not deal with Article 3. It is nevertheless pointed out by legal scholars that the prohibitions of Article 3 must be viewed as included in the grave breaches doctrine, since only such an interpretation would do justice to the development of human rights protection mechanisms during the preceding decades.[55] Such an approach seems questionable, considering the conscious separation of Article 3 and the grave breaches doctrine in terms of the state's duty to prosecute. However, it must be borne in mind that this differentiation stems from a conviction to maintain a strict separation of internal and international conflicts. This approach has become increasingly blurred in international law, especially since the ruling of the International Court of Justice in the Nicaragua case.[56] With regard to such developments, there is in fact no justification to treat breaches of Article 3, which occurred in internal conflicts, different from those that occurred in international conflicts. Civilians must, therefore, also be treated as protected persons. The Constitutional Court has also strongly expressed its willingness to accept an overlap of internal and international conflicts in analysing the application of Article 3 in the framework of the overall protection regime of the Geneva Conventions.[57] Thus, breaches of Article 3 must be interpreted as constituting grave breaches in terms of the Conven-

[54] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 29.

[55] G. Werle *Principles of international criminal law* (2005) para. 180.

[56] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 185.

[57] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179.

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tions.[58] The duty to prosecute as outlined in the Geneva Conventions, thus, extends to violations of the rules for internal armed conflicts.

The effect of this interpretation is that South Africa has an obligation under the Geneva Conventions to prosecute any breach of Article 3 that occurred in the conflict with the SWAPO liberation movement in Namibia.

Further obligations regarding the internal conflicts might derive from the two additional 1977 Protocols to the Geneva Conventions. Article 1(4) of Protocol I[59] supplements Article 2 of the Geneva Conventions so that jurisdiction is extended to armed conflicts fought against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination.[60] Thus, the full application of the Geneva Conventions according to Article 2 is extended to the situations outlined in Protocol I. The Protocol was apparently motivated to a large degree by the apartheid conflict in South Africa.[61] The outlined situations clearly fit the Namibian conflict. Protocol II[62] supplements Article 3 of the Geneva Conventions to the effect that it shall include

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[58] G. Werle *Principles of international criminal law* (2005) para. 180; K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 186; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 306. See further on the distinction between international and non-international conflict C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 114–23; T. Meron 'International criminalisation of internal atrocities' (1995) 89 *AmJIntL* 554–77; *Prosecutor v Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction (AC) Case no. IT-94-1-AR72 2 October 1995 para. 83.

[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[60] The right is enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[61] J. Dugard *International law* (1994) 334.

[62] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

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armed conflicts that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

Both Protocols, however, again require an armed conflict, which did not exist for the internal South African conflict. Furthermore, the requirements of Protocol II were clearly not met by the expansion of militant opposition activities in South Africa, which were far from being able to exercise sustained military operations in apartheid South Africa. Moreover, South Africa only became party to the Protocols in November 1995, which, thus, have no application for state sponsored crimes committed during the apartheid era.[63] Whether the Protocol I in that exact form codified customary international law, which was already applicable during the period in question, is rather doubtful.[64] This is especially so for South Africa, which specifically refrained from acceding to the Protocols to avoid their possible application to the state's fight against liberation movement activities.[65]

A further treaty source establishing an obligation to investigate and charge perpetrators of gross human rights violations is the Torture Convention. The covenant, which entered into force in 1987, requires each signatory state to ensure that acts of torture are investigated, charged and sentenced.[66] Torture in terms of the Convention is, according to Article 1(1), defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing

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[63] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 29.

[64] A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 323.

[65] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 265.

[66] See articles 4–7 Torture Convention.

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him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The TRC found that the South African police systematically used torture against the liberation movement for political and often arbitrary reasons, but mostly to force them to cooperate or disclose information about underground activities.[67] There can be no doubt that this practice constitutes torture in terms of the Convention. Yet South Africa only ratified the Torture Convention on 10 December 1998. Moreover, according to a decision of the Committee Against Torture, a treaty body established under Article 17 of the Torture Convention, the Convention only covers incidents, which took place after its entry into force in 1987.[68] It is also not possible to sustain the proposition that South Africa might nevertheless, by acceding to the Convention, have accepted a duty to prosecute all as yet unpunished acts of torture that took place after 1987. Article 28 of the 1969 Vienna Convention on the Law of Treaties, to which South Africa is a party, makes it clear that a convention only is applicable to situations which occurred after the entry into force of the convention for the signatory state in question. According to Article 27(2) Torture Convention, it only enters into force 30 days after ratification by acceding states. Thus, no duty to prosecute arises from the Convention for South Africa.

Eventually it is necessary to address the question of whether South Africa is obliged under international conventions to prosecute the racial segregation and discrimination of apartheid as such.[69] According to Article I.1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 (hereinafter Apartheid

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[67] *TRC Report*, vol. 6, s. 5, chap. 2, para. 16.

[68] Report of the Committee Against Torture to the General Assembly on its 45th session on 21 June 1990, supplement No. 44 (A/45/44), Annex V, para. 7.5.

[69] See generally on apartheid as a crime against humanity R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267–300.

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Convention)[70] signatory states declare apartheid to be a crime against humanity and all racist and discriminatory acts flowing from the apartheid policies as crimes violating the principles of international law. Article II of the Convention outlines policies and practices of racial segregation and discrimination, which typically occurred during the apartheid era, as criminal conduct in terms of the Convention. According to Article IV of the Convention, signatory states are obliged to prosecute persons accused of acts which constitute crimes of apartheid under the Convention.

However, South Africa never became a party to the Apartheid Convention, not even today.[71] The Convention, thus, only establishes an obligation to prosecute the discriminatory policies of apartheid for the present government, if the Convention became part of customary international law. Although the Apartheid Convention was not unanimously adopted by states[72] some commentators have contended that the Apartheid Convention's definition of apartheid as a crime against humanity has meanwhile found expression as customary international law.[73] Also the Rome Statute for the International Criminal Court has incorporated in its Article 7(1)(j) the crime of apartheid as a crime against humanity.[74] Nevertheless, considering the limited international

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[70] International Convention on the Suppression and Punishment of the Crime of Apartheid, ratification by General Assembly resolution 3068 (XXVIII) of 30 December 1973, entry into force 18 July 1976.

[71] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 262; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 325.

[72] R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 293.

[73] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 263; R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 300.

[74] The Rome Statute, however, only concerns crimes falling in the ambit of the Statute, thus only those committed after its entry into force in 2002 (A. du Bois-Pedain

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support of the Apartheid Convention's obligation to prosecute,[75] it cannot be said that a specific obligation under customary international law has developed that conveys a specific duty on the South African state to prosecute the politics of apartheid as such. Furthermore, there would be no grounds in South African law to prosecute the political acts of apartheid. The acts of designing and executing the policies of apartheid were not penalised at the time. Within its own system, the legality of apartheid for the past remained intact, even under the new dispensation.[76] This follows from the Interim Constitution,[77] in which the apartheid laws were repealed, but which did not abolish the legality of apartheid retroactively.[78]

1.2.2 *Customary international law*

Apart from these limited sources in statutory international law, obligations for South Africa to prosecute might also arise out of customary international law.[79] The preamble of the Statute of the International Criminal Court (hereinafter "Rome Statute"), to which South Africa is also a party, states that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured', as well as 'that it is

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Transitional amnesty in South Africa (2007) 326).

[75] R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 293–95; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 307–8.

[76] G. Werle 'Without truth no reconciliation' (1996) 29 *Verfassung und Recht in Übersee—Law and politics in Africa, Asia and Latin America* 58 at 63.

[77] Ibid. See section 229 on the continuation of existing laws. See generally H. Corder 'Towards a South African constitution' (1994) 57 4 *The Modern Law Review* 491–533.

[78] See also M.R. Rwelamira 'Punishing past human rights violations: considerations in the South African context' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) 3 at 7.

[79] See on the forming of customary international law: J. Dugard *International law* (1994) 24–32.

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the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[80]

Today, there is overwhelming scholarly support for the contention that customary international law has indeed developed after the second world war so that it places states under a duty to prosecute certain serious crimes under international law.[81] Although it is rather doubtful that this also obliges third party states, regardless of where the crime was committed, it is strongly supported with regard to the state of commission.[82] The progress of human rights protection mechanisms and treaties are cited as support for this contention. These include the International Law Commissions Draft Code of Crimes against the Peace

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[80] It needs to be pointed out that this passage alone does not constitute a specific obligation (C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 338). Also, the wording 'jurisdiction' might be ambiguous regarding the interpretation of the precise scope of the statement (C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 163).

[81] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 203; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 262; D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2582–94; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 342–43; G. Werle *Principles of international criminal law* (2005) para. 179. C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 162–63 cautions that whether a duty can be established in this regards depends on the methodological approach to determining customary international law. M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 59 rejects the notion of a customary law duty to prosecute since multiple examples of amnesty laws adopted by states in transition indicate that no consistent state practice in this regard exists.

[82] G. Werle *Principles of international criminal law* (2005) para. 179; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 343.

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and Security of Mankind; several declarations and resolutions of the UN General Assembly, such as the adopting of the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity;[83] and the great progress made in trying crimes under international law since the Nuremberg trials, i.e. the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.[84]

Basically, crimes under international law concern acts that involve direct and individual criminal responsibility as laid out by statutory or customary rules of international criminal law.[85] The core crimes under international law are war crimes, crimes against humanity, genocide and the crime of aggression.[86] The international element of crimes under international law is established through the scope and gravity of the acts in question, such as the systematic and large-scale use of force typically by state organs, suggesting that important values of the international community are concerned.[87] Such an international link exists, for instance, in cases of systematic violations of basic human rights.[88] Given the fact that during the apartheid conflict grave human rights violations occurred on a regular and widespread basis over decades, the relevance of international law is obvious.

War crimes are to a large extent covered by the codification of international humanitarian law, which has been referred to above. However, the international law duty to prosecute crimes against humanity as separate crimes under international law is of specific interest in the South African context. Crimes against humanity generally require a

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[83] General Assembly resolution 3074 (XXVIII) of 3 December 1973.

[84] J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1003; D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2593.

[85] G. Werle *Principles of international criminal law* (2005) para. 72.

[86] Ibid., para. 74.

[87] Ibid., para. 81.

[88] Ibid., para. 102.

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widespread or large-scale and systematic attack on a population or parts of a population or large groups of civilians.[89] The attack needs to target a specific group, a civilian population or also a political group.[90] The specific disruption of values of the international community in cases of crimes against humanity occurs by systematic or large-scale violations of fundamental human rights of the civilian population.[91] Recent developments mean that crimes against humanity are no longer required to take place in the context of an armed or international conflict.[92]

Torture on a widespread and systematic scale is, on this basis, typically considered to be a crime against humanity.[93] As such, under customary international law torture is understood to be the infliction of severe pain or suffering by a person acting in an official capacity especially if this is part of a widespread or systematic practice.[94] Widespread and systematic use of extrajudicial killings and abductions or enforced disappearance of persons are also typically considered to be crimes against humanity, if such conduct was authorised, supported or acquiesced in by the state or a political organisation.[95]

Of the criminal acts committed by the state security forces during the conflict in South Africa, murder, kidnapping and abduction are some of the most prominent.[96] As has already been pointed out in this book,

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[89] G. Werle *Principles of international criminal law* (2005) paras. 82 and 666; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 340; K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 187–88.

[90] G. Werle *Principles of international criminal law* (2005) para. 633.

[91] Ibid., para. 84.

[92] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 188; C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 127; R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 286.

[93] G. Werle *Principles of international criminal law* (2005) para. 710.

[94] A. Cassese *International criminal law* (2003) 119.

[95] Ibid., 74 and 80; G. Werle *Principles of international criminal law* (2005) paras. 675–77 and 752–57.

[96] See on the use of the security forces of such practices *supra* Chapters 1 and 2.

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acts of torture were committed by the security forces on a widespread basis. In fact torture of prisoners was a very common tool to get information. Political prisoners were commonly subjected to often severe torture in order to move them to work for the police as informants or to extract information on their colleagues. Torture was so common that thousands of prisoners became victim of such conduct. What in many cases preceded the torture of political captives was the kidnapping of the opposition activist and what usually followed such conduct in cases of denied cooperation was the elimination of the liberation activist. Extrajudicial killings and abductions of apartheid opponents increased significantly from the early 1980s onwards and were a means often used to combat political resistance. It is clear from this that there was a systematic pattern in the state security force's use of torture and, to a lesser but still very significant degree, of kidnapping and murder of political opponents in the quest to quell resistance to apartheid. In terms of the aforementioned definition of crimes against humanity, state organs committed such acts on a large scale and widespread basis. The acts were directed at a political group—the opponents to apartheid.

However, a legal evaluation of this subject denied that the high threshold required for actions to constitute crimes against humanity was met in the South African context.[97] With regard to torture, it is referred specifically to Article 7(2) of the Rome Statute, which requires the crime against humanity to be committed in the furtherance of a state policy to commit such violations. As such, it is pointed out that many of the criminal acts were committed on an operational level only and, though they were certainly accepted or even welcomed by superior authorities as they contributed to the purpose of quashing the resistance, there is not sufficient proof that torture was part of a state policy or even ordered by figures at the highest political levels.[98] The crimes were not committed in a holistic and concentrated effort to violate rights but rather on a case by case basis.

This view, however, is not convincing. The definition of torture in the Rome Statute does not necessarily conform to the understanding

[97] A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 326–27.

[98] Ibid.

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of torture as a crime against humanity in terms of customary international law. In fact, the customary international law definition of crimes against humanity does not require a policy element.[99] Since the Nuremberg trials, most definitions of crimes against humanity did not encompass a policy element.[100] The policy element in the Rome Statute can be interpreted as a mere reference to the requirements of a widespread and systematic attack.[101] The systematic and widespread nature of the crimes has already been pointed out. Furthermore, the TRC found sufficient indicators that the criminal conduct in question was not something developed solely on an operational level but clearly resulted, at least indirectly, from policy guidelines of the highest state levels demanding a violent, if not even criminal conduct.[102]

Even if one opts for requiring a policy element in terms of persecution on political, ethnic or religious grounds,[103] which it has been pointed out is not required by the customary law definition, the crimes of the South African security forces committed in quashing the resistance to apartheid can be defined as crimes against humanity. The definition employed by the French *Cour de Cassation* for instance held that crimes against humanity are

> …inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy whatever the form of their opposition.[104]

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[99] G. Werle *Principles of international criminal law* (2005) para. 666.

[100] Ibid.

[101] Ibid., para. 667.

[102] See *TRC Report*, vol. 5, chap. 6, paras. 84–99.

[103] See J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 263.

[104] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (France, Cour de Cassation) [1984] 78 ILR 125 at 137.

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It is clear that the human rights violations were committed by the security forces in the course of furthering and protecting the racist and oppressive apartheid state policy of ideological supremacy. The crimes were committed on racial grounds but mainly against opponents for their political opposition, which underlines that the crimes in question must be seen as crimes against humanity. The South African Constitutional Court on occasion of the Basson case also stated that it was firmly convinced that apartheid led to the commission of crimes against humanity, though it did so in rather general terms without explaining whether this held true only for the situation in Namibia or also for the conflict in South Africa.[105]

As a result, the systematic and large-scale use of kidnapping, extrajudicial killings and torture by the apartheid security forces, which was committed to protect the apartheid regime against political opposition, qualifies as crimes against humanity in terms of the above mentioned definitions. Thus, on the basis of the customary international law duty to prosecute crimes against humanity, South Africa is obliged to investigate and prosecute such acts of murder, abduction and torture committed by the apartheid state security forces.[106]

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[105] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

[106] Some even argue for a rule under customary international law imposing a duty on states to prosecute every human rights violation committed by organs of a prior regime, even in cases where they occur on an occasional basis without constituting crimes against humanity (D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2583–85). In support of this notion reference is made to a wide range of United Nations and intergovernmental organisations' practices and activities with regard to the prohibition of certain human rights violations as well as the incorporation of such a duty in various international instruments such as the Inter-American Convention to Prevent and Punish Torture or the Draft Declaration on the Protection of Persons from Enforced Disappearance prepared under UN auspices. Above the International Covenant on Civil and Political Rights is cited for support. It is, however, rather doubtful whether such a rule under customary international law has indeed already developed.

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1.2.3 *Conclusion*

South Africa is obliged under international law to prosecute any crime constituting a grave breach in terms of the four Geneva Conventions, violations of common Article 3 and acts of the security forces as far as they constitute crimes against humanity under customary international law. The Constitutional Court has pointed out in the Basson judgment the circumstances in which South African courts have jurisdiction to try crimes which were committed in Namibia and abroad.[107]

Any of the international law obligations outlined only concern acts, which are attributable to the state and committed by state organs. If the NPA refrains from investigating and prosecuting members of the apartheid security police, SADF or other state employees who are alleged to have committed political crimes, which constitute grave breaches or breaches of Article 3 or crimes against humanity, despite evidence that there are sufficient prospects of a successful prosecution, South Africa will violate international law. Any legal setup providing for extended non-prosecution of apartheid era human rights offenders would equally constitute a violation of international law.

The government must further, as also explicitly required by the Geneva Conventions, undertake to enact appropriate legislation to provide for criminal proceedings to take place. In this regard it must refrain from enacting restrictive measures since otherwise it would breach its obligations under international law. The reluctant and restrictive approach of the South African government towards criminal proceedings equally does not do justice to the requirements of international law.

2. *The Prosecution of Torture and Statutes of Limitation*

In the preceding subchapters, it has been shown that under certain circumstances South Africa is obliged to prosecute acts of torture committed during the apartheid conflict, should those acts constitute crimes against humanity. However, there is one major obstacle for the

[107] See *supra* Chapter 2(2.3 and 2.5).

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NPA to comply with this obligation. According to the limitation period in section 18 of the Criminal Procedure Act, the right to lay criminal charges, except for *inter alia* cases of murder and kidnapping as well as the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, lapses after 20 years from the point of time the crime was committed.[108] The prosecution of offences listed in section 18 never becomes statute barred. The 20 year limit is not absolute since prescription is interrupted by the institution of a prosecution.[109]

Concerning the prosecution of the most serious crimes relevant for post-TRC prosecutions, murder, kidnapping and torture, the statute of limitation has the effect that murder and kidnapping are not subject to any time limitation. Torture, however, is prosecuted as assault or assault causing grievous bodily harm, which is covered by the statute of limitation and cannot be prosecuted after 20 years from the time the offence was committed. Thus, section 18 of the Criminal Procedure Act currently precludes the NPA from prosecuting any acts of torture that were committed before 1988. This is especially serious considering the fact that the mid- to late 1980s witnessed a climax in violence in South Africa, which resulted in increased incidents of torture. The massive delay in instituting criminal proceedings in a significant number of post-TRC cases has, therefore, led and continues to lead to many cases of torture being time-barred from prosecution. However, the following subchapter seeks to outline the possibility to argue that under

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[108] Section 18 of the Criminal Procedure Act ('Prescription of right to institute prosecution') reads:
The right to institute a prosecution for any offence, other than the offences of- (*a)* murder; *(b)* treason committed when the Republic is in a state of war; *(c)* robbery, if aggravating circumstances were present; *(d)* kidnapping; *(e)* child-stealing; or *(f)* rape; *(g)* the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

[109] See *R. v Magcayi* 1951 (4) SA 356 (O) and *R. v Friedman* 1948 (2) SA 1034 (C).

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international law the statute of limitation of section 18 of the Criminal Procedure Act does not apply to torture. It also seeks to point out ways under constitutional law to neutralise the statute of limitation.

Section 18(g) of the Criminal Procedure Act itself exempts certain international crimes from the statute of limitation. It provides that the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act no. 27 of 2002, are not covered by the statute of limitation. This exemption, however, is only applicable from the point of its introduction in 2002 and is obviously only related to the crimes contemplated in the Rome Statute. Article 29 Rome Statute determines that statutes of limitation are not applicable to crimes within the jurisdiction of the court. This provision required implementation in the national law of signatory states.[110] In South Africa, this was done with the introduction of section 18(g) of the Criminal Procedure Act, which is designed to implement only the Rome Statute, from 2002 forward, and not to apply to all past circumstances of international crimes.

The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 16 November 1968 also constitutes an attempt to rule out any obstacles in national law to the prosecution of serious international crimes. According to Article 1 of the Convention, national statutes of limitation shall not be applicable to war crimes and crimes against humanity. However, thus far only 50 states have signed the treaty[111] and South Africa has never been party to it. The rules outlined therein are, thus, not applicable.

It has been argued, however, that there is also a rule under customary international law that precludes the application of national statutes of limitation at least with regard to the most egregious of international crimes, such as genocide, crimes against humanity and torture.[112] Statutes of limitation would contradict the rules penalising such crimes. It is submitted that these crimes are so abhorrent that their authors

[110] W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233.

[111] See http://www.ohchr.org/english/countries/ratification/6.htm.

[112] A. Cassese *International criminal law* (2003) 319.

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must be invariably punished, otherwise the important deterrent effect of preventing future reoccurrences could be undermined. Furthermore, the universal nature of international crimes is in conflict with various national statutes of limitations.[113] The French *Cour de Cassation* took a similar view as it ruled that crimes against humanity, in that case the murder of thousands of Jews during World War II, could not be subject to the French statute of limitation.[114] Other commentators have pointed out that whether and to what extent such a rule has become part of customary international law is far from being clear.[115] The moral and technical desirability for the non-application of statutory limitations to serious international crimes, which are the aspects mainly cited in support of a customary rule, is certainly not matched by a consistent state practice and *opinio juris* in this regard, as necessary for customary international law.[116]

Calls by states in support of a respective rule under international law have largely been made through resolutions of the UN General Assembly, which are not binding.[117] Moreover, the highly limited acceptance of the relevant UN convention and the lack of a consistent widespread practice in national approaches to the issue indicate that a state practice, in terms of customary international law, has yet to be established.[118] The European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 1974 has equally only been met with minimal support and has not

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[113] Ibid., 318.

[114] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (France, Cour de Cassation) [1984] 78 ILR 125 at 315.

[115] G. Werle *Principles of international criminal law* (2005) para. 553.

[116] C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 164–65.

[117] W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233–34. See General Assembly resolutions 3(I); 170(II); 2583(XXIV); 2712(XXV); 2840(XXVI); 3020(XXVII); 3074(XXVIII).

[118] S.R. Ratner and J.S. Abrams *Accountability for human rights atrocities in international law* (2001) 143–44; H. Kreicker 'Die völkerstrafrechtliche Unverjährbarkeit und die Regelung im Völkerstrafgesetzbuch' (2002) *Neue Justiz* 281 at 285.

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entered into force yet.[119] Moreover, the process of drafting the Rome Statute for the International Criminal Court highlighted that the various delegations were clearly not in agreement as to the acceptance of rules under international law concerning statutes of limitation.[120] Furthermore, in the South African context, the most serious crimes of concern, such as murder, are, unlike the regulation of the respective legislation in France, which was examined by the *Cour de Cassation*,[121] exempted from the South African statute of limitation. Thus, a rule does not exist under customary international law that precludes the applicability of section 18 of the Criminal Procedure Act with regard to torture.

However, the non-applicability of the provision with regard to torture might also be argued under South African constitutional law.[122] During apartheid, the crimes of the security forces were virtually never prosecuted and operatives were protected by a system and policy of non-prosecution.[123] This practice of impunity is contrary to the values of human rights and the rule of law according to the democratic constitution. Thus, it might be argued that compelling constitutional implications require an interpretation of the statute of limitation to the effect that the limitation period is interrupted during the apartheid period when there was not a prospect of prosecution.[124] In the preceding subchapters it was pointed out that deliberate impunity for state sponsored, political and gross human rights violations is in stark conflict with fundamental constitutional values and international law. The state of impunity for state sponsored political crimes during the apartheid era is, thus, absolutely incompatible with the present constitutional order. The Constitutional Court found that the duty to prosecute extends to

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[119] Ibid.

[120] Ibid.

[121] See W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233.

[122] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 67–69.

[123] K. Koppe *Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika* (2005) 26.

[124] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 69. Nerlich, however, rejects this proposition considering that with murder and kidnapping the most serious crimes of apartheid remain prosecutable.

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crimes committed before the Constitution came into effect. The same should be true concerning a possible interruption of the statute of limitation during times before its entry into force. These circumstances indeed provide good grounds to assume that compelling constitutional circumstances mean that the statute of limitation was interrupted during the state of systematic impunity for security force violence. Only from 1994 and more specifically from the coming into force of the Interim Constitution on 27 April 1994 onwards was there a realistic prospect and possibility for apartheid crimes to be prosecuted.

German courts took a similar view in the prosecution of political crimes committed under the Nazi regime and in the former socialist GDR. According to the *Bundesgerichtshof*, the German Federal Supreme Court, the German statute of limitation's limitation period was suspended until the capitulation of the German army in May 1945 if the crimes in question were condoned or ordered by the former regime and not prosecuted due to an unlawful policy of impunity for politically motivated gross human rights violations.[125] Similar findings were made with respect to certain crimes of state forces of the GDR and legislation was enacted accordingly after 1990.[126]

Academics have pointed out yet another way of neutralising the statute of limitation. It has been argued that the crimes of the security forces could be prosecuted directly as international crimes which, according to section 232 of the Constitution, would be directly applicable in South Africa as international law and not only under national South African law.[127] Section 18 of the Criminal Procedure Act would then have no application, as it is confined to South African crimes, such as assault.

It remains to be seen how, if at all, South African courts will be willing in potential future trials to interrogate and possibly follow such arguments. First, the NPA would be required to adopt a more open attitude to such approaches and not to strictly rely on the statute of limitation.

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[125] BGHSt 18, 367 (368–369).

[126] BGHSt 40, 48–59; K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 5–7.

[127] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 81–96.

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3. *Strategies and Priorities*

The issue of strategy has proved to be of major concern in considering the approach towards post-TRC prosecutions. In the face of highly limited resources and considering the large number of *prima facie* politically motivated crimes for which amnesty was not granted, choices invariably have to be made regarding which cases to concentrate on with criminal proceedings.

However, the most important consideration regarding prosecution prioritisation is whether there is sufficient evidence available to prosecute or whether there is a sufficient prospect of gathering more evidence to prosecute successfully. Although there are potentially thousands of cases, most cannot be considered because the availability of evidence is too limited.[128] To a certain degree, the question of who to prosecute will also often be driven by the prosecutors' practical considerations concerning their specific strategy in certain cases. As such, the experience of Jan D'Oliveira has shown that it is often advisable in cases involving different levels of command to prosecute the operatives first in order to be able to establish a solid case against their superiors.[129] Nevertheless, with regard to those cases that would provide a reasonable practical prospect of success, those arguing against trials in the public debate frequently express doubts as to whether it is possible to decide whom to prosecute and whom not to prosecute using consistent criteria.[130] Should the focus be on those who created the policies of apartheid or those who executed orders and should liberation movement members be put on trial in an 'even-handed' way like apartheid agents?[131] Selective prosecutions could fail to establish accountability where the command and political responsibility actually lay.[132] The gross human rights violations committed in the name of the apartheid state were not

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[128] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[129] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[130] Interview with Jan Wagener in Pretoria (May 8, 2006).

[131] See on such strategic dilemmas N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 44–45.

[132] See also A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 345.

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a range of isolated acts but flowed from a systematic pattern of abuse that resulted from political guidelines and often from the orders of superiors. Although operatives are generally more easily implicated by evidence, to prosecute them alone and not also those from the higher ranks would, thus, not do justice to the systematic nature of apartheid policies. The question, thus, that needs to be addressed is which criteria should be used to identify higher priority cases.

With the prosecution guidelines for TRC-related cases, a rather inappropriate attempt was made to create prioritisation criteria. The following subchapter will deal with the issue of how to differentiate between cases on a consistent normative basis and will highlight ways concerning how to deal with limited evidence and the need to encourage further perpetrator disclosures.

3.1 *Prioritisation*

A very noteworthy approach to prioritisation has been presented by a lawyer closely involved with TRC matters.[133] It is suggested that generally the egregiousness and the rank and authority of the perpetrator should govern the decision whether to focus on a case or not. As such, it is viewed as a mitigating factor when a junior perpetrator has acted on the basis of specific instructions issued to him or when a crowd involved in mob violence is concerned. Aggravating circumstances include situations in which the perpetrator acted in a position of great influence, authority and leadership, thus, a position of high personal responsibility that enabled the perpetrator to determine whether and how the specific operation takes place, and which, therefore, could have allowed him to resort to legal means. The egregiousness of the offence in question should be determined on the basis of the proportionality test similar to that outlined for the granting of amnesty by the Amnesty Committee

[133] H. Varney *Exploring a prosecutions strategy in the aftermath of South Africa's Truth & Reconciliation Commission* discussion paper presented at the Foundation for Human Rights and International Centre for Transitional Justice conference 'Domestic prosecutions and transitional justice conference' (Magaliesburg, May 16–19, 2005)(on file with author).

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according to section 20(3)(f) of the TRC Act.[134] Accordingly, an offence should be considered egregious if the political objective pursued is out of proportion to the gravity of the offence, which is determined by the scope and value of the violated human rights. On this basis, three categories of priority are identified: low priority cases involve non-egregious offences committed by junior perpetrators; middle order priority cases involve egregious offences committed at least by low ranks; and high priority cases concern egregious offences committed by senior perpetrators. Low priority cases should not be prosecuted at all. Most attention should be paid to high priority cases and middle order priority cases should be pursued when there are practical demands to do so or when resources allow it.

A number of examples suffice to illustrate the point.[135] The attempted murder of Frank Chikane is a high priority case. It involved a number of high-ranking security force officials, infringed against a high legal value and, considering the fact that Chikane was clearly a non-violent opponent and the objective of the offence was to protect the racist and oppressive apartheid regime, the offence was disproportionate.[136] Generally, an aggravating factor with regard to security forces crimes is that they could have resorted to far less violent means to achieve their goal. Especially during the many states of emergency during the 1980s, the state had a huge range of official legal tools at hand to quash resistance, such as detention for indefinite periods without charge or

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[134] In terms of the TRC Act the proportionality test determined, *inter alia*, the polical character of the crime. It is important to remember that the Amnesty Committee applied the proportionality test very generously so that crimes that were clearly disproportionate to their aims were still considered to be politically motivated (A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 121–26. The practical implementation of the proportionality test by the Amnesty Committee thus cannot be adopted by the NPA when prioritising cases.

[135] H. Varney *Exploring a prosecutions strategy in the aftermath of South Africa's Truth & Reconciliation Commission* discussion paper presented at the Foundation for Human Rights and International Centre for Transitional Justice conference 'Domestic prosecutions and transitional justice conference' (Magaliesburg, May 16–19, 2005)(on file with author).

[136] Ibid.

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trial and the banning of persons believed to be a security risk. Notwithstanding these options the security police often chose instead to murder their enemies.

The refusal of amnesty to 37 ANC leaders which might relate to the bombing and landmine campaigns and other violent acts ordered during the armed struggle of the ANC is also significant. It is contended that the overwhelming majority of such offences committed under orders of the NEC must be classified as non-egregious since they were proportional to the objective pursued.[137] The objective of the ANC was to liberate the country from an internationally condemned regime of racism and oppression of the population's majority and to establish a system based on democracy and human rights. It must also be pointed out that the liberation movement tried in vain to achieve its goals by means of public and non-violent political protest and only when after decades of massive oppression and intransigence of the apartheid government this proved fruitless did they resort to violent means of protest. Violent acts were overwhelmingly directed at state facilities and police or military personnel. They generally attempted, though often unsuccessfully, to avoid harm to civilians. Such acts, accordingly, cannot be seen as egregious, they should be of low priority. However, there were occasionally individual acts that were primarily directed at civilians that went beyond official ANC policy. Any conscious attack of liberation fighters on defenceless civilians, regardless of ethnic group, cannot be seen as proportional in terms of the struggle for liberation.[138]

The outlined criteria of this prioritisation proposal[139] seem to offer a consistent and plausible way of prioritising factors, as the personal responsibility of commanders is generally greater.

3.2 *The call for even-handedness*

The considerations regarding prioritisation according to egregiousness and the statements concerning the distinction between the liberation

[137] Ibid.
[138] Ibid.
[139] Ibid.

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movement and state forces also find support in the framework of the Constitution. The South African state is, according to section 1 of the Constitution, founded on the values of human dignity, freedom, equality, non-racialism, democracy and the advancement of human rights. In light of these parameters, acts of murder, torture and abduction, which were committed by the state security forces in order to oppress free and democratic political developments and to maintain a system of racism, inequality and violation of basic human dignity, in legal terms, cannot simply be equated with acts that were committed in a violent liberation struggle, conducted as a last resort and aimed only at state forces in order to establish these very constitutional values.

The decisive circumstance regarding the legal evaluation of 'even-handedness' lies, however, with the relevance of international law. As has been outlined above, the systematic, large-scale and widespread use of torture, extra-judicial killings and kidnapping of opposition activists by the state security forces are covered by an international law obligation to prosecute. In contrast to this, liberation movement crimes are not crimes under international law or crimes against humanity, since they were not orchestrated by state organs or on behalf of a state. From an international law viewpoint, the liberation movement conducted a lawful and legitimate struggle.[140] This strongly underlines the comparatively higher egregiousness of security forces crimes. In order for South Africa to fulfil its international law obligations, the NPA's first priority must be to prosecute the outlined systematic crimes orchestrated by the apartheid state forces.

It certainly does not mean that there is no criminal liability concerning e.g. the many civilians who fell victim to the landmine campaign by the ANC. It does, however, mean that on the basis of constitutional requirements as well as of international law requirements, the NPA's primary focus must be on prosecuting criminal acts committed by the security forces in the furtherance of apartheid. Constitutional Court

[140] M.R. Rwelamira 'Punishing past human rights violations: considerations in the South African context' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) 3 at 16.

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judge Albie Sachs underlined this perception when he made it clear that securing accountability for the clandestine use of state power to murder and dispose of opponents 'goes at the heart of South Africa's constitutional order'.[141]

However, the request for 'even-handedness' was nevertheless based on section 9 of the Constitution.[142] Section 9(1) of the Constitution states that everyone is equal before the law and section 9(3) prohibits the unfair discrimination through the State. It would certainly be unacceptable under section 9 to indemnify certain criminals generally while others are held criminally liable. Yet this does not answer the question of which cases must be considered more appropriate for prosecution. Section 9(1) of the Constitution only rules out differentiations that are not justified on reasonable grounds.[143] The abovementioned legal circumstances in international and constitutional law clearly provide such reasonable grounds for a differentiation.

The request for even-handedness towards apartheid crimes and liberation movement crimes, thus, is not of perceptible legal merit and must be considered as merely political. It should not be considered in any decision-making process of the prosecution authorities concerning on which cases to focus. There is no legal authority demanding equal prosecution of liberation movement and security force members and the process of post-TRC prosecutions would not be discredited in legal terms should the NPA primarily focus on former state forces. Nevertheless, for other societies in transition, opting for a similar system to deal with past atrocities, one must conclude that the new rulers and former liberation fighters must participate in the process unequivocally so that they are not exposed to political claims of unjust proceedings and a lack of 'even-handedness' in prosecutions and to avoid political obstacles to trials.[144]

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[141] See *supra* Chapter 4 note 32.

[142] Interview with Jan Wagener in Pretoria (May 8, 2006).

[143] See J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 199–222.

[144] It must, however, be pointed out that the ANC did support the TRC amnesty proceedings and encouraged its members to apply for amnesty. Nevertheless there obviously were gaps, as highlighted by the applications of the 37 ANC leaders.

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3.3 *Limited evidence*

In terms of strategy, another issue needs to be addressed, which is general paucity of evidence in TRC-related cases and the often heavy demands such cases place on prosecutors. Various high profile trials that failed, like those of Malan and Basson but also the Chikane case, where the convictions of Vlok and van der Merwe were not reached due to strong evidence, are proof of such difficulties.

Generally, the crimes of the security forces were committed in great secrecy and evidence was meticulously concealed and never properly investigated by the police.[145] Witnesses of the criminal acts were mostly involved in the deeds themselves. Urging them to cooperate with the State, would require prosecutors to find evidence, which implicates the potential state witnesses themselves.[146] Problems of evidence increase, the higher one looks in the chain of command of the apartheid state. Written orders or records of policy directives to combat the liberation movement by criminal means are rarely obtainable.[147] Furthermore, before the first democratic government was constituted in 1994, apartheid government and security force agents destroyed huge amounts of sensitive documents.[148]

Where the prospect of a successful conviction is limited due to the insufficient capacity to compile more evidence, such difficulties could, at least to a certain degree, be countered by an extended use of plea and sentence agreements in terms of section 105A of the Criminal Procedure Act.[149] The agreements might deal with far reaching issues, such as an admission of the accused regarding the details of the crime.[150] In exchange, the accused could be rewarded with a significantly reduced

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[145] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 45.

[146] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[147] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 46.

[148] See *TRC Report*, vol. 1, chap. 8, paras. 1–106; and *TRC Report*, vol. 5, chap. 6, para. 105.

[149] See also *supra* Chapter 2(9.2).

[150] Du Toit et al., *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–7.

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sentence.[151] Thus, perpetrators willing to make disclosures regarding offences they were involved in could do so in exchange for a suspended and/or greatly reduced sentence under a plea bargain, as was already done in the Chikane case. The declared intention of the government to offer incentives for perpetrators to come forward and disclose could thereby be met. The extended use of plea-bargaining could be accompanied by specifically drafted directives applicable only for post-TRC criminal cases in order to meet the specific demands and challenges of post-TRC prosecutions.[152] According to section 105A(11) of the Criminal Procedure Act, the NDPP with the concurrence of the Minister of Justice can issue binding directives for the use and implementation of plea and sentence agreements. Consistent criteria could, thus, outline how to apply plea-bargaining to TRC-related cases, to treat and test information that is provided and to reward perpetrators willing to make full disclosures. It could also provide for victim participation and publication of information.

These measures could also easily replace the policy approach which the government considered, as perpetrators would be encouraged to make full disclosures. The benefit would be that for plea-bargaining the participation of victims is legally required,[153] the court proceedings and its records are accessible to the public, perpetrators have to admit their guilt publicly and although they might only receive low or suspended sentences, are held criminally liable, which avoids complete impunity. Since a court tests the validity of the agreement and assesses the guilt of the accused in a plea-bargaining situation, possibly also through a process of questioning and considering evidence,[154] such procedures certainly have far greater legal legitimacy with regard to the principle of the rule of law under section 1(c) of the Constitution than decisions

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[151] Ibid., 15–5.

[152] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 69–70.

[153] E. Du Toit et al., *Commentary on the Criminal Procedure Act* service 35 (2006) §105A 15–7.

[154] Ibid.

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of the NDPP to grant impunity under unknown and untested circumstances. Plea-bargaining certainly cannot replace trials completely but is advisable where resources and evidence are limited, there is an increased interest for victims to reveal the facts of the case and the interest in avoiding years long, possibly futile, criminal proceedings.

Furthermore, it is trite to point out that the challenges of prosecuting higher echelons of the command structures could, to a certain degree, be met by the use of section 204 of the Criminal Procedure Act. According to section 204(2)(a) of the Criminal Procedure Act, a witness who testifies on behalf of the State shall be discharged from prosecution for the offence in question if the court is satisfied that he has answered all questions put to him frankly and honestly. The provision is designed to protect perpetrators of a crime from criminal liability who have testified for the prosecution against their co-perpetrators.[155] Especially lower level operatives, who are generally more easily implicated since they were the ones carrying out the operations, can be offered indemnity from prosecution should they testify against those from whom they received their orders. As has already been mentioned, the mechanism continues to be of enormous practical value for the PCLU.

The above discussion shows that there are worthwhile strategy approaches for TRC-related cases. However, it is important to remember that an imminent threat of prosecution will nevertheless usually still be required since it is rather unlikely that a perpetrator who previously refused to take part in the amnesty process would, subsequently, volunteer to cooperate with the NPA without such incentive.[156]

4. *General Prospects for Further Trials*

The fact that dozens of amnesty applications concerning *prima facie* politically motivated offences were refused due to a lack of full disclosure

[155] Ibid., service 33 (2004) § 204 23–50B.

[156] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 70.

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suggests that, potentially, a great number of cases could still be dealt with by the PCLU. Furthermore, in many instances of politically motivated human rights violations, amnesty was not applied for at all. Thus, from her experience during the TRC, a former Commissioner consequently estimated that a great number cases could still warrant further investigation.[157] This is also suggested by the fact that the TRC handed to the NPA a list containing over 300 references to criminal incidents, which came to light during the TRC investigations and hearings.

However, it has already been pointed out that the actual prospects for further trials depend on the availability of evidence and the willingness of co-perpetrators to testify on behalf of the State, among other things. It has been mentioned in the preceding paragraphs that evidence is often highly limited, especially when it comes to those who occupied the higher echelons of the state. That other former officials of the apartheid government would be willing to follow the example of Vlok's and van der Merwe's voluntary admissions in the Chikane case appears rather unlikely. The two had already cooperated greatly in the process during the TRC, at least compared to other leading apartheid officials and politicians, and were, thus, possibly more willing to cooperate again with the PCLU. Especially leading figures in the ranks of the SADF, who obviously also played a central role in the Chikane case, are likely to continue to refuse to cooperate in even the slightest regard, as was already the case during the TRC proceedings. The continued lapse of time aggravates problems concerning evidence gathering, as witnesses' memory of the crimes, which often happened over 20 years ago, diminish. Some potential witnesses may have passed away, as well as certain alleged perpetrators, such as Gideon Nieuwoudt or security police general Nicolaas van Rensburg. The delay also has other negative consequences, since public and political awareness generally decline.

Another vital precondition for the conduct of successful prosecutions, is that there are sufficient investigative resources and skilled and experienced investigators available to tackle the intricate cases of apartheid

[157] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

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era crimes. However, these are not in place.[158] It has been outlined above that the PCLU generally does not have sufficient investigative resources and funding to conduct prosecutions on a broader basis than has already happened. The PCLU is rather modest and small compared to the task it has to face.[159] Furthermore, apart from TRC cases, it was also assigned other significant responsibilities that demand a lot of its resources.[160] Thus, there is certainly also a need for greater numbers of experienced prosecutors and investigators to conduct the proceedings. Considering these shortcomings in terms of resources, it appears rather unlikely that the PCLU will be capable to proceed with more than a few cases at a time or to guarantee that a broader spectrum of crimes can be prosecuted during a short time frame.

Given these realities, the number of cases that potentially could be prosecuted diminishes significantly in comparison to what could be expected from the number of refused amnesty applications. Consequently, at one stage the PCLU referred to only 16 cases it considered at all prosecutable, five of which were of high priority and had already been investigated to an advanced stage.[161] It is certainly possible that more cases could be pursued, were there more resources available. Thus, in general, apart from problems of evidence, the prospects of further successful trials hinge on whether the government has the political will to promote prosecutions and whether it will assign more resources to the NPA.[162] Yet as has been shown above, the government is clearly lacking political will to support prosecutions and to assign sufficient resources to the process. Moreover, considering the overall resource constraints of the judicial system in the face of the extraordinarily high present-day crime rate, it is unlikely that significantly more resources

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[158] Interview with Anton Ackermann in Pretoria (May 11, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[159] See N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[160] See *supra* Chapter 2(1.2).

[161] Ibid.

[162] D. Ntsebeza 'The legacy of the TRC' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 23 at 25.

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will be assigned to the PCLU in the future.[163] Should possible future mechanisms of the kind that the government adopted with the prosecution policy amendment prevail over legal challenges, it would have the effect that many cases would not reach the court room.

As has been outlined above, the bleak prospects for further trials will also remain unaffected by the legal option to conduct private prosecutions, since victims and NGOs do not have the means necessary for such proceedings.[164]

Further trials might also potentially be interrupted by certain perpetrators from the ranks of the security police, exercising their right to apply for a review of their amnesty refusal, should they have been clients of Jan Wagener, with the consequences highlighted by the PEBCO-Three prosecution.[165] With regard to the need to have a consistent and short period of prosecutions, it was a bad decision to create the option to apply for a review of certain amnesty decisions years later.

Essentially, we must conclude that, although constitutional as well as international law requires the government to pursue post-TRC prosecutions vigorously, in the circumstances, the prospects for a significant number of further trials are absolutely minimal. However, it is still possible that a small number of cases will nevertheless be prosecuted.

5. *Non-Prosecutions*

The following subchapter will outline the practical prospects of further proceedings by describing an array of exemplary cases. Given the practical realities such as evidence, the choice of cases is not necessarily what might be desired by specific groups or the public generally. Thus, for instance, the prominent Steve Biko case, which many had expected to be prosecuted, will not go ahead. The popular political activist Steve Biko was the founder of the Black Consciousness movement. He was severely

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[163] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[164] See text accompanying *supra* Chapter 3 note 230.

[165] See *supra* Chapter 2(7.2).

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assaulted and tortured in police custody and died as a result thereof in 1977.[166] Five amnesty applications were refused in this matter, among those that of since deceased Gideon Nieuwoudt.[167] The NPA, however, stated that a prosecution would not be sustainable since sufficient evidence was not available to prove charges relating to the death, and other charges, such as assault, had lapsed under the statute of limitation.[168] As mentioned above, others have called for the prosecution of leading ANC members. The possible grounds for this have already been outlined.[169] However, the list of priority cases at the PCLU allegedly does not contain cases of ANC members[170] and the PCLU has, as had already been mentioned, denied that sufficient evidence would exist to prosecute any of the ANC leaders who were denied amnesty.

Although the NPA has not made public which are its priority cases, the media referencing NPA sources reported that it would focus on, *inter alia*, the cases of the St. James Church massacre, Nokuthula Simelane, both of which will be described below, and the Cradock-Four.[171] Yet charges in a number of other cases could potentially be pursued. More indications to the practical scope of a possible prosecution can be found regarding the cases outlined below.

5.1 *The cases of missing Simelane and Morudu*

Cases in which the whereabouts of the victim and the exact circumstances of his or her death remain unknown are of specific relevance.

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[166] See *TRC Report*, vol. 2, chap. 3, paras. 184–85; *TRC Report*, vol. 4, chap. 5, para. 12; *TRC Report*, vol. 3, chap. 2, para. 120.

[167] Decision no. AC/99/0020.

[168] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[169] See *supra* Chapter 3(4.).

[170] Interview with Sheila Camerer in Cape Town (March 30, 2006) (Camerer claims to have had insight in the list). See also C. Terreblanche *Apartheid massacres go to court* The Sunday Independent, April 23, 2006.

[171] C. Terreblanche *Apartheid massacres go to court* The Sunday Independent, April 23, 2006.

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5.1.1 *The Nokuthula Simelane case*

An example for this is the case of Nokuthula Simelane, which many people, such as the former TRC commissioner Yasmin Sooka, believe should be investigated and prosecuted at the PCLU. The case is an example of a very egregious, yet not untypical, act of security police violence against anti-apartheid activists.

Nokuthula Simelane acted as a courier for MK and was based in Swaziland.[172] Through covert agents of the security police branch of Soweto, Simelane was lured into a trap while she was on a mission in Johannesburg in September 1983. According to the findings of the TRC in this case, Simelane was abducted and brought to a remote farm in the north-west of South Africa, where she was held captive for a period of approximately five weeks. During this period, the security police attempted to get information from her and to recruit her as an informer for the police. She was continuously and seriously assaulted and tortured until she was almost unrecognisable and could barely walk. Yet according to the TRC's findings, all attempts to get information and to recruit her remained fruitless. After Simelane's torture ordeal on the farm, she was taken away without a trace. Her exact fate has never been established with any certainty. It is, however, quite clear that she is dead.

The Amnesty Committee received eight amnesty applications in connection with the events, among them those of the three white security police officers Willem Coetzee, Anton Pretorius and Frederick Mong,[173] who were given the task of overseeing and directing the operation. Applications were also received from two black policemen, Veyi and Selamolela. All, except Veyi, participated in the abduction as well as in the subsequent torture. Compelling differences emerged in the testimonies of the black and white policemen. Whereas the white policemen maintained that Simelane was only tortured during the first

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[172] Unless otherwise is cited, the information concerning the Simelane case derives from *TRC Report*, vol. 6, s. 3, chap. 1, paras. 199–206 and *TRC Report*, vol. 2, chap. 3, paras. 287–92.

[173] Applications no. AM/4122/96; AM/4389/96; AM/4154/96.

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week of her detention and that she eventually agreed to cooperate as an informer, whereafter she had been returned to Swaziland, the black policemen denied Simelane ever agreed to cooperate. According to them she was held captive for several weeks, during which she was continuously tortured, allegedly also with electric shocks, which was denied by the white policemen. The last time the black policemen saw Simelane was when she was loaded into the boot of Coetzee's car and taken away. She was allegedly in such a bad state that it would have been absolutely impossible to return her to Swaziland. They claim to have been told by another black policeman, who has since died, that Simelane was subsequently shot by Pretorius and Coetzee and buried near Rustenburg.

The Amnesty Committee found strong indicators that the versions of the white security policemen were false and accordingly refused to grant them amnesty for the torture. Amnesty was, however, granted to all applicants regarding the abduction.[174] No conclusion could be reached on her eventual fate but it is highly likely that Simelane was murdered after being kept on the farm.

Although the case is certainly being considered by the PCLU and an investigation had already started before the TRC hearings, which was then pending the amnesty decisions, the case was simply not taken further by the NPA after the Amnesty Committee eventually refused amnesty in May 2001. This inexcusable failure has grave consequences since prospects for a successful prosecution now seem limited. Possible criminal conduct in the Simelane matter concerns kidnapping, assault, assault causing grievous bodily harm and murder. The NPA, however, refuses to investigate charges of assault because of the limitation period of section 18 of the Criminal Procedure Act, according to which the right to pursue assault charges lapses after 20 years.[175] As the torture of Simelane constituted assault in a legal sense, the possibility to charge the white policemen, who had been denied amnesty for the torture, lapsed after 20 years in September 2003. They can also not be

[174] Decision no. AC/2001/185.

[175] Interview with Howard Varney in Johannesburg (May 6, 2006).

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prosecuted for kidnapping, since they all were granted amnesty for Simelane's abduction.[176] What possibly remains are charges of murder. Yet a possible murder seems very hard to prove, as there is apparently not enough evidence and possible witnesses are not forthcoming or have meanwhile passed away.[177]

The case, thus, drastically illustrates the grave consequences of the massive delay of prosecutions. Had the NPA pursued assault charges before 2003, a conviction might have been achieved. Likewise, the alleged perpetrators could have possibly been urged to testify against each other concerning the murder or to fully disclose their knowledge in a plea and sentence agreement. The NPA has also been asked to initiate investigations into the involvement of other security branch members, who possibly participated in the abduction, such as Msebenzi Radebe and Willem Schoon, neither of whom even applied for amnesty.[178]

5.1.2 *The Moss Morudu case*

Many similar cases exist in which the exact facts concerning the fate of still missing victims remain unknown.[179] One such case is that of the MK operative Moses "Moss" Morudu, in which the notorious and infamous Northern Transvaal security branch was involved. The security police believed that Morudu was part of a special MK unit, the so-called "Icing Unit", which was engaged in eliminating black collaborators with the apartheid regime such as black policemen.[180] On the instruction of Captain Hendrik Johannes Prinsloo, Morudu was abducted in October 1986 from his home in Mamelodi/ Pretoria

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[176] The attorney Howard Varney, who is presently acting for the Simelane family, has pointed out that the decision to grant amnesty for the abduction was flawed in a legal sense, since the Committee basically failed to distinguish between the two legal terms abduction and kidnapping. The attorney of the family at the time failed to apply for a review of the amnesty decision in this regard on behalf of the relatives. The possibility to apply for review has since lapsed. The option to apply for condonation has been assessed and found not to be promising.

[177] Interview with Howard Varney in Johannesburg (May 6, 2006).

[178] Ibid.

[179] See generally *TRC Report*, vol. 6, s. 4, chap. 1.

[180] *TRC Report*, vol. 6, s. 3, chap. 1, para. 269.

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and taken to a farm.[181] He was interrogated and brutally tortured for approximately one week.[182] What happened to him afterwards remains unknown. His family, however, had been deceived into believing he had gone into exile.[183]

The only amnesty applications concerning this incident were tendered by three black former security police members.[184] They only applied for their role in the abduction and later captivity of Morudu on the farm and claimed to have no knowledge of what eventually happened to Morudu, since they had not been present or involved for the whole time. They implicated the other security police operatives Hechter, Ludick, dos Santos, Mokhaba, Joe Mamasela and especially Captain Prinsloo, who was allegedly in charge of the operation. All of them denied any involvement.[185] Another officer believed to have been present during the interrogation is Northern Transvaal security branch constable van Vuuren.[186] The applicants claimed that at some point Morudu was taken away from the farm while they themselves had not been present and that Prinsloo had thereafter simply ordered them to remove all signs of their presence on the farm. It still remains unclear what eventually happened to Morudu. It is, however, again highly probable that he was executed and his remains were disposed of somewhere.

The problems in prosecuting this case are similar to those in the Simelane matter, since there is not any proper evidence of a murder and the possibility of prosecuting for assault has lapsed. Yet in this case, the alleged perpetrators, such as Prinsloo, had not applied for amnesty and might possibly, providing there was evidence to support the charge, be prosecuted for the kidnapping.

Commentators close to the TRC claimed that the Northern Transvaal security police's activities were generally not properly investigated by the TRC and that prosecutions should focus more on this area, since

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[181] Ibid., para. 272.

[182] Ibid.

[183] Ibid., s. 4, chap. 1, para. 1.

[184] Applications no. AM/3756/96, AM/3755/96, AM/6064/97.

[185] Decision no. AC/2000/010.

[186] *TRC Report*, vol. 6, s. 3, chap. 1, para. 272.

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amnesty applications were often not submitted.[187] As such, especially Prinsloo is believed to be a very worthwhile target for prosecution.[188]

5.1.3 *The relevance of prosecution in missing persons cases*

The family of Nokuthula Simelane and especially her mother suffers severely, mentally and physically, from the lack of closure.[189] According to Simelane's sister, it is extremely important for the family to find out the whole truth of Simelane's probable murder and to see the perpetrators admit their guilt. Only by discovering the full truth and being able to retrieve the remains for a proper burial could the family find closure and leave their grief behind. The yet unresolved situation prevents them from doing so and is a continuous source of pain.[190] This example is representative for others. The relatives of Moss Morudu experience similar problems.[191] It is generally essential for victims' families to get to know the exact fate and whereabouts of the remains of family members for whose disappearance is still unaccounted.[192] Otherwise they are unable to find closure.[193] As the TRC Report aptly put it, families remain 'trapped in the past, unable to move on' and 'constantly caught between near certainty that the missing person has not survived and hope that he or she will return'.[194]

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[187] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[188] Ibid. See further *TRC Report*, vol. 6, s. 3, chap. 1, paras. 267–77.

[189] T. Nkadimeng (sister of N. Simelane) *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[190] Ibid.

[191] See for an account of equal suffering caused by the unresolved situation for the relatives of missing former activist Moss Murudu: S. Russouw *'All I want is to bury my son'* The Star, March 31, 2007. See for an exemplary account from a victim's point of view on this issue and the implications for reconciliation with regard to victims: Y. Sooka 'Apartheid's victims in the midst of amnesty's promise' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 309 at 312.

[192] *TRC Report*, vol. 6, s. 4, chap. 1, para. 115.

[193] Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[194] *TRC Report*, vol. 6, s. 4, chap. 1, para. 7.

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Although in such cases it is generally more important for victims to get to know all the facts than to see the perpetrator being sentenced to a long jail term,[195] criminal proceedings are nevertheless an important tool to extract this very information. In both above examples, the possible perpetrators are not willing to cooperate with the NPA or the victims' relatives to clarify the facts. An imminent threat of prosecution is absolutely critical in presenting an incentive to move the perpetrators to disclose information.

Both cases have shown the grave consequences that the non-investigation of security police violence during the apartheid years and the statute of limitation has with regard to torture. On the basis of the above elaborations,[196] it can be argued that the limitation period should be extended. Furthermore, in terms of the above outlined prioritisation approach, both cases should be considered as of high priority for the PCLU, since the crimes in question are very egregious and can qualify as crimes against humanity. Both cases also give proof that it is worthwhile to explore an extended use of plea-bargaining. Perpetrators could be offered a suspended or reduced sentence in exchange for a full disclosure on the victims' fates.

5.2 *The Cradock-Four case*

The Cradock-Four case is a well-known case, typical of police violence against opposition activists.[197] Four leading UDF members of the Eastern Cape town of Cradock, Matthew Goniwe, Sparrow Mkhonto, Fort Calata and Sicelo Mhlauli, were abducted and executed by the security police in 1985.[198] All four had already previously been frequently arrested,

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[195] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Y. Sooka in Pretoria (May 3, 2006).

[196] See *supra* Chapter 4(3.).

[197] See on the case *TRC Report*, vol. 2, chap. 3, paras. 245–52; *TRC Report*, vol. 3, chap. 2, paras. 294–98. The Motherwell-Four case is connected to this case, since there the killings took place to prevent revelations concerning the Cradock-Four murders (*TRC Report*, vol. 3, chap. 1, appendix, page 28).

[198] *TRC Report*, vol. 3, chap. 2, para. 295.

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tortured and harassed by the police.[199] On 27 June 1985, after returning from a UDF meeting in Port Elizabeth, they were abducted by the security police and shortly thereafter shot or stabbed to death.[200] To avert suspicion from the security police their bodies and the car were burned.[201] The corpses were later found in the vicinity of Port Elizabeth.[202] In 1987 an inquest into the matter did not find any indications of security force involvement in the murders. However, in 1993 a secret document containing a message of the regional SADF command to the State Security Council secretariat was found, which called for the 'permanent removal from society' of the four activists.[203] Thereafter the inquest was reopened. The inquest judge found that there was *prima facie* evidence that the security forces carried out the murders and recommended the institution of criminal proceedings.[204]

Prompted by later investigations of the Transvaal Attorney-General in the case,[205] the Amnesty Committee received amnesty applications in relation to the murders from six security police officers: Hermanus du Plessis, Gerhardus Johannes Lotz, Harold Snyman, Johannes Martin van Zyl, all of whom had also been involved in the PEBCO-Three case, which happened only six weeks beforehand, Eric Taylor and General Nicolaas van Rensburg.[206] All applications with regard to the abduction and killing were refused in 1999 since the Committee was not convinced the applicants had made a full disclosure.[207] Snyman and van Rensburg have since passed away. Thus, the PCLU could potentially prosecute the four remaining security police perpetrators. However, since the amnesty refusals, the NPA has not made an attempt to lay charges.

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[199] *TRC Report*, vol. 2, chap. 3, para. 247.

[200] Ibid., para. 250.

[201] Ibid.

[202] *TRC Report*, vol. 3, chap. 2, para. 296.

[203] *TRC Report*, vol. 2, chap. 3, para. 248.

[204] Ibid.

[205] *TRC Report*, vol. 6, s. 3, chap. 1, para. 17.

[206] Applications no. AM/4384/96, AM/3921/96, AM/3918/96, AM/5637/97, AM/3917/96, AM/3919/96.

[207] Decision no. AC/99/0350.

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The Cradock-Four case must be considered as egregious and of high priority, since it involves systematic, ordered and very grave police violence against opposition members. However, should a prosecution be initiated, at least with regard to van Zyl, and possibly also with regard to some of the other alleged perpetrators, if they are clients of the lawyer Jan Wagener, the agreement to apply for a review of the amnesty refusal could again come into play and possibly delay or even prevent the start of a trial, as was the case in the PEBCO-Three matter.[208]

5.3 *The St. James Church massacre*

Among the cases believed to be under close scrutiny by the PCLU, there is at least one case that concerns the former liberation movement, the St. James Church massacre. The massacre was committed by members of the APLA, the military wing of the PAC. On 25 July 1993, a service congregation of St. James Church in Kenilworth, a district in Cape Town with predominantly white inhabitants, was stormed by APLA members.[209] The attackers opened machine gun fire and threw hand grenades at the about 1000 churchgoers. Eleven people were killed and fifty-eight were wounded.[210]

Four people applied for amnesty in relation to the attack, among them Letlapa Mphahlele,[211] former APLA commander and later president of the political party PAC. Mphahlele was director of operations of the APLA at the time of the massacre.[212] He was allegedly involved in the planning and authorisation of the attack.[213] Mphahlele later effectively withdrew his application before a decision of the Committee was handed down.[214] According to him, this was done in protest against a

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[208] See *supra* Chapter 2(7.2).

[209] *TRC Report*, vol. 2, chap. 7, para. 472.

[210] Ibid.

[211] Application no. AM/3018/96.

[212] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 271.

[213] Ibid., 277.

[214] *TRC Report*, vol. 6, s. 3, chap. 4, para. 114.

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perceived lack of objectivity of the TRC.[215] All other applicants were granted amnesty.[216]

The APLA attack was exceptionally brutal. It appeared highly senseless and totally unjustifiable in terms of the struggle against apartheid. The only reason for the APLA to attack the church was allegedly that white churches were used to legitimise apartheid and were, thus, perceived to be a means of oppressing the black population.[217] However, this specific church community consisted of very liberal whites, who actively engaged in cooperating with black church communities in poor areas of Cape Town.[218] Furthermore, about one third of the congregation consisted of people of colour.[219] The massacre also happened at a time when the Interim Constitution was about to enter into force and the transition to democracy was well under way. It was presumed by many that the attack was an attempt to thwart the negotiations, which were not supported by the PAC.

The APLA was also responsible for a number of other attacks during the negotiation period, which were only aimed at killing civilians. Among those are the Heidelberg Tavern massacre of December 1993 and the King William's Town Golf Club attack of November 1992, both of which left four people dead.[220]

In September 2006 Mphahlele was elected president of the political party PAC.[221] His prosecution was apparently high on the PCLU's list of priority cases. It remains to be seen whether these brutal attacks on unarmed civilians will indeed be prosecuted. However, since the targets of the attack were totally defenceless civilians, the case must be considered as being egregious and of high priority.

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[215] Ibid.

[216] Decision no. AC/1998/018.

[217] *TRC Report*, vol. 2, chap. 7, para. 475.

[218] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 275.

[219] *TRC Report*, vol. 6, s. 3, chap. 4, para. 125.

[220] See *TRC Report*, vol. 2, chap. 7, paras. 466–96; *TRC Report*, vol. 6, s. 3, chap. 4, paras. 89–167.

[221] See *PAC elects new president* SAPA, Sep. 26, 2006.

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5.4 *Cases involving former security police leaders*

In the Chikane case further proceedings are apparently envisaged concerning a very high-ranking former security force official. As such there are obviously plans to charge the former head of the apartheid security police, General Sebastiaan "Basie" Smit, since part of the plea agreement in the case was that the accused undertook to act as state witnesses in the event of a prosecution of General Smit.[222] As mentioned above, Smit eventually issued the order to murder Chikane.[223] The plea bargain also clearly indicated that other figures from the higher echelons of authority, probably including the highest levels of the apartheid government and the command of the SADF, were involved. It remains to be seen if the PCLU will follow up on such leads and charge these persons who may have been behind Chikane's assassination.

One of those concerned in the Chikane case, General Johan van der Merwe, could be a focus point for the PCLU, also with regard to at least one other case.[224] He was refused amnesty for a failure to make full disclosure concerning his involvement in organising a cross-border raid into Lesotho.[225] In December 1985 a group of security police operatives secretly entered Lesotho with the aim of executing various MK members who had planned to enter South Africa. During the attack nine people were murdered, among them uninvolved civilians.[226] However, it must be remembered that van der Merwe was one of the very few high-ranking security force officials who cooperated with the TRC extensively. His general openness to cooperate with the state in clarifying apartheid atrocities has also been shown in the Chikane case. The focus should rather be on those leaders, who, thus far, have yet to cooperate.

Another possible prosecution could again target General Smit and

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[222] See *supra* Chapter 2(9.3).

[223] Ibid.

[224] As a leading security police official during the 1980s, van der Merwe was probably involved in or must have had knowledge of a number of criminal security police operations (see various mentioning of van der Merwe in *TRC Report*, vol. 6).

[225] Decision no. AC/2001/231.

[226] Decision no. AC/2001/231.

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a further former high-ranking officer of the security police, General "Krappies" Engelbrecht, for their involvement in instigating "third force" violence during the early 1990s. Engelbrecht had been the last head of the notorious C section of the security police, which the Vlakplaas unit was a part of, and was, as such, also the direct superior of Eugene de Kock.[227] In this, he was certainly involved in a number of the criminal activities of Vlakplaas. However, the TRC, specifically, found evidence of Smit and Engelbrecht having been involved in the provision of arms to Inkatha fighters to support their attacks on ANC sympathisers during the bloody conflicts raging during the early 1990s.[228] The Goldstone Commission had in 1994 found indications of the two generals having initiated, authorised and supervised a project, which involved the production of home-made guns as well as the importing of large amounts of weapons from Namibia.[229] Allegedly the arms were directly provided to senior members of the IFP, such as Themba Khosa, to be used in their brutal slaying of ANC supporters.[230] A central figure in these activities was Eugene de Kock, who testified against the two at the TRC.[231] The involvement of Engelbrecht and Smit could merit, to say the least, a charge of incitement and/or aiding and abetting the murder of thousands of ANC supporters.

An investigation against Engelbrecht was already completed by the D'Oliveira team in 1999 and there were plans to charge Engelbrecht by April 2000.[232] However, strangely nothing has happened thus far, which might be due to the overall pattern of delay and the flaws in providing for proper continuity between the prosecution teams. Whether a trial of Engelbrecht is still planned is unknown.

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[227] *TRC Report*, vol. 2, chap. 3, appendix, para. 19.

[228] *TRC Report*, vol. 6, s. 3, chap. 1, para. 132. See especially *TRC Report*, vol. 2, chap. 7, paras. 100–123.

[229] *TRC Report*, vol. 3, chap. 6, para. 546.

[230] Ibid.

[231] Ibid.

[232] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 155 and 220. It cannot be said, however, which conduct was planned to be concerned by the charges.

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5.5 *The State Security Council and the apartheid government*

In public debates on the topic many human rights activists and victim representatives have called for more prosecutions of figures from the higher ranks of the apartheid regime and political leaders of the former governments, notwithstanding the practical challenges in targeting the command and political level of the former apartheid regime. Many have claimed that it would be necessary to investigate the involvement of former President F.W. de Klerk in apartheid atrocities.[233] Whereas the former Director-General of de Klerk's presidential office, Dave Steward, maintained that de Klerk could not be prosecuted since he had not been aware of any crimes committed by the security forces during his tenure, human rights activists claimed that his accountability could be established on the basis of his involvement in the State Security Council (hereinafter SSC).[234]

The SSC was a board of leading security force members and politicians, including de Klerk from the late 1980s, which was established to advise the government and security forces on security issues.[235] The TRC expressed great surprise that members of the SSC, who always maintained that they had no knowledge of criminal conduct, had never investigated or followed up the clear indications of crimes committed within the security structure they commanded.[236] Former leading NP member Leon Wessels, himself a member of the SSC, doubted the argument that SSC members could not have known of the crimes, which at least indirectly resulted from its policy directives.[237] With regard to former President F.W. de Klerk, the TRC had lamented that during his testimony before the TRC he did not give a truthful and full account of his knowledge of gross human rights violations committed by senior

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[233] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Howard Varney in Johannesburg (May 6, 2006); Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[234] H. Varney *De Klerk and the Truth Commission* The Guardian, Aug. 17, 2007.

[235] See *TRC Report*, vol. 2, chap. 3, appendix, paras. 1–6.

[236] *TRC Report*, vol. 6, s. 3, chap. 1, para. 357.

[237] *TRC Report*, vol. 5, chap. 6, para. 77.

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government members and the SAP.[238] As such, the Commission proposed to make a finding that he had known of the bombing of Khotso house in Johannesburg, the headquarters of the South African Council of Churches which was very active in anti-apartheid opposition, through the security police in 1988.[239]

The TRC also found that 22 members of the SSC were accountable for the violence of Inkatha groups against anti-apartheid organisations, especially the ANC, as the government had provided equipment, training and financial resources to IFP hit-squads.[240] It further found that the SSC, among others, pressured the security forces to act robustly against the liberation movement, used language that could easily be understood as orders to eliminate anti-apartheid activists and failed to prevent the commission of crimes by security force operatives.[241] Such conduct could possibly constitute criminal liability, such as incitement to commit the political crimes in question or make the involved politicians accessories to the fact. However, the exact scope of involvement of apartheid politicians in criminal acts cannot be determined here.

5.6 *The Steyn-Report concerning criminal SADF activities*

The potential to investigate cases of criminal SADF activities was again highlighted by the declassification of a report on alleged dangerous activities of SADF components in early 2006.[242] SADF general Pierre Steyn had in the early 1990s been assigned by former President de Klerk with the task of following up and investigating allegations that SADF

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[238] The respective paragraph of *TRC Report*, vol. 5, chap. 6, para. 104 containing these findings on de Klerk had to be blacked out before publication following a court order de Klerk had applied for.

[239] *TRC Report*, vol. 6, s. 1, chap. 4, para. 29. See further *TRC Report*, vol. 2, chap. 3, paras. 521–29.

[240] *TRC Report*, vol. 2, chap. 5, para. 249.

[241] *TRC Report*, vol. 5, chap. 6, paras. 99 and 102.

[242] Staff paper prepared for the Steyn commission on alleged dangerous activities of SADF components, December 1992 (on file with author).

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elements attempted to thwart the negotiations in the early 1990s and destabilise the country. During the mid-1990s, the report was handed to the TRC from which it was, after being considered highly sensitive, moved to the Department of Justice. It had only been declassified after the South African History Archives had lodged a legal challenge for its release against the Department of Justice.

The report outlines detailed yet uncorroborated indications of far-reaching and intense involvement of the SADF in third force violence, such as provision of weapons to IFP members, instigation of the so-called train murders and hostel violence in the Witwatersrand area, setting up of weapon caches, incitement to kill ANC members and various murders. The report also alleges that there had been plans for a right wing *coup d'État* as well as that support had been given to opposition movements in neighbouring countries. It details a wide range of names of officials and their specific alleged conduct.[243]

Criminal investigations concerning the SADF activities interrogated by Steyn had allegedly already been conducted in the early 1990s, apparently without results.[244] However, the concrete indications of intense and far reaching involvement of some very high-ranking SADF officials in high profile political crimes, which emerged through the Steyn report, appear to offer grounds on which the PCLU can initiate further investigations.[245]

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[243] Strangely and apparently due to a lapse the names had not, at least in the English version, been masked by the NPA which eventually released the document.

[244] C. Carter *Apartheid army's deadly secrets* The Sunday Independent, April 30, 2006.

[245] However, the report itself points out that criminal proceedings might be difficult due to destroyed evidence and the role players protecting each other.

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Chapter Five

Conclusion

This book was written to document and evaluate the progress, and lack thereof, which has been made in establishing criminal accountability for politically motivated gross human rights violations of the apartheid era, for which amnesty was not granted by the TRC. This process of establishing accountability is not isolated. Post-TRC prosecutions are part of South Africa's model of dealing with crimes committed during the apartheid conflict and, thus, must be put in context with the TRC's conceptual and legal regime on amnesty. Such prosecutions potentially impact on South Africans' attitude towards the TRC process and reconciliation generally, since many expect trials as part of this process. On the other hand, the former apartheid establishment and parts of the white population may see trials as yet another confirmation of their perception of victor's justice. The following will summarise the main conclusions and results reached in this book and will comment on the conduct of post-TRC prosecutions and their impact on the process of dealing with the past.

1. *Summary of Results*

The deadline to apply for amnesty was 30 September 1997. On the release of the TRC Report in 1998, the TRC and President Mandela made strong recommendations for criminal proceedings to be instituted where there was evidence of gross human rights violations (Chapter 1).

However, the government and the NPA implemented the recommendations very reluctantly (Chapter 2). In 1999 the Human Rights Investigative Unit was established to oversee investigations into and

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the prosecution of TRC-related cases. Thereafter matters were moved to the DSO ("Scorpions"). Not one prosecution was instituted by these units. Only when the last volumes of the TRC Report were issued in 2003 was a more appropriate unit, the PCLU, established.

The PCLU nevertheless only concluded three criminal proceedings during its five years of existence. In all, during almost one decade after the conclusion of the TRC, prosecutions have been initiated in only eight cases. Seven proceedings were finalised in court, four of which resulted in the conviction of all accused parties. Four of the finalised cases were conducted by regional prosecution offices.

There has, therefore, been a minimal number of criminal proceedings conducted after the conclusion of the TRC. Provisions for the appropriate conditions for the units to perform the necessary tasks involved in prosecutions were totally insufficient. For the sake of the country to achieve quick closure on the past, as President Mandela had rightly suggested already in 1998, it would have required a clear commitment in 1998, consistent strategic decisions, the definition of priority criteria, the assignment of better and more resources, more continuity and cooperation between the D'Oliveira Unit and possibly only one successor unit instead of various different ones.

The lack of a clear commitment and concentrated efforts after 1998 essentially reveal a lack of political will from the government to properly support post-TRC prosecutions (Chapter 3). This lack of political will has found expression when the government intervened in a specific case and interrupted all proceedings for 13 months by imposing a moratorium without compelling reasons, thereby further delaying trials from taking place. However, most indicative of the lack in political will were the consultations of government and leading ANC representatives with groups of former apartheid security force leaders, which aimed to reach agreement on new indemnity mechanisms to circumvent trials. Eventually, the Prosecution Policy was amended to the effect that specific guidelines, which reproduced the TRC's indemnity mechanism and aimed to avoid large-scale prosecutions, shall govern the discretionary decision on whether to prosecute a TRC-related case. It was found to have potentially negative consequences for the establishment of criminal accountability after the TRC. With the suspension of the amendment

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by the High Court of Pretoria, the government suffered a serious blow in its ambitions to introduce new indemnity mechanisms.

The South African handling of post-TRC prosecutions violates the Constitution wherever proceedings are not instituted despite the existence of evidence which would warrant further investigation or prosecution (Chapter 4). By granting *de facto* indemnity to many authors of gross human rights violations, South Africa is also in breach of its obligations under international humanitarian and human rights law, should the crimes in question constitute grave breaches of the Geneva Conventions or crimes against humanity.

There are practical and strategic difficulties in the approach to post-TRC prosecutions, which should be an incentive to explore legally appropriate solutions, allowing prioritisation of cases, embracing the practical needs as well as the interests of victims and that do justice to the Constitution. On this basis, there are sound legal grounds to place higher priority on systematic crimes of state forces.

The prospects for a significant number of cases to be dealt with are bleak. Better progress would require the state to increase resources significantly, which, in the face of a lack of political will, limited resources and a very high present-day crime rate, is unlikely to happen. Among such cases that could already have been tackled, are the St. James church massacre, the Simelane case, the Cradock-Four case and many other cases from the PCLU's priority list of 16 cases, which allegedly are cases that have already been prepared to an advanced stage, as well as the many cases, which had already been prepared for prosecution by the D'Oliveira Unit, such as the case of General Engelbrecht.

Even under the difficult conditions in present-day South Africa, a limited amount of the most egregious cases of gross human rights violations could have been and can still be targeted. Nevertheless, many cases which actually warrant further investigation and provide the prospect of a successful prosecution on the basis of available evidence will remain unpursued. The book has practically been closed on post-TRC accountability.

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2. *The Conduct of Prosecutions in the Context of the TRC Process*

While the appropriate course of transitional justice will always depend on the specific circumstances in the country concerned, there are general considerations either speaking for or against prosecutions in transitional societies.[1] However, any academic assessment concerning the advantages or disadvantages of prosecutions in South Africa's transition to democracy is now anachronistic. The course of transitional justice and dealing with the crimes under apartheid, which South Africa chose, means that prosecutions must take place where amnesty was not granted.

The systematic requirement of prosecutions to take place is obvious. However, the question needs to be addressed to what extent the minimal conduct of post-TRC prosecutions impacts on the overall assessment of the TRC and its amnesty proceedings. Some suggest that abandoning the idea of prosecutions would 'make a mockery of the process',[2] and even that the entire TRC might unravel into a farce.[3] Certainly, the granting of amnesty on conditions simply does not make any sense if there are no consequences in terms of criminal proceedings attached to the non-compliance with one or more of the requirements. However, it can hardly follow from this that the entire legitimacy of the TRC would be obliterated. This would mean that the justice of amnesty depends fundamentally on post-TRC prosecutions being implemented. This certainly is not the case. It has been pointed out at the outset that the granting of amnesty was necessitated by the political realities during the negotiation period. Nevertheless, with the conditional model a successful attempt was made to avoid blanket amnesty, which in itself is an achievement. The great strength of the amnesty proceedings above was that they encouraged perpetrators to disclose information about their deeds, which might otherwise not have been forthcoming. Thousands

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[1] See A. Boraine *A country unmasked* (2000) 280–81; E. Hahn-Godeffroy *Die Südafrikanische Truth and Reconciliation Commission* (1998) 39–43.

[2] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[3] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 79.

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participated in the process. It was often suggested that the model was ideal to meet the demands of the South African transition and even superior to prosecutions.[4] There was, therefore, strong justification for the amnesty proceedings on their own, regardless of the overall context of accountability.

Nevertheless, amnesty and prosecutions were both integral parts of the South African system. The offer of amnesty was fundamentally premised on the fact that, without it, criminal proceedings would be instituted if there was sufficient evidence to support a prosecution. Many relied on this premise. 'Amnesty is not cheap', as former TRC chair Desmond Tutu repeatedly pointed out.[5] Yet this statement only rings true for those who participated in the process. For those who did not participate but who are not prosecuted, indemnity was obtained cheaply. Perpetrators who participated in the process may now ask themselves why they did so at all. Those who scoffed at the TRC are, in contrast, validated in their decision not to cooperate. This makes it clear that failing to institute prosecutions contradicts the system of accountability, which South Africa chose to adopt as a transitional justice scheme. Thus, if it is not the entire legitimacy of amnesty which is at stake, it is certainly the perceived credibility and justice of the process. What is therefore also at stake, is the overall assessment of the success of South Africa's attempt to deal with its past and the perception of many concerned South Africans that a consistent and just way of dealing with the past has been implemented.[6]

Consistency and credibility in the process is especially relevant with regard to victims' position in the legal setup of amnesty. Their sacrifice of retributive justice and redress was meant to be compensated with a concrete claim to the full truth regarding the crimes they had to endure. This benefit of the amnesty procedures for victims was, according to the Constitutional Court, of central relevance for the scheme's legal

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[4] See A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 344–45.

[5] See G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 279.

[6] See G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 297.

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justification.[7] It follows from this logic that should this benefit fail to materialise, either because the full truth was not told or amnesty was not applied for, these victims have a right to call for the normal course of criminal justice to proceed.[8]

In terms of consistency of the process, we must also conclude that the positive international perception of transitional justice in South Africa must be altered. The great international reputation the TRC gained with regard to amnesty was premised on the fact that blanket indemnity was avoided.[9] Especially with regard to the amnesty scheme's legal evaluation in terms of South Africa's international law obligations to prosecute, this structure was considered as the basis for the TRC's legal legitimacy in comparison to other societies in transition.[10] This, however, only rings true if the conditional model is conducted consistently. This is not the case. South Africa does not properly comply with its international law obligations to conduct post-TRC prosecutions properly. Thus, whereas the TRC's scheme on amnesty was seen by many as a role model, which could provide many lessons for transitional societies,[11] South Africa's actual conduct cannot properly function as a role model since it sends out the message that those who refused the offer of amnesty will still not be held accountable for their actions.

Nevertheless, it was often argued in the case against post-TRC prosecutions, that in terms of dealing with the past and promoting reconciliation and nation-building, the achievements of the TRC were

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[7] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 17.

[8] Ibid., at para. 20.

[9] Interview with Desmond Tutu in Cape Town (March 22, 2006); L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 79.

[10] R.A. Wilson *The politics of truth and reconciliation in South Africa* (2001) 23.

[11] S. Garkawe 'The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of victims of gross human rights violations?' (2003) 27 *Melbourne University Law Review* 334 at 335; P. Hayner 'Same species, different animal: how South Africa compares to truth commissions worldwide' in W. Verwoerd and C. Villa-Vicencio (eds) *Looking back reaching forward* (2000) 32 at 33.

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sufficient.[12] Trials are seen by many as detrimental to these achievements of the TRC. Certainly, prosecutions concentrating on former security police members, who were mostly recruited from the white Afrikaans speaking population, would be perceived by many South Africans of that ethnicity as yet another attack of the new ruling class on their group.[13] However, it would seem that such perceptions, especially among the Afrikaans speaking population, generally stem from affirmative action measures and the feeling that their language and heritage are predominantly pushed away from schools, universities, city names or memorial sites. Prosecutions would rather be a merely insignificant addition to these circumstances.

Furthermore, it fails to take into account what victims are required to do to reconcile the gross human rights violations they, or their family members, had to endure. Their ability to do so is certainly dependent on accountability being established for the crimes,[14] since what was for perpetrators a very generous offer to come clean on their criminal deeds,[15] was hard to accept for victims and often highly contested.[16] Unless proceedings are instituted, a balance cannot be struck between the concessions made by victims and the offers made to perpetrators.[17] To abandon post-TRC trials would, thus, be considered as 'a slap in the face' to victims.[18] Under such circumstances, it is hardly possible to expect victims to reconcile themselves with the past if perpetrators

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[12] G. Bizos *Why prosecutions are necessary* in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 5 at 7 refers to this notion of many others.

[13] The activities of the predominantly Afrikaans advocacy group "Afriforum", especially around the Chikane litigation, demonstrate the mingling of anti-prosecution with pro-Afrikaans advocacy efforts.

[14] R.C. Slye 'Amnesty, truth and reconciliation' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 170 at 179. See also K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 246.

[15] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[16] A. Gutmann and D. Thompson 'The moral foundations of truth commissions' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 22 at 24.

[17] M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 36.

[18] Interview with Desmond Tutu in Cape Town (March 22, 2006).

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simply get away with their deeds scot-free without the state making sufficient efforts for prosecutions.[19] The deep divide between the government and apartheid victims, mainly caused by the highly reluctant payout of reparations, will deepen further.

The proposition of prosecutions harming the achievements of the TRC also forgets that the amnesty proceedings had significant gaps, since many perpetrators of politically motivated gross human rights violations did not submit amnesty applications. Prosecutions can function to fill some of these gaps. They can, to some extent, clarify the facts regarding past atrocities[20] and should occur where the TRC has not been successful.

3. *Closing Remarks*

The assessment of the conduct of post-TRC prosecutions in South Africa in this study is negative. However, the moral and/or legal desirability of criminal accountability is certainly restricted by the adverse practical realities and conceptual difficulties that have been acknowledged. Certainly, only a relatively small number of cases could still be tackled under the present circumstances. The question which ultimately needs to be addressed is, whether these practical burdens and theoretical dilemmas can, in terms of this evaluation, trump criminal accountability and justify not instituting more proceedings. Can the fact that the vast majority of crimes cannot be prosecuted lend support to the contention that it would then be better not to prosecute at all? Must one conclude that the prosecution of only a small number of cases is actually not worth the effort, today, fifteen years into the new democracy?

The answer clearly must be, no. Limited resources and strategic demands can, by no means, be a reason not to institute proceedings at all. Many victims still have no answers to what happened to their

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[19] R.C. Slye 'Amnesty, truth and reconciliation' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 170 at 179.

[20] See also K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 245.

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Bubenzer, Ole. Post-TRC Prosecutions in South Africa : Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process, BRILL, 2009. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=634909.
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family members, although in many cases the perpetrators are known to the NPA. What is fundamentally at stake is not only the aforementioned consistency and reputation of the TRC process and, partially, the success of the process of dealing with the past, but also the substance and credibility of South Africa's commitment to the enforcement of a culture of human rights. The new South Africa was, in its renunciation of the politics of apartheid, eager to support international human rights law. Respect for human rights has found expression in the Constitution as a fundamental basis for the new democratic order.[21] The current practice of *de facto* indemnity, however, furthers a disreputable tradition of impunity for state orchestrated gross human rights violations, which was adopted during apartheid.[22] It renders meaningless and undermines the human rights protection in international, as well as constitutional law.

Finally it must be pointed out that to rely on forgetfulness in dealing with the past, which by many is seen as the ideal option in the interest of the country, has hardly ever proved to be successful as many countries provide an example that their violent past refuses to rest until it has sufficiently been dealt with and acknowledged. Reconciliation and closure on the past on an individual and national level are prevented by official forgetting.[23] Thus, avoiding the assignment of criminal accountability serves short term practical interests but in the long run will not be in the interest of the country to leave its past behind effectively. Although South Africa made an important step against total impunity with the TRC, too many crimes yet remain unrevealed and unaccounted for.

Almost 10 years after conclusion of the TRC, post-TRC prosecutions have not been conducted successfully and the South African process of dealing with past gross human rights violations, therefore, cannot be seen as concluded.

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[21] See also T.M. Grupp *Südafrikas neue Verfassung* (1999) 27–28.

[22] See F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 29–63; P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 1.

[23] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 255.

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Post-TRC Prosecutions in South Africa
Collection of documents

A. The State v. van der Merwe, Vlok, Smith, Otto, van Staden (*Chikane case*)

I. Charge sheet (*Afrikaans*)
II. Plea and Sentence Agreement (*English*)
III. Plea and Sentence Agreement (*Afrikaans*)

B. The State v. Nieuwoudt, van Zyl (*PEBCO-Three case*) charge sheet

C. The State v. Ronnie Blani

I. Charge sheet
II. Judgment

D. Prosecution Policy Amendment (related documents)

I. Prosecution Policy text
II. Minutes Justice Portfolio Committee
III. NPA presentation Justice Portfolio Committee
IV. NPA press statement
V. High Court judgment suspending the amendments

E. Motherwell-Four Case new amnesty hearing

I. New amnesty decision of 29 August 2005
II. Minority decision of 23 June 2005

F. National Party and others v. Truth and Reconciliation Commission

(High Court judgment of 1998 setting aside the granting of amnesty to 37 high ranking ANC officials)

G. NPA Press Statement on non-continuation of Basson prosecution

H. "Steyn Report" on dangerous SADF activities

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A.

I.

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IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Transvaalse Provinsiale Afdeling)

DIE STAAT

teen

1. JOHANNES VELDE VAN DER MERWE
'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK
'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH
'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO
'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN
'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

AKTE VAN BESKULDIGING

Die Spesiale Direkteur van Openbare Vervolging, wat as sodanig vervolg vir en namens die Staat, stel die hof hiermee in kennis dat die beskuldigdes skuldig is aan die misdade van:

1. **POGING TOT MOORD ALTERNATIEWELIK OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

2. **OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

18/07/2007 11:29 FAX 007

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AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby die **destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur sy klere **met 'n gifstof, te wete Paraoxon, te besmet.**

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Sebastiaan Smit, Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsingslaboratorium en/of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsingslaboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en/of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

In die geval van skuldigbevinding versoek die genoemde Direkteur vonnis ooreenkomstig die reg teen die beskuldigdes.

AR ACKERMANN SC
SPESIALE DIREKTEUR VAN OPENBARE VERVOLGING
KANTOOR VAN DIE NASIONALE DIREKTEUR VAN OPENBARE VERVOLGING

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OPSOMMING VAN WESENLIKE FEITE INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

AGTERGROND:

1. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

2. Dr Wouter Basson was die projekoffisier.

3. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

4. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

5. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

6. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

7. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

8. Gedurende ongeveer 1987 is die vermoëns van die projek aan ander afdelings van die Suid-Afrikaanse Veiligheidsmagte tydens 'n vergadering in Kaapstad voorgehou.

9. Na bovermelde vergadering het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

10. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die

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behoefte van die besondere afdeling bespreek en is die substanse later aan hulle oorhandig.

11. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A"**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

DIE BESKULDIGDES:

12. Beskuldigde no 1 was gedurende die tydperk Januarie 1986 tot September 1988 'n generaal in die Suid-Afrikaanse Polisie (hierna genoem die "Polisie") en in bevel van die Veiligheidstak van die Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

13. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak.

14. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

15. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging senior offisiere verbonde aan die Veiligheidstak.

DIE SAMESWERING:

16. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van die misdaad apartheid en/of die omverwerping van die regering van die dag teweeg te bring.

17. In 1987 was daar 'n besluit deur die leierkorps van die Veiligheidsgemeenskap geneem dat hoë profiel lede van die anti-Apartheids-vryheidstryd in uiterste gevalle om die lewe gebring moes word.

18. 'n Lys met die name van die geïdentifiseerde persone is aan die bevelstruktuur van die Veiligheidsgemeenskap oorhandig.

19. Beskuldigdes no 1 en 2 het die uitvoering van die bovermelde besluit bespreek.

20. Daar was toe besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

21. Beskuldigde no 3 was die bevelvoerder van hierdie eenheid.

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22. Beskuldigdes no 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid.

23. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

24. Ten alle relevante tye het die beskuldigdes, Smit, Basson, Immelman en ander persone onbekend aan die Staat opgetree ter bevordering van die gemeenskaplike oogmerke vermeld in die akte van beskuldiging.

DIE SLAGOFFERS:

25. Eerwaarde Frank Chikane se naam was op die lys vermeld in paragraaf 18.

26. Eerwaarde Frank Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse regering. Hy was onder andere sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front.

27. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskeie lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

28. Die eerste been van sy toer was 'n besoek aan Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

29. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

30. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

31. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

32. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

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33. Ten aansien van aanklag 2, is die slagoffers waarna daar verwys word, met die uitsondering van Eerwaarde Chikane, onbekend aan die staat.

DIE MISDADE:

34. Nadat Dr Basson die opdrag vermeld in paragraaf 7 aan Dr Immelman gegee het om navorsing te doen oor die aanwending van toksiese substanse, was daar verskeie klandestiene ontmoetings tussen Dr Immelman en beskuldigdes no 3, 4 en 5.

35. Gedurende die ontmoetings het die beskuldigdes inligting oor *inter alia* gifstowwe, bakterieë en kiere as gewenste toedieningsroete verlang. Dr Immelman het die substans, Paraoxon, vir die doel geïdentifiseer en verduidelik dat hierdie tipe gifstof op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die beskuldigdes het Dr Immelman daarop versoek om Paraoxon aan hulle te verskaf.

36. Paraoxon is 'n dodelike, toksiese substans.

37. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in Aanhangsel "A" gereflekteer word.

38. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

39. Voor sy vertrek het beskuldigdes no 4 en 5 vir ene Zeelie, wat ook verbonde was aan die Veiligheidspolisie, genader en Zeelie versoek om hulle behulpsaam te wees om Eerwaarde Chikane se bagasie op die lughawe te onderskep en oop te maak, sodat die kiere met 'n gifstof besmet kon word.

40. Die aand van 23 April 1989 was beskuldigdes no 4 en 5 op die lughawe en is Eerwaarde Chikane se tas onderskep en aan hulle oorhandig. Beskuldigdes no 4 en 5 het van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

41. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 29 - 32 tot gevolg gehad.

42. Die Staat beweer dat beskuldigdes ter bevordering van 'n gemeenskaplike oogmerk opgetree het om Eerwaarde Chikane te dood.

43. Ten aansien van aanklag 2 is dit onbekend aan die staat wanneer en ten opsigte van wie die substanse toegedien is. Die staat beweer egter dat daar gedurende die vermelde tydperk 'n sameswering bestaan het om teenstanders van die regering van die dag te elimineer.

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LYS VAN GETUIES INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

1. Eerwaarde Frank Chikane
2. Dr André Immelman
3. Charles Alfred Zeelie
4. Paul Francis Erasmus
5. Pieter Jacobus Johannes Burger
6. Eugéne Alexander de Kock
7. Superintendent Marthinus Gert Thomas Swart
8. Jacobus Francois Kotze
9. Wynand Johannes Pretorius
10. Dr Daniël J Smith
11. Dr Tomas P Lynch
12. Mary Rook
13. Joan Emmerich

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AANHANGSEL "A"

VERKOPE

Datum gelewer		Stof	Volume	Prys
19.03.89	JK	Phensiklidien Thallium asetaat	1 x 500mg 50g	Teruggebring
23.03.89	JK	Phensiklidien	5 x 100mg	
04.04.89	C	Aldicarb – Lemoensap	6 x 200mg	
04.04.89	C	Asied – Whisky	3 x 1,5 g	
04.04.89	C	Paraoxon	10 x 2ml	
07.04.89	C	Vit D	2gr	
15.05.89	C	Vit D	2gr	R300,00
15.05.89	C	Katharidien	70mg	R150,00
15.05.89	C	10ml Spuite	50	
16.05.89	C	Naalde 15Gx10mm	24	R18,00
16.05.89	C	Naalde 17Gx7,5mm	7	R7,00
19.05.89	C	Thallium asetaat	1g	
30.05.89		Fosfied tablette	30	
09.06.89		Spore en Brief	1	
20.06.89	K	Kapsules NaCN	50	
21.06.89		Bierblik Bot	3	
21.06.89		Bierblik Thallium	3	
21.06.89		Bottel bier Bot	1	
21.06.89		Bottel bier Thallium	2	
22.06.89	K	Suiker en Salmonella	200gr	
27.06.89	C	Wiskey en Paraquat	1x75ml	
20.07.89	K	Hg-sianied	4gr	
27.07.89	K	Bobbejaan foetus	1	
04.08.89	K	Vibrio cholera	16 bottels	

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DATUM GELEWER		STOF	VOLUME	PRYS
10.08.89	K	Asied 4xgr	Kapsule sianied 7	
11.08.89	C	Sigarette B anthracis	5	
	C	Koffie sjokolade B anthracis	5	
	C	Koffie sjokolade Potulinum	5	
	C	Pepperment sjokolade Aldikarb	3	
	C	Pepperment sjokolade Brodifakum	2	
	C	Pepperment sjokolade Katharidien	3	
	C	Pepperment sjokolade Sianied	3	
16.08.89	K	Vibrio cholera	6 bottels	
16.08.89	K	Kapsules Propan NaCN	7	
16.08.89	K	Formalien en Piridien	50ml x 30	
		Naalde 10cm x no 16	12	
16.08.89	K	Katharidien - poeier in sakkie	100mg	
16.08.89	K	Metanol	3-30ml	
	C	Vibrio cholera	10 bottels	
06.09.89	K	Slange	2	
	K	Mamba toksien	1	Teruggebring
13.09.89	K	Digoksien	5 mg	
18.09.89	C	Whiskey 50ml + colchicines	75mg	
06.10.89	K	B.melitensis c	1 x 50	
		S.typhimurium in deodorant	1	
11.10.89	K	Kulture vanaf briewe	2	
21.10.89	K	B.melitensis c		
		S.typhimurium in deodorant	1	

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A.

II.

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:

In the matter between:

THE STATE

and

1. JOHANNES VELDE VAN DER MERWE

an adult male South African citizen

2. ADRIAAN JOHANNES VLOK

an adult male South African citizen

3. CHRISTOFFEL LODEWIKUS SMITH

an adult male South African citizen

4. GERT JACOBUS LOUIS HOSEA OTTO

an adult male South African citizen AND

5. HERMANUS JOHANNES VAN STADEN

an adult male South African citizen

(hereafter referred to as the accused)

PLEA AND SENTENCING AGREEMENT IN TERMS OF SECTION 105A OF ACT 51 OF 1977 (AS AMENDED)

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THE PLEA AGREEMENT:

A. PARTIES TO THE AGREEMENT:

1. The State is the National Prosecuting Authority of South Africa and represents the complainant.

2. There are five accused, namely:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO and

HERMANUS JOHANNES VAN STADEN;

B. AUTHORISATION:

3. The prosecutor who represents the Prosecuting Authority in this matter is **Adv AR Ackermann SC,** a Special Director in the Priority Crimes Litigation Unit in the Office of the National Prosecuting Authority, who is duly authorised to enter into this plea agreement on behalf of the State. The relevant authorisation is attached as **Annexure A.**

C. LEGAL REPRESENTATION:

4. At all times during the plea negotiations and these proceedings, the accused have been represented by **Adv Johann Engelbrecht SC** and **Jan Wagener**, of Attorneys Wagener Muller, 833 Church Street, Pretoria, 0001.

D. THE INVESTIGATING OFFICER:

5. The investigating officer was consulted regarding this plea agreement and has indicated that he has no objection to the pleas of guilty as set out in the agreement, or to the proposed sentences.

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E. THE COMPLAINANT'S ATTITUDE WITH REGARD TO THE PLEA AGREEMENT:

6. The complainant, the **Reverend Frank Chikane**, has been consulted and has indicated that:

   6.1 He does not harbour a grudge against the accused.

   6.2 It is extremely important for him to have the true facts surrounding the attempt on his life disclosed.

   6.3 He is satisfied with the plea agreement and does not wish to make any further representations in connection with the matter.

F. THE RIGHTS OF THE ACCUSED:

7. Prior to entering into the plea agreement, the accused were duly informed about their constitutional rights..

8. They have been fully informed regarding the rebuttable presumption that they are innocent until guilt has been proved beyond reasonable doubt.

9. They were informed of their right to remain silent.

10. They were also fully informed of their right not to offer self-incriminating testimony.

11. The accused are fully aware of the fact that the Honourable Court is not bound by this plea agreement.

G. THE CHARGES:

12. The accused are charged with the following offences:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

ALTERNATIVE CHARGE TO COUNT 1: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

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IN THAT the accused, together with **Wouter Basson**, **André Immelman** and **persons unknown to the State, during April 1989** and at or near **Roodeplaat Research Laboratory and/or Pretoria** in the district of **Pretoria,** unlawfully and intentionally conspired to commit the crime of **murder** against the **Reverend Frank Chikane,** and / or to assist in the commission of this offence and / or to further the commission of the offence.

COUNT 2: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, **Wouter Basson**, **André Immelman** and **persons unknown to the State, during 1989** and at or near **Roodeplaat Research Laboratory, Security Branch Headquarters** in the district of **Pretoria and/or other locations unknown to the State,** unlawfully and intentionally conspired to commit the crime of **murder** of **persons unknown to the State** and / or to assist with the commission of such murders and / or to further the commission of such murders.

H. THE PLEA OF THE ACCUSED:

13. The parties to this plea agreement have concurred on the following:

13.1 That all the accused plead guilty to **Count 1,** as set out in the indictment:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

13.2 That the State will withdraw **Count 2** against all the accused.

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1. FACTUAL SUMMARY OF EVENTS:

(i) BACKGROUND:

(For the sole and exclusive purpose of this agreement, the accused admit the contents of paragraphs 14 to 23 as set out hereunder, although at the time the relevant offence referred to in **Count 1** was committed, they had no knowledge whatsoever thereof.)

14. During the period 1982 – 1992, the South African Defence Force ran a Top Secret project, namely Project Coast. The primary objective of this project was to develop a defensive and limited offensive chemical and biological warfare capacity.

15. Dr Wouter Basson was the project officer.

16. Due to the sensitivity of the project, front companies were used to conduct research as well as to manufacture and procure substances.

17. The front company Delta G Scientific (Pty) Ltd (hereafter referred to as "Delta G") was responsible for research and manufacture of chemical substances for the project.

18. Roodeplaat Research Laboratory (Pry) Ltd (hereafter referred to as "Roodeplaat") conducted research in the biological sphere and to a lesser extent, also carried out chemical research.

19. Dr A Immelman was a scientist employed as the head of toxicological research at Roodeplaat.

20. Around the mid-1980s, Dr Basson instructed Dr Immelman to, *inter alia*, carry out research on the use of toxic substances against individuals, methods of application and the traceability of such substances following administration. These toxic substances (including Paraoxon) were manufactured at Roodeplaat and some of them were handed over to Dr Basson.

21. In approximately 1987, Dr Basson ordered Dr Immelman to meet clandestinely with representatives of other branches of the Security Forces and to supply them with whatever substances they needed.

22. As a result of this instruction, Dr Immelman had various clandestine meetings with members of the various Security Force components. During these meetings, the needs of particular components were discussed and toxic substances were in fact later supplied to them.

23. In order to keep a record of the toxic substances that were handed over to these outsiders, Dr Immelman maintained a list (attached to the indictment

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as **Annexure "A"**) indicating the date of delivery, the name of the substance and the volume / quantity supplied.

(ii) THE ACCUSED:

24. During the period January 1986 to September 1988, accused No 1 was the commanding officer of the SA Police Special Branch. In October 1988, he was promoted to Deputy Commissioner of Police.

25. General Sebastiaan Smit succeeded him as commander of the Security Police and thereafter, accused No 1 had no further involvement with the project.

26. During the period December 1986 to August 1991, accused No 2 was the Minister of Law and Order in the Republic of South Africa.

27. During the period relevant to the indictment, accused 3 to 5 served as police officers attached to the Security Branch.

(iii) THE VICTIM:

28. The Reverend Frank Chikane was an outspoken opponent of apartheid and the policies of the then lawfully elected government. He was, *inter alia*, the secretary-general of the South African Council of Churches and the vice president of the United Democratic Front. It was the stated policy of the latter organisation to propagate and support countrywide unrest and violence for the direct purpose of rendering the country ungovernable.

29. During April / May 1989, Reverend Chikane was planning to visit various foreign countries with a view to propagating the imposition of economic sanctions against South Africa.

30. The first leg of his trip was a visit to South West Africa, now Namibia. He travelled by air from the former Jan Smuts Airport to Windhoek.

31. After dressing on 24 April 1989 in some of the clothes that had been packed in his suitcase, the Reverend Chikane took ill. He was admitted to a hospital in Namibia, but later the same day, he was transported back to South Africa as a matter of urgency and re-hospitalised on arrival.

32. His condition improved and he was discharged from hospital. He then flew to the USA, both to recuperate and to keep a number of scheduled appointments. Additional clothing was packed in his suitcase, which had arrived from Namibia in the interim.

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33. In the United States, Reverend Chikane again fell ill after wearing clothing taken from his suitcase. Again, after being hospitalised, his condition improved. This pattern was repeated twice more.

34. During his third hospitalisation in the USA, extensive medical tests were carried out on Reverend Chikane. P-Nitrophenol was found in his urine and this, together with specific symptoms and other test results, indicated organophosphate poisoning. P-Nitrophenol is a rapidly biodegradable metabolite of Parathion, of which Paraoxon is the active ingredient.

(iv) THE CRIME:

35. During the 1980s, various individuals / organisations were actively involved in efforts to abolish apartheid in South Africa and/or overthrow the government of the day by violent means. Methods used included the promotion of economic sanctions against and the international isolation of South Africa, as well as direct propagation of civil disobedience in order to render the country ungovernable.

36. During 1987, at a meeting arranged by the South African Defence Force, accused No 1 took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.

37. A list containing the names of persons identified in terms of this order was handed to senior members of the security establishment, including accused No 1. Reverend Chikane's name was among those on this list.

38. The execution of the above-mentioned order was discussed by accused No 1 and No 2.

39. Accused No 1 and No 2 then decided that a special unit should be set up within the Security Branch for the purpose of carrying out this order.

40. Accused No 4 and No 5 were attached to this special unit at all relevant times and from January 1989, accused No 3 served as the commander of the unit.

41. After General Smit assumed command of the Security Branch, he was informed about the objectives of the special unit.

42. Acting on the orders of General Smit, accused No 3 made contact with Dr Basson and requested him to assist the special unit in acquiring substances that could be applied against the enemy. Dr Basson arranged for contact to be made with Dr Immelman.

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43. A number of clandestine meetings took place thereafter between Dr Immelman and accused No 3, 4 and 5. At these meetings, these three accused discussed the details of substances that could be used against the enemy. In respect of Reverend Chikane, a substance that would specifically lead to his death was required. Dr Immelman identified a certain substance for this purpose and explained that it should be applied to close-fitting clothing items, such as a shirt collar and/or underpants. The toxic substance, which was subsequently identified as Paraoxon, was supplied to them by Dr Immelman.

44. Paraoxon is a lethal toxic substance.

45. On 4 April 1989, Dr Immelman delivered the Paraoxon to the accused, as reflected in **Annexure "A" of the Indictment.**

46. Reverend Chikane was due to depart for Windhoek from Jan Smuts Airport on 23 April 1989.

47. On the evening of 23 April 1989, accused No 3 and No 4 were at the airport and Reverend Chikane's suitcase was intercepted. They then applied the Paraoxon supplied to them by Dr Immelman, to the contents of Reverend Chikane's suitcase.

48. The poisoning of Reverend Chikane's clothing resulted in the series of events set out in paragraphs 31-34.

49. The order to kill Reverend Chikane was issued by General Smit to accused No 3 in terms of an order conveyed to accused No 1 and No 2. The accused acted in pursuance of a common purpose to murder Reverend Chikane. At all relevant times, the accused acted unlawfully and with the necessary intent.

AGREEMENT REGARDING A JUST SENTENCE:

J. AGGRAVATING CIRCUMSTANCES:

50. The administration of poison in order to secretly eliminate opponents is an egregious, reprehensible and universally abhorrent act.

51. Accused No 1 was the Deputy Chief of the Republic of South Africa's Police at the time of commission of this crime.

52. Accused No 2 was a prominent political leader and member of the ruling party of the day.

53. Reverend Chikane was a religious leader.

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54. The motive for the planned murder of Reverend Chikane was to prevent him from lobbying abroad for economic sanctions against South Africa and to deprive him of his role in promoting internal résistance against the government..

55. The **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** made provision for persons who were guilty of committing gross human rights violations for political purposes, to apply for amnesty.

56. On several occasions, accused No 1 and 2 availed themselves of this right and testified before the Truth and Reconciliation Committee, each time under oath.

57. The accused did not apply for amnesty in respect of the charge to which they have now pleaded guilty.

58. On 10 July 1997, accused No 1 testified before the TRC that he was not aware of the existence of a so-called "internal hit list" that was circulated within the security community.

59. Acts of reconciliation towards Reverend Chikane by accused No 2 took place only after the National Prosecuting Authority had indicated that it had a *prima facie* case against accused No 3, 4 and 5 in respect of the poisoning of Reverend Chikane.

60. During the trial of Dr Wouter Basson, who was charged, *inter alia,* with the poisoning of Reverend Chikane, the accused, and in particular accused No 2, remained silent about their role in the attempted murder and avoided any suggestion of attempted reconciliation.

61. During the prosecution of Dr Basson, accused No 3, 4 and 5 were approached on several occasions by members of the prosecution team with a view to giving evidence as State witnesses. They were offered indemnity from prosecution in terms of Section 204 of Act 51 of 1977 in this regard. The accused consistently refused to offer their cooperation and persisted in furnishing the State with a false version of events. The accused offered instead to cooperate with Dr Basson's legal defence team.

62. After conclusion of Dr Basson's trial, Reverend Chikane wrote to accused No 3, 4 and 5 several times, pleading with them to reconcile with him. The accused consistently ignored all his requests.

K. MITIGATING CIRCUMSTANCES:

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63. None of the accused has any previous convictions. Their respective ages are 71 (accused No 1), 70 (accused No 2), 69 accused No 3), 60 (accused No 4) and 63 (accused No 5).

64. The accused are all married.

65. The accused have all pleaded guilty.

66. Disposal of this case in terms of Section 105A of Act 51 of 1977 saves both the court and the State the cost and inconvenience of a protracted trial.

67. The accused have assisted the State by pleading guilty, in so far as it would otherwise have been difficult for the State to prove its case, since the State is not in possession of any evidence regarding the involvement of accused No 1 and No 2 and has been able to establish their role only as the result of their cooperation. In addition, accused No 3 and No 4 came forward to disclose their roles.

68. The accused have shown remorse for their deeds and have undertaken to act as State witnesses in the event of a prosecution being instituted against General Sebastiaan Smit.

69. Accused No 2 publicly washed Reverend Chikane's feet as a gesture of reconciliation. This act of contrition must be seen against the background that it was performed voluntarily by accused No 2.

70. The sincere remorse of accused No 2 in regard to past deeds is further illustrated by his act of reconciliation towards the mothers of 9 of the 10 Nietverdiend victims killed by the Security Forces, despite the fact that accused No 2 had no knowledge of this operation at the time and nor was it sanctioned by him.

71. At all relevant times, the accused were acting by virtue of their official positions and posts, in defence of the lawfully elected government of the day, to which they had sworn an oath of allegiance.

72. The offence was committed during a period of intense conflict and division between the various communities and structures in South Africa. On the one hand, the ANC and other anti-apartheid organisations that wished to overthrow the government by violent means, had thrown everything into the struggle to achieve their objectives. All members and spheres of society were drawn into the struggle in order to foment résistance in a variety of forms. On the other hand, the then lawfully elected government, in turn, used all the methods and powers at its disposal. The Security Forces, and in particular the SA Police, played a key role in combating the onslaught. Amid the violence raging countrywide as well as in Namibia, the SA Police were increasingly required to act against trained military operatives, which had a significant influence on normal policing. At times,

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they were forced to sacrifice the principle of minimum force and, amid the violence and bloodletting, the distinction between lawful and unlawful action became blurred.

73. At the time of commission of the offence outlined in Count 1, accused No 1 was no longer head of the Security Police and was also no longer involved in the project.

74. Neither accused No 1 nor No 2 had knowledge of the specific attempt on Reverend Chikane's life. Notwithstanding the fact that accused No 2 had made it clear that he wished to be informed in advance if consideration was being given to killing a specific individual, he was not informed in this particular case.

75. Accused No 3 and No 4 were subordinates who acted in terms of a direct order issued by the Security Branch chief, General Smit.

76. The original project aimed at neutralising the influence of high profile members of the anti-apartheid liberation struggle, was not initiated by the accused, but by the SA Defence Force, which itself was acting on higher authority.

77. As secretary-general of the South African Council of Churches and vice president of the United Democratic Front, Reverend Chikane played a key role in fomenting resistance to the former government. The United Democratic Front succeeded in mobilising the masses countrywide, resulting in widespread unrest and violence.

78. In the run-up to the TRC process, accused No 1 did everything possible to encourage members and former members of the SA Police to participate in the process. When the incident involving Reverend Chikane came to his notice, he held discussions with former chiefs and generals of the SA Defence Force in an attempt to persuade them to take part in the process as well. Because members of the defence force were involved in the incident, any attempt to seek amnesty would necessarily have been unsuccessful without their cooperation. The military generals were of the opinion, however, that the **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** contained one-sided provisions that rendered the process unacceptable to them.

79. After conclusion of the TRC process, accused No 1 and No 2 did everything they could to promote creation of a further process that could address shortcomings exposed by the TRC process. Following the decision to prosecute accused No 3, 4 and 5, accused No 1 and No 2 also held discussions with Reverend Chikane with a view to the institution of such a process. He showed empathy for the problems with which accused No 1 and No 2 were wrestling.

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80. With the formulation of the National Prosecuting Authority's prosecutorial guidelines entitled "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (see **Annexure "B"**), a process was created that offered built-in protection for individuals who wished to make use of it, and the accused lost no time in coming forward and making full disclosure regarding this incident, which they had not been able to do in response to the letters from Reverend Chikane referred to in paragraph 62 above.

L. SENTENCE AGREEMENT:

81. In the light of the circumstances set out above, agreement has been reached on the following as appropriate sentences in respect of count 1:

Accused No 1 and No 2:

Each of the accused is sentenced as follows:

> "**10 (ten)** years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

Accused No 3, 4 and 5:

Each accused is sentenced as follows:

> "**5** (five) years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

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SIGNED AT **PRETORIA** ON THIS DAY OF JUNE 2007.

_____

AR ACKERMANN SC
Director of Public Prosecutions
Priority Crime Litigation Unit.

_____

1. JOHANNES VELDE VAN DER MERWE

_____

2. ADRIAAN JOHANNES VLOK

_____

3. CHRISTOFFEL LODEWIKUS SMITH

_____

4. GERT JACOBUS LOUIS HOSEA OTTO

_____

5. HERMANUS JOHANNES VAN STADEN

_____

JAN WAGENER
ATTORNEY FOR THE ACCUSED
WAGENER MULLER
833 CHURCH STREET
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
REF: JW0423

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A.

III.

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IN DIE HOOGGEREGSHOF VAN SUID AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAK NR:

In die saak tussen:

DIE STAAT

en

1. JOHANNES VELDE VAN DER MERWE

'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK

'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH

'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO

'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN

'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

PLEIT- EN VONNISOOREENKOMS INGEVOLGE

ARTIKEL 105A VAN WET 51 VAN 1977 (SOOS GEWYSIG)

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DIE PLEIT-OOREENKOMS:

A. PARTYE TOT OOREENKOMS:

1. Die Staat is die vervolgingsgesag en verteenwoordig die klaer;

2. Daar is vyf beskuldigdes, naamlik:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO en

HERMANUS JOHANNES VAN STADEN;

B. MAGTIGING:

3. Die aanklaer wat die Vervolgingsgesag hierin verteenwoordig, is **Adv. Anton R Ackermann SC**, 'n Spesiale Direkteur verbonde aan die Prioriteits Misdaad Litigasie Eenheid van die Nasionale Vervolgingsgesag en het die pleit-onderhandelinge in hierdie saak behartig, waartoe hy behoorlik gemagtig is. Die betrokke magtiging word hierby aangeheg as **Aanhangsel A**.

C. REGSVERTEENWOORDIGING:

4. Die beskuldigdes is gedurende die pleit-onderhandelinge en voer van die verrigtinge deurentyd verteenwoordig deur **Adv Johann Engelbrecht SC** en **Jan Wagener**, van Prokureurs Wagener Muller, Kerkstraat 833, Pretoria, 0001.

D. DIE ONDERSOEKBEAMPTE:

5. Die ondersoekbeampte is geraadpleeg in hierdie aangeleentheid en het geen beswaar teen die verrigtinge en die voorgestelde vonnisse nie.

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E. DIE KLAER SE HOUDING TEN OPSIGTE VAN DIE PLEIT-OOREENKOMS:

6. Die klaer, **Eerwaarde Frank Chikane**, is gespreek.

6.1 Hy het te kenne gegee dat hy nie 'n wrok teen die beskuldigdes koester nie;

6.2 Dat dit baie belangrik vir hom is dat die ware feite aan die lig kom; en

6.3 Dat hy tevrede is met die pleit-ooreenkoms en geen verdere vertoë in verband met hierdie aangeleentheid wil rig nie.

F. DIE BESKULDIGDES SE REGTE:

7. Alvorens hierdie verrigtinge 'n aanvang geneem het, is die beskuldigdes behoorlik oor hul fundamentele regte ingelig.

8. Hulle is volledig ingelig oor die weerlegbare vermoede dat hulle onskuldig is totdat hul bo redelike twyfel skuldig bewys word.

9. Hulle is ingelig oor hul reg om te kan swyg.

10. Hulle is ook volledig ingelig oor die reg om nie inkriminerende getuienis teen hulself af te lê nie.

11. Die beskuldigdes is verder bewus van die feit dat die Agbare Hof nie gebonde is aan hierdie ooreenkoms nie.

G. DIE AANKLAGTE:

12. Die beskuldigdes word aangekla van die volgende aanklagte:

AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet**.

P. 005/024
Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsings Laboratorium en of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsings Laboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

H. DIE BESKULDIGDES SE PLEIT:

13. Die partye tot hierdie ooreenkoms het tot die volgende ooreengekom:

13.1 Dat die beskuldigdes skuldig pleit op **aanklag 1**, soos vervat in die akte van beskuldiging:

Aanklag 1:

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet.**

13.2 Dat die Staat **aanklag 2**, soos vervat in die akte van beskuldiging, terugtrek teen al die beskuldigdes.

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I. FEITLIKE UITEENSETTING VAN DIE VOORVALLE:

(i) AGTERGROND:

(Vir doeleindes van hierdie ooreenkoms alleen erken die beskuldigdes die inhoud van paragrawe 14 tot 23 wat direk hierna volg, alhoewel hulle ten tye van die pleeg van die betrokke misdryf geen kennis van enige aard daarvan gedra het nie.)

14. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

15. Dr Wouter Basson was die projekoffisier.

16. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

17. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

18. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

19. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

20. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

21. Gedurende ongeveer 1987 het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

22. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die behoefte van die besondere afdeling bespreek en is die substanse later

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23. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A" tot die Akte van Beskuldiging**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

(ii) DIE BESKULDIGDES:

24. Beskuldigde no 1 was gedurende die tydperk Januarie1986 tot September1988 die bevelvoerende offisier van die Veiligheidstak van die SA Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

25. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak en beskuldigde no 1 was daarna nie meer betrokke by die projek nie.

26. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

27. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging offisiere verbonde aan die Veilgheidstak.

(iii) DIE SLAGOFFER:

28. Eerwaarde Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse wettige verkose regering. Hy was onder andere die sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front. Laasgenoemde organisasie het as verklaarde beleid gehad die propagering en ondersteuning van landswye onrus en geweld met as direkte doelstelling om die land onregeerbaar te maak.

29. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskele lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

30. Die eerste been van sy toer was 'n besoek aan Suidwes-Afrika, tans Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

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31. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

32. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

33. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

34. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

(iv) DIE MISDAAD:

35. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van apartheid en/of die omverwerping van die regering van die dag met geweld teweeg te bring. Dit is onder andere gedoen deur die bevordering van ekonomiese sanksies teen en die internasionale isolasie van Suid-Afrika, asook die regstreekse bevordering van burgerlike ongehoorsaamheid ten einde die land onregeerbaar te maak.

36. Gedurende 1987 het beskuldigde no 1 op 'n vergadering, wat deur die Suid-Afrikaanse Weermag gereël is, verneem van 'n opdrag om teen hoë profiel lede van die anti-Apartheids-vryheidstryd op te tree ten einde hul invloed te neutraliseer en dat, slegs in uiterste gevalle, as 'n laaste uitweg, oorweeg kon word om hulle om die lewe te bring.

37. 'n Lys met die name van die geïdentifiseerde persone is aan senior lede van die Veiligheidsgemeenskap, insluitende beskuldigde no 1, oorhandig. Eerwaarde Chikane se naam het op hierdie lys verskyn.

38. Beskuldigdes nos 1 en 2 het die uitvoering van die bovermelde opdrag bespreek.

39. Daar was toe deur beskuldigdes nos 1 en 2 besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

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40. Beskuldigdes nos 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid en vanaf Januarie 1989 het beskuldigde no 3 gedien as die bevelvoerder van die eenheid.

41. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

42. In opdrag van Generaal Smit het beskuldigde no 3 kontak met Dr Basson gemaak en hom versoek om hulle spesiale eenheid behulpsaam te wees om middels te bekom wat aangewend kon word teen die vyand. Dr Basson het reëlings getref dat kontak gemaak word met Dr Immelman.

43. Verskeie klandestiene ontmoetings het daarna tussen Dr Immelman en beskuldigdes nos 3, 4 en 5 plaasgevind. Gedurende die ontmoetings het die gemelde beskuldigdes inligting oor middels wat teen die vyand aangewend kon word, bespreek, en wat Eerwaarde Chikane betref, spesifiek 'n middel verlang wat tot sy dood sou lei. Dr Immelman het 'n bepaalde substans vir die doel geïdentifiseer en verduidelik dat dit op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die betrokke substans, wat nou blyk Paraoxon te gewees het, is deur Dr Immelman aan hulle verskaf.

44. Paraoxon is 'n dodelike, toksiese substans.

45. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in **Aanhangsel "A" tot die Akte van Beskuldiging** gereflekteer word.

46. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

47. Die aand van 23 April 1989 was beskuldigdes nos 3 en 4 op die lughawe en is Eerwaarde Chikane se tas onderskep. Daarna het hulle van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

48. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 31-34 tot gevolg gehad.

49. Die opdrag om Eerwaarde Chikane te dood is deur Generaal Smit aan beskuldigde no 3 gegee in navolging van 'n opdrag van beskuldigdes nos 1 en 2. Die beskuldigdes het ter bevordering van 'n gemeenskaplike oogmerk opgetree om Eerwaarde Chikane te dood. Te alle relevante tye het die beskuldigdes met die nodige opset en wederregtelikheid opgetree.

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OOREENKOMS TEN OPSIGTE VAN 'N REGVERDIGE VONNIS:

J. VERSWARENDE OMSTANDIGHEDE:

50. Die aanwending van giftstowwe om opponente heimlik te vermoor, is 'n uiters laakbare daad wat universeel verag word.

51. Beskuldigde no 1 was die Adjunk-Polisiehoof van die Republiek van Suid-Afrika tydens die pleeg van die misdryf.

52. Beskuldigde no 2 was 'n prominente politieke leier van die regerende party van die dag.

53. Eerwaarde Chikane was 'n geestelike leier.

54. Die motief vir die beplande moord op Eerwaarde Chikane was om hom te verhoed om ekonomiese sanksies teen Suid-Afrika in die buiteland te propageer en om sy rol om in die binneland verset teen die regering aan te wakker, aan bande te lê.

55. Die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, het daarvoor voorsiening gemaak dat persone wat hulle skuldig gemaak het aan die growwe skending van menseregte vir 'n politieke oogmerk, aansoek kon doen vir amnestie.

56. Beskuldigdes nos 1 en 2 het op verskeie geleenthede gebruik gemaak van hierdie reg deur te getuig voor die Komitee, welke getuienis elke keer onder eed gelewer is.

57. Die beskuldigdes het nie aansoek gedoen vir amnestie ten opsigte van die aanklag waarop hulle skuldig pleit nie.

58. Beskuldigde no 1 het *inter alia* op 10 Julie 1997 voor die WVK getuig dat hy nie bewus was van die bestaan van 'n sogenaamde "internal hit list" wat onder die Veiligheidsgemeenskap gesirkuleer is nie.

59. Beskuldigde no 2 se versoenende optrede teenoor Eerwaarde Chikane het eers plaasgevind nadat die Vervolgingsgesag aangedui het dat hy 'n *prima facie* saak ten aansien van die vergiftiging van Eerwaarde Chikane teen beskuldigdes nos 3, 4 en 5 het.

60. Gedurende die verhoor van Dr Wouter Basson wat *inter alia* tereg gestaan het op die vergiftiging van Eerwaarde Chikane, het die beskuldigdes, en in die besonder beskuldigde no 2, geswyg oor sy rol in die poging tot moord en was daar ook geen sprake van enige versoenende optrede nie.

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61. Gedurende die verhoor van Dr Basson is Beskuldigdes nos 3, 4 en 5 verskeie kere deur lede van die vervolgingspan genader om as Staatsgetuies op te tree. Vrywaring ingevolge Artikel 204 van Wet 51 van 1977 is vir hulle aangebied. Die beskuldigdes het geweier om enigsins hulle samewerking te gee en het voortgegaan om 'n valse weergawe aan die Staat te verskaf. Beskuldigdes het hulle samewerking aan die verdedigingspan van Dr Basson aangebied.

62. Na afloop van die verhoor van Dr Basson het Eerwaarde Chikane verskeie skrywes aan Beskuldigdes nos 3, 4 en 5 gerig, waarin hy om versoening gepleit het. Die beskuldigdes het nie op hierdie skrywes gereageer nie.

K. VERSAGTENDE OMSTANDIGHEDE:

63. Beskuldigdes het geen vorige veroordelings nie en is onderskeidelik 71 (beskuldigde no 1), 70 (beskuldigde no 2), 69 (beskuldigde no 3), 60 (beskuldigde no 4) en 63 (beskuldigde no 5) jaar oud.

64. Die beskuldigdes is tans getroud.

65. Die beskuldigdes pleit skuldig.

66. Die afhandeling van die huidige saak by wyse van artikel 105A van Wet 51 van 1977 het die hof en die Staat die onkoste en die ongerief van 'n uitgerekte verhoor gespaar.

67. Die beskuldigdes het die Staat gehelp deur skuldig te pleit, deurdat die Staat andersins moeilik die aanklag sou kon bewys het, aangesien die Staat oor geen getuienis beskik het rakende die aandeel van beskuldigdes no 1 en 2 en slegs met hul eie samewerking bewus geraak het van hulle aandeel. Verder het beskuldigdes no 3 en 4 na vore gekom met die feite rakende hulle aandeel.

68. Die beskuldigdes het berou getoon vir hulle dade en onderneem om as staatsgetuies op te tree indien daar 'n vervolging teen generaal Sebastiaan Smit ingestel word.

69. Beskuldigde no 2 het sonder geheimhouding en as versoeningsdaad Eerwaarde Chikane se voete gewas. Hierdie versoeningsdaad moet beoordeel word teen die agtergrond dat beskuldigde no 2 self na vore gekom het vir soverre dit hierdie saak aangaan.

70. Dat beskuldigde no 2 opregte berou het oor optredes in die verlede word verder geïllustreer deur sy versoeningsdaad geopenbaar teenoor die moeders van 9 van die 10 Nietverdiend-slagoffers wat deur die veiligheidsmagte gedood is, dit ten spyte van die feit dat beskuldigde no 2

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destyds nie enige kennis van hierdie optrede gedra het nie en dit ook nie gemagtig het nie.

71. Die beskuldigdes het uit hoofde van hulle ampte en poste te alle relevante tye opgetree ter beskerming van die wettige verkose regering van die dag, teenoor wie hulle 'n eed van getrouheid afgelê het.

72. Die voorval het plaasgevind tydens 'n tydperk toe daar intense konflik en verdeeldheid tussen die verskillende gemeenskappe en strukture in Suid-Afrika geheers het. Enersyds het die ANC en ander organisasies wat apartheid teëgestaan het en die vorige regering met geweld omver wou werp, alles in die stryd gewerp om hulle doelstellings te bereik. Alle lede en sfere van die samelewing is by die stryd betrek om verset in 'n verskeidenheid van vorme aan te wakker. Andersyds het die destydse wettige verkose regering op sy beurt al die middele en kragte tot sy beskikking gebruik. Die veiligheidsmagte, in besonder die SA Polisie, het 'n sleutel rol gespeel om die aanslag af te weer. Te midde van die geweld wat landwyd asook in Namibië gewoed het moes die SA Polisie al hoe meer teen militêr opgeleide aanvallers optree, wat normale polisiëring wesentlik beïnvloed het. Hulle was soms genope om die beginsel van minimum geweld prys te gee en te midde van die geweld en bloedvergieting het die skeidslyn tussen regmatig en onregmatig vervaag.

73. Ten tyde van die handeling vermeld in aanklag 1 was beskuldigde no 1 nie meer die Veiligheidshoof van die polisie nie en ook nie meer betrokke by die projek nie.

74. Nóg beskuldigde no 1 nóg beskuldigde no 2 het kennis gedra van hierdie spesifieke aanslag op Eerwaarde Chikane se lewe. Ten spyte van die feit dat beskuldigde no 2 in elk geval vereis het om vooraf ingelig te word, indien dit oorweeg sou word om iemand spesifiek te dood, het dit in hierdie geval nie gebeur nie.

75. Wat betref beskuldigdes nos 3 en 4, was hulle ondergeskiktes wat gehandel het in terme van 'n direkte opdrag van die Veiligheidshoof, Generaal Smit.

76. Die oorspronklike projek om die invloed van hoë profiel lede van die anti-apartheids-vryheidstryd te neutraliseer, is nie deur die beskuldigdes geïnisieer nie, maar is deur die SA Weermag van stapel gestuur in opdrag van hoër gesag.

77. Eerwaarde Chikane het as sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en vise-president van die United Democratic Front 'n belangrike rol gespeel om verset teen die vorige regering aan te wakker. Die United Democratic Front het daarin geslaag om die massas landwyd te mobiliseer en burgerlike ongehoorsaamheid op groot skaal te weeg te bring, wat weer tot grootskaalse onrus en geweld gelei het.

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78. Tydens die aanvang van die WVK-proses het beskuldigde no 1 alles moontlik gedoen om lede en voormalige lede van die SA Polisie aan te moedig om aan die proses deel te neem. Toe die geval van Eerwaarde Chikane onder sy aandag gekom het, het hy met voormalige hoofde en generaals van die SA Weermag samesprekings gevoer om hulle te probeer oorreed om ook aan die proses deel te neem. Omdat lede van die weermag by die voorval betrokke was, sou enige poging om amnestie te vra sonder hulle samewerking noodwendig misluk het. Die generaals van die weermag was egter van mening dat die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, eensydige bepalings bevat het wat dit vir hulle onaanvaarbaar gemaak het.

79. Beskuldigdes nos 1 en 2 het na afloop van die WVK-werksaamhede alles moontlik gedoen om 'n verdere proses tot stand te bring om die leemtes wat tydens die WVK-proses ontstaan het, uit te skakel. Na die besluit om beskuldigdes nos 3, 4 en 5 te vervolg, het beskuldigdes no 1 en 2 ook met Eerwaarde Chikane samesprekings gevoer met die oog op so 'n proses en het laasgenoemde begrip gehad vir die probleme waarmee beskuldigdes nos 1 en 2 geworstel het.

80. Met die daarstel van die Nasionale Direkteur van Openbare Vervolging se vervolgingsdirektief met die opskrif "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (sien **Aanhangsel "B"**), is 'n proses geskep wat ingeboude beskerming verleen aan persone wat daarvan gebruik maak en het die beskuldigdes onverwyld na vore gekom en oop kaarte gespeel met die Vervolgingsgesag ten aansien van die hierdie aangeleentheid, iets wat hulle nie kon doen in reaksie op die briewe van Eerwaarde Chikane na verwys in paragraaf 62 hierbo nie.

L. VONNIS-OOREENKOMS:

81. Dit word ooreengekom dat wat betref aanklag 1, die volgende 'n regverdige vonnis daarstel in die omstandighede hierbo uiteengesit:

<u>Beskuldigdes nos 1 en 2:</u>

Elke beskuldigde word soos volg gevonnis:

> "**10 (tien)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van

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Beskuldigdes nos 3, 4 en 5:

Elke beskuldigde word soos volg gevonnis:

> "**5 (vyf)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van opskorting en ten opsigte waarvan gevangenisstraf sonder die keuse van 'n boete opgelê word."

GETEKEN TE **PRETORIA**, OP HIERDIE 15 DAG VAN AUGUSTUS 2007.

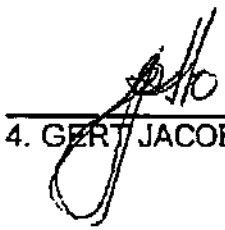
AR ACKERMANN SC
Direkteur van Openbare Vervolging,
Prioriteits Misdade Litigasie Eenheid.

1. JOHANNES VELDE VAN DER MERWE

2. ADRIAAN JOHANNES VLOK

3. CHRISTOFFEL LODEWIKUS SMITH

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4. GERT JACOBUS LOUIS HOSEA OTTO



5. HERMANUS JOHANNES VAN STADEN



JAN WAGENER
PROKUREUR VIR BESKULDIGDES
WAGENER MULLER
KERKSTRAAT 833
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
VERW: JW0423

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B.

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KONSEP AKTE VAN BESKULDIGING

IN DIE OOS KAAPSE PROVINSIALE AFDELING

Saakno: .....

Die Staat

teen

1. **Gideon Nieuwoudt**
2. **Johannes Martin Van Zyl**

(Hierna vermeld as die beskuldigdes)

Akte van Beskuldigding

AANKLAGTE 1 TOT 3 – MENSEROOF (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

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ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 8 - 10 Mei 1985 te of naby die Port Elizabeth lughawe en Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die vryheid en beweging van:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

ontneem het.

AANKLAGTE 4 TOT 6 – MOORD (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

Ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 10 Mei 1985 te of naby Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die volgende persone:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

gedood het.

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AANKLAGTE 7 – 9 : AANRANDING MET DIE OPSET OM ERNSTIG TE BESEER (3 AANKLAGTE)

Deurdat die beskuldigdes en persone vermeld in aanklag 1, ter bevordering van 'n gemeenskaplike oogmerk op of omtrent die 8 – 9 Mei 1985 te Post Chalmers in die regsgebied van die Oos- Kaapse Afdeling wederregtelik en met die opset om ernstig te beseer vir:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

aangerand het.

OPSOMMING VAN WESENTLIKE FEITE

1. Die drie oorledenes was lede van 'n politieke organisasie wat bekend gestaan het as "Port Elizabeth Black Civic Organization" hierna genoem PEBCO.

2. Die oorledenes het leidende rolle gespeel in die aktiwiteite van die organisasie en het onderskeidelik die volgende ampte bekleë:

   (i) Qaquwili Godolozi was die President;
   (ii) Champion Galela was Organiserings-Sekretaris; en
   (iii) Sipho Hashe was die Sekretaris.

3. PEBCO was geaffilieer by die "United Democratic Front" en het oorhoofs ten doel gehad die afskaffing van die misdaad apartheid in Suid-Afrika.

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4. Die SA Polisie het die standpunt gehuldig dat die "United Democratic Front" en PEBCO bloot verlengingstukke was van die toe verbode "African National Congress" en dat die organisasies verantwoordelik was vir die voortdurende onrus en geweld wat in die Port Elizabeth gebied geheers het.

5. Die beskuldigdes was verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth.

6. Die aktiwiteite van die drie oorledenes was deur die bovermelde Veiligheidstak gemonitor.

7. Daar is besluit dat die drie oorledenes gedood moes word.

8. Gedurende die relevante tydperk was lede van die Veiligheidspolisie wat verbonde was aan die Vlakplaas eenheid werksaam in die Port Elizabeth gebied.

9. Ene Roelf Venter het bevel gevoer oor hierdie lede.

10. Beskuldigde 2 wat verbonde was aan die Veiligheidstak Port Elizabeth het Venter versoek om hulle behulpsaam te wees met die ontvoering van die drie oorledenes.

11. Op 8 Mei 1985 is die drie oorledenes onder valse voorwendsels na die Port Elizabeth lughawe gelok.

12. Gedurende die aand van 8 Mei 1985 was die drie oorledenes ontvoer vanaf die lughawe. Die volgende persone was daadwerklik betrokke by hierdie ontvoering:

    (i) Die beskuldigdes;
    (ii) Venter;
    (iii) Lotz;
    (iv) Beeslaar;

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(v) Koole;
(vi) Mogai; en
(vii) Mamasela.

13. Die oorledenes is na 'n verlate Polisiestasie, Post Chalmers, in die Cradock distrik geneem waar hulle aangehou is.

14. Die oorledenes is daardie nag ondervra en herhaaldelik aangerand.

15. Die aanranding het die volgende dag voortgeduur.

16. Op 10 Mei 1985 het al die Vlakplaas-lede wat teenwoordig was onttrek vanaf Post Chalmers. Die oorledenes het op daardie stadium nog geleef en was onder die beheer van die beskuldigdes en ander lede van die Port Elizabeth se Veiligheidstak.

17. Die Staat beweer dat die beskuldigdes en ander lede van die Port Elizabeth Veiligheidstak die oorledenes gedood het, in omstandighede wat onbekend is aan die Staat.

18. Die lyke van die oorledenes is nooit gevind nie.

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C.

I.

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CALENDER

EASTERN CAPE DIVISION

GRAHAMSTOWN A

BEFORE THE HONOURABLE MR. ACTING JUSTICE

D.P.P	Ref. No Registrar or Magistrate	Accused	Charge(s)	District	Witnesses
TUESDAY 12 OCTOBER TO FRIDAY 15 OCTOBER 2004					
CC81/04 1.	9/2/4/1-63/04 KIRKWOOD CR42/8/85	BUYILE RONNIE BLANI	1. MURDER 2. MURDER 3. HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1(1)(b) of Act 51 of 1977)	KIRKWOOD	5 WITNESSES
MONDAY 18 OCTOBER TO FRIDAY 29 OCTOBER 2004					
2.			TO BE FINALIZED		

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IN THE HIGH COURT OF THE EASTERN CAPE

The Director of Public Prosecutions for the area of jurisdiction of the High Court of the Eastern Cape, who prosecutes for and in the name of the State, informs the Honourable Court that

BUYILE RONNIE BLANI, a 40 year old male of the Military Base, Grahamstown

(hereinafter called the accused)

is guilty of the following crimes:

1. **MURDER**

2. **MURDER**

3. **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1((1)(b) of Act 51 of 1977)**

COUNT 1: MURDER

IN THAT on or about 17 June 1985 and at or near the farm Enhoek in the Kirkwood magisterial district, the accused unlawfully and intentionally killed **KOOS DE JAGER,** a 72 year old male.

COUNT 2: MURDER

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally killed **MYRTLE LOUISA DE JAGER,** a 65 year old female.

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COUNT 3: **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES**

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally broke into and entered the house of **KOOS** and **MYRTLE LOUISA DE JAGER** and by intentionally using force and violence to induce submission by the said **KOOS** and **MYRTLE LOUISA DE JAGER** took and stole from out of their care and protection certain property as per the attached annexure, being in their lawful possession and thereby robbing them of same.

In the event of a conviction, the said Director of Public Prosecutions requests sentence against the accused according to law.

In terms of section 144(3) of Act 51 of 1977 a summary of substantial facts and a list of certain state witnesses are attached.

J P M MARAIS
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: EASTERN CAPE

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ANNEXURE TO COUNT THREE

1. One ,22 Rifle (serial number: 210934)
2. One Pellet Gun
3. One long knife
4. One bayonet
5. R180.00 cash
6. One portable radio
7. Two torches
8. One thermos flask
9. One 1976 model Datsun pick-up truck (Registration number: CB 8978)
10. Linen (assorted)
11. Foodstuffs

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SUMMARY OF SUBSTANTIAL FACTS

1. The two deceased were an elderly married couple who resided on the farm Enhoek.

2. The accused was associated with an organization known as the "Addo Youth Congress".

3. At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

4. On the night of 17 June 1985 the accused and his co-conspirators ("the group") armed themselves and traveled to the farm of the deceased.

5. Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

6. The group then broke into the house despite attempts by the deceased in count 1 to defend himself with a firearm.

7. Both deceased were assaulted and killed inside the house. A child who was also present in the house was, however, not harmed.

8. The group ransacked the house and removed the items set out in the annexure to count three.

9. The group then left the scene in a Datsun pick-up truck that was in the possession of the deceased in count 1. The vehicle was driven to Motherwell, near Port Elizabeth where it was set on fire and burnt out.

10. At medico-legal post mortem examinations conducted on the bodies of the two deceased, the cause of death was determined as "Breinbesering" and "Akute bloedverlies" respectively.

11. At all relevant times the group acted in pursuance of a common purpose to break into the house of the two deceased, and to rob and kill them.

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LIST OF STATE WITNESSES

1. Insp. G Le Roux
   Serious and Violent Crime Unit
   PORT ELIZABETH

2. Dr. D S Gerber
   District Surgeon
   KIRKWOOD

3. Casper Jonker
   Directorate Special Operations
   VGM Building
   PRETORIA

4. James Ronald Beyl
   C/o Investigating Officer

5. Supt. Victor Leonard Clive Meyer
   SAPS
   PORT ELIZABETH

In terms of section 144(3)(a)(ii) of Act 51 of 1977 the names and addresses of other witnesses have been withheld.

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C.

II.

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

CASE NO.: CC81/2004

DATE: 25 APRIL 2005

In the matter between:

THE STATE

versus

BUYILE RONNIE BLANI

SENTENCE

LEACH J

The accused is charged with two counts of murder and one count of robbery with aggravating circumstances. Although he initially pleaded not guilty to those charges he amended his plea to one of guilty and explains that his plea of not guilty had been based upon a misconception of the legal position in that although he admitted participation in the events, he was not the person who actually killed the two deceased.

The material facts had been read into the record and the accused has confirmed that he agrees with those facts.

The charges against him arise out of an incident which occurred on 17 June 1985 when the accused and certain companions went to the farm Enhoek in the district of Kirkwood. There entry was gained into the house and the deceased, Mr Koos de Jager and his wife, Mrs Myrtle Louisa de Jager were both overpowered and killed. The accused states that this was done as he was a member of the Youth Congress which was affiliated to the African National Congress and that instructions had

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been received to attack farmers to destabilise the country. During the course of the incident I understand that Mr De Jager was shot to death and his wife was stabbed to death. In the course of the incident a number of items were stolen including a rifle, a pellet gun, a knife, a bayonet, cash, a radio, torches, a flask, linen, foodstuffs and a light delivery van. It seems clear that the accused was guilty of the offences of which he was charged on the basis that he participated with a common purpose in all three of these charges.

The parties are agreed that a just sentence in the circumstances, taking the three counts together as one, is one of 5 years' imprisonment of which 4 years is suspended for 5 years on various conditions. At first blush that appears to be an alarmingly light sentence for the predetermined killing of other human beings, especially as section 105A of the Criminal Procedure Act obliges me to take the minimum sentencing legislation into account which, although it would not be of application because the actions in question were committed before the minimum sentencing legislation came into effect, does provide an indication of how severe murders committed with premeditation should be regarded.

However, the parties are agreed that one of the co-perpetrators of these crimes, a person by the name of Malgas, had applied for amnesty to the Truth and Reconciliation Commission and had been granted amnesty for the same crimes. It is further agreed that after the commission of these crimes the accused went into exile and returned to this country only after the Further Indemnity Act of 1992 had been enacted. In terms of that Act, provision was made for any outstanding warrants relating to exiled persons who wished to return to this country

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to be stayed on condition that, when they did return, they would then formally apply for amnesty. The accused misunderstood the position and was under the impression that as he had been granted leave to come back to the country, it was not necessary for him to apply for amnesty. It is agreed that if the accused had applied for amnesty and made the confession that he has made to this Court today, his application for amnesty would have been granted. It would seem to me to be an injustice for his misunderstanding of the provisions of the Act to be held against him and for him to go to gaol for a long period of time, whereas if he had understood the legislation properly and applied for amnesty, he would not be in that position at all.

What is also of relevance is that another co-perpetrator who committed these offences and who had been tried and sentenced for his crimes has been granted a Presidential pardon. These are political considerations which normally would not count with the Court, because a Court must, in general, impose whatever sentence it feels appropriate and then leave the political machinations up to the politicians. But in these particular circumstances, bearing in mind that it is an element of justice that people who commit the same offences should be treated more or less the same way, it would seem to me that the sentence which has been agreed upon is in fact a just sentence and I should have regard to what has happened to his two co-perpetrators in deciding in what should happen to him.

I am therefore satisfied, that the accused has admitted all the elements of the offences with which he is charged, that he is guilty of those offences and that the sentence upon which agreement has been

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other is just.

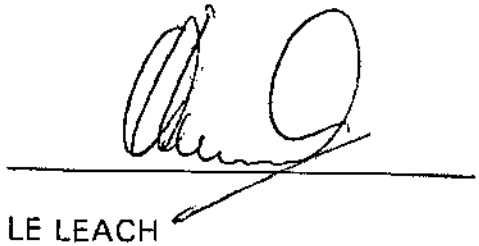
The accused is therefore found guilty on all three counts.

Taking all three counts together for the imposition of sentence I impose a sentence of 5 years' imprisonment of which 4 years is suspended for 5 years on the following conditions:

Firstly, that the accused is not found guilty of murder or culpable homicide committed during the period of suspension.

Secondly, that the accused is not found guilty of housebreaking with the intent to commit a crime, committed during the period of suspension.

Thirdly, that the accused is not found guilty of robbery committed during the period of suspension.



LE LEACH

JUDGE OF THE HIGH COURT

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D.

I.

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TABLE OF CONTENTS

PROSECUTION POLICY

Preface

1. **Introduction**

2. **Purpose of Policy Provisions**

3. **The Role of the Prosecutor**

4. **Criteria Governing the Decision to Prosecute**

   (a) General

   (b) Factors to be considered when evaluating evidence

   (c) (Prosecution in the public interest

5. **Case Review**

   (a) Stopping of proceedings

   (b) Restarting a prosecution

   (c) Consent to prosecution

6. **Forum of Trial, Determination of Charges and Acceptance of Pleas**

7. **The Trial Process and Related Matters**

8. **Co-operation and Interaction with Police and Other Constituent Agencies**

8A. Prosecutorial Policy and Directives relating to Specified Matters

9. **Conclusion**

Appendix A

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PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. The efforts of the Prosecuting Authority should therefore be directed at reducing pervasive criminal activities. An efficient Prosecuting Authority will also enhance public confidence in the criminal justice system.

Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process.

Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.

Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.

The Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It has also been circulated to a number of criminal justice organizations, government departments, academic institutions and community organizations.

The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

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1. INTRODUCTION

The Constitution of the Republic of South Africa provides for a single National Prosecuting Authority, consisting of—

- the National Director of Public Prosecutions, who is the head of the Prosecuting Authority,
- Deputy National Directors,
- Directors,
- Deputy Directors, and
- Prosecutors.

As an organ of state the Prosecuting Authority must give effect to the laws of the country; as an instrument of justice it must exercise its functions without fear, favour or prejudice.

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director of Public Prosecutions to determine, with the agreement of the Minister of Justice and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*".

This Prosecution Policy must be tabled in Parliament and is binding on the Prosecuting Authority. The *National Prosecuting Authority Act* also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The Prosecuting Authority is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the Prosecuting Authority.

The law gives a discretion to the Prosecuting Authority and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

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By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

3. THE ROLE OF THE PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

- the decision whether or not to institute criminal proceedings against an accused;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- the decision about which crimes to charge an accused with and in which court the trial should proceed;
- the decision whether or not to accept a plea of guilty tendered by an accused;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender. Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

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4. CRITERIA GOVERNING THE DECISION TO PROSECUTE

(a) General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

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(b) Factors to be considered when evaluating evidence

When evaluating the evidence prosecutors should take into account all relevant factors, including—

How strong is the case for the State?

X Is the evidence strong enough to prove all the elements of an offence?

X Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

 Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

 What sort of impression is the witness likely to make?
 Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
 If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

 Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

(c) Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

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There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.

- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.

- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.

- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.

- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.

- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the*

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accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

5. CASE REVIEW

(a) Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen which make the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decisions should therefore be made with circumspection.

(b) Restarting a prosecution

People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include:

- an indication that the initial decision was clearly wrong and should not be allowed to stand;

- an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again; and

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- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

A number of statutes provide that a prosecution for an offence under a particular law cannot be commenced or proceeded with unless the consent of a Director of Public Prosecutions has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

6. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

(a) Forum of trial

The law directs and policy considerations suggest that certain types of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, should be taken into account:

- the nature and complexity of the case and its seriousness in the circumstances;
- the adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect;
- any specific legal provision on, or any implied legislative preference for, a particular forum of trial;
- any delay, cost or adverse effect that witnesses may have to incur if the case is heard in the High Court; and
- the desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

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The decision regarding the court in which to prosecute an accused is determined by the complexity and seriousness of an offence, and the need for the Prosecuting Authority to guard against making decisions that will bring the law into disrepute.

(b) Determination of charges

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors should decide upon, and draw up charges based on, available evidence which will—

- reflect adequately the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provide the court with an appropriate basis for sentence; and
- enable the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction of an accused or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused to plead guilty to some. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

(c) Acceptance of pleas

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that -

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

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7. THE TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases should therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors should present the facts of a case to a court fairly. They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an un-represented accused before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, the prosecutor should not oppose the release from custody of an accused if the interests of justice permit.

Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary. In suitable cases the prosecutor should advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors should consult with victims and witnesses before the trial begins. They should assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors should assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

They should also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.

The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The Prosecuting Authority should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

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8. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

Prosecutors have the responsibility under the *National Prosecuting Authority Act* to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors should consult the police and other interest groups where required.

It is therefore desirable, wherever practicable, that matters be referred to prosecutors by the police before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should work together with other departments and agencies such as Correctional Services, Welfare, lawyers' organizations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

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8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

9. CONCLUSION

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

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APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

   (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

   (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

   (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

   (b) The constitutional right to life.

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(c) The non-prescriptivity of the crime of murder.

(d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

(e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See ***Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC***).

(f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See ***The State v Wouter Basson CCT 30/03.).***

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

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trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

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B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Service.

   (c) The Department of Justice & Constitutional Development.

   (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

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8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

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C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

   (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

   (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

      (i) The motive of the person who committed the act, commission or offence.

      (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

      (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

      (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

         (aa) for personal gain; or

         (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

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(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

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D.

II.

JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
17 January 2006
BRIEFING AND DELIBERATION ON THE AMENDMENT OF THE PROSECUTING POLICY TO PROVIDE FOR DIRECTIVES FOR THE PROSECUTION OF MATTERS BEFORE 11 MAY 1994.

Chairperson: Ms F Chohan-Khota (ANC)

SUMMARY
The National Prosecution Authority (NPA) briefed the Committee on its proposals to amend its Prosecution Policy to allow it to decide whether or not to prosecute cases arising from conflicts of the past and were committed before 11 May 1994. The President had made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NPA emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. The NPA recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. The amended Prosecution Policy came into effect on the 1st of December 2005.

Members of the Committee asked how a prosecution could be triggered, if the NPA had an idea of how many cases were pending and what the effect of the amendments would be on the budget of the NPA.

MINUTES
Adv G Nel, the Deputy Director of Public Prosecutions, said that according to section 179(5)(a) and (b) of the Constitution, the National Director of Public Prosecution with the concurrence with the Minister determine Prosecution Policy. Any amendments to this policy were to be included in the report referred in section 35(2)(a) of the National Prosecution Authority Act. As a matter of public interest, the amendments in question were tabled before Parliament.

Adv Nel said that in his statement to Parliament on the tabling of the Report of the Truth and Reconciliation Commission (TRC) on the 25th of April 2003, the President made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President said that the matter could not be resolved by setting up another amnesty process which would mean suspending the constitutional rights of those on the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, had been categorically excluded by Government as an option, not least because it was unconstitutional.

The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NDPP would leave its doors open for those willing to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that were standard in the normal execution of justice, and which were accommodated in legislation. Adv Nel emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. The President also said that the involvement of victims was crucial in determining the appropriate course of action.

Section 179(1) of the Constitution stated that there was a single prosecuting authority, and section 179(2) gave the prosecuting authority the power to institute criminal proceedings on behalf of the state and any functions incidental to this. Thus the NPA was independent constitutional institution. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. Adv Nel recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. All the cases were centralised in the office of the NDPP to ensure consistency in decision-making especially given the complexities in some of these cases. The Priority Crimes Litigation Unit (PCLU) was responsible for

overseeing the investigations and instituting prosecutions. Since this task team was based in Pretoria, it was desirable that the cases be centralised in the office of the NDPP.

The Prosecution Policy was amended by the insertion of a new paragraph 8A. This gave the NDPP power to supplement or amend the Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest. In line with this amendment, the NDPP determined the criteria in Appendix A relating to the prosecution of cases arising from conflicts of the past and were committed before 11 May 1994. Appendix A had three parts. Paragraph A was an introduction and paragraph B set out the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. Paragraph C set out the criteria governing the decision to prosecute or not. This amended Prosecution Policy came into effect on the 1st of December 2005.

Discussion

Ms S Camerer (DA) asked how a prosecution could be triggered. Now that the guidelines were in place, would the workload of the PCLU greatly increase, and how many people were involved?

Adv Nel replied that a prosecution could be triggered firstly by a complaint being lodged by a victim. The PCLU had already looked at some of the cases from the TRC where amnesty had not been given. Some matters could be brought by the intelligence agency as well as the police. Thus there was a pro-active aspect to the triggering of prosecutions. It was not necessary at present to appoint new personnel given their current workload, but it may become necessary later on. It was hard to predict.

Mr G Solomon (ANC) asked what would happen where the victims did not want to prosecute an accused as the crime may have occurred many years ago.

Adv Nel said that the NDPP looked at all the circumstances of the case, such as the seriousness of the case, and whether there had been full disclosure for instance. It was for the NDPP to decide whether or not it would prosecute, not the victim.

Mr L Joubert (IFP) asked if the NPA had an idea of how many cases were pending. Also, in the case of a private prosecution, what was the situation regarding *locus standi*?

Adv Nel replied that at present it was impossible to know exactly how many cases were pending especially as the amendments were new. With regards to *locus standi,* anyone with an interest in the matter could bring an action.

Adv C Johnson (NNP) asked if looking at the circumstances of the accused created a loophole in the system for example where they claimed to be too old or infirm to stand trial. Could the NDPP be taken on review by an unsatisfied victim if they decided not to prosecute?

Adv Nel replied that it was important to consider things like the health of the accused. The Chairperson added that there was no hierarchy of criteria. Each case had to be decided on its merits. The whole basket of criteria had to be examined in making the determination of whether or not to prosecute. The NDPP could be taken on review.

Mr B Magwanishe (ANC) asked what the effect of the amendments would be on the budget of the NPA.

Adv Nel said that he did not see a major effect on the NPA’s budget given the number of cases they were dealing with now. It was hard to predict how many more people would come forward and how this would affect their budget.

The meeting was adjourned.

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D.

III.

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PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

1. In his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President, when dealing with the "issue of amnesty", **made it clear that there shall be no general amnesty.** He argued that such an approach would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

2. However, the President did not stop there. He went further and stated in respect of any further process of amnesty, as follows:

> "Yet we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process….This reality cannot be avoided. .."The President then concludes that Government is of the firm conviction that **we cannot resolve this matter by setting up yet another amnesty process,** which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, has been categorically

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excluded by Government as a future option, not least because it would be unconstitutional.

3. The President then went on to explain Government's proposal as follows:

"We have therefore, left this matter in the hands of the **National Directorate of Public Prosecutions**, for it to pursue any cases that, as is normal practice, it believes deserve **prosecution** and can be prosecuted. This work is continuing."; and

"However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and **to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.";** and

"…in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the **involvement of the victims** will be crucial in determining the appropriate course of action.". (Emphasis added)

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4. It is important for the Prosecuting Authority to deal with these matters on a uniform basis in terms of specifically defined criteria.

5.1 In terms of **section 179(1) of the Constitution** of the Republic of South Africa, 1996, there is a single national prosecuting authority in the Republic consisting of a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority, and Directors of Public Prosecutions and prosecutors.

5.2 In terms of **section 179(2) of the Constitution** the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. This means that the National Prosecuting Authority (NPA) is an independent constitutional institution and that the NDPP has full discretion regarding whether a particular prosecution should or should not be instituted.

5.3 **Section 179(5)(a) of the Constitution** provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process. To assist the prosecutors at arriving at a decision whether to prosecute or not, the NDPP has, in terms of the above provision, **issued general criteria governing such a decision**. These general Criteria are set out in paragraph 4 of the Prosecution Policy.

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These criteria could be defined as general policy guiding decision makers in arriving at informed decisions in the above regard. The question arises whether these guidelines are sufficient to assist the NDPP in arriving at decisions relating to offences which arise from conflicts of the past as contemplated by the President. The answer is no. Therefore, it is recommended that this process requires specific policy guidelines to facilitate the structured conclusion of the matter. It is therefore recommended that policy be determined in terms of section 179(5)(a) of the Constitution to deal with the matter under discussion.

6. Before dealing with the amendments to the Prosecution Policy, it is important to deal with the requirements for the determination for such Policy as required by section 179(5)(a) of the Constitution.

(a) In the first instance this provision requires that the Policy must be determined **"with the concurrence of the Cabinet member responsible for the administration of justice".** The amendments proposed by the NDPP were submitted and approved by the Minister for Justice and Constitutional Development. In view of the fact that the President requested the NPA to deal with the matter, the Minister also submitted the amendments and guidelines to Cabinet. Cabinet noted the amended Prosecution Policy.

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(b) Secondly, section 179(5)(a) of the Constitution requires that the Prosecution Policy must be determined **"after consultation with the Directors of Public Prosecutions"**. The amended Prosecution Policy was submitted to all Directors of Public Prosecutions. All the Directors supported the amended Prosecution Policy.

7. It was decided to centralise all these case in the Office of the NDPP for the following reasons:

(a) A prosecution should not undermine nation building and it is therefore important that all these cases be synchronised in the Office of the NDPP in order to ensure that there is consistency in decision-making.

(b) The decision is consistent with the request of many DPPs to the NDPP, namely, that the National Office should take over these cases, because of the complexities implicit therein.

(c) As indicated in paragraph B4 of the amended Policy, the Priority Crimes Litigation Unit (PCLU) shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA must assist the PCLU in the execution of its duties. Since this Task Team will be based in

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Pretoria, it is desirable that the cases be centralised in the Office of the NDPP.

8. The Prosecution Policy is amended by the insertion of a new paragraph 8A. In terms of this amendment the NDPP may supplement or amend the Prosecution Policy so as to **determine prosecutorial policy and directives in respect of specific matters**, for example, in respect of new legislation and matters of national interest. In accordance with this amendment, the NDPP determined the criteria in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994.

9. Appendix A consists of three parts, namely, an introduction part (par A); the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past (par B); and the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past (par C).

10. (a) **Paragraph A1** sketches the background and motivation for the amended Policy and guidelines.

(b) **Paragraph A2** sets out the various factors to be taken into account in developing and applying the prosecuting policy, directives and guidelines. See subparagraphs (a) to (l).

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(c) **Paragraph A3** emphasises that Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

- **section 204 of the Criminal Procedure Act**, 1977 (Act No. 51 of 1977), in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

- **section 105A of the Criminal Procedure Act**, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

- the processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

11. **Paragraphs A1 to 15** provide for the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. In summary the following process must be followed:

(a) A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, must submit a **written sworn affidavit or solemn affirmation** to the NDPP containing such representations (par 1).

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(b) The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations (Par 2).

(c) All representations must contain **a full disclosure of all the facts**, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security (par 3).

(d) The PCLU in the Office of the NDPP is responsible for overseeing investigations and instituting prosecutions in all such matters (par 4).

(e) The regional DPPs must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP (par 5).

(f) The PCLU shall be assisted in the execution of its duties by a senior designated official of the National Intelligence Agency, the Detective Division of the South African Police Service, the Department of Justice & Constitutional Development and the Directorate of Special Operations (par 6).

(g) The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute (par 7). The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the

bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements (par 8).

(h) The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, **and must obtain the views of any victims,** as far as is reasonably possible, before arriving at a decision (par 9).

(i) A decision of the NDPP not to prosecute and the reasons for that decision must be made public and in accordance with section **179(6) of the Constitution**, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past (par 10 and 11).

12. **Paragraphs C1 to C3** set out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994 and secondly the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3 (a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

13. This amended Prosecution Policy came into effect on 1 December 2005.

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D.

IV.

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Media Statement

DATE: 24th January 2006
EMBARGO: 11H30

AMENDED PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

In his statement to Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President of the Republic, when dealing with the issue of amnesty, made four very important points regarding the future handling of cases arising from conflicts of the past:

- In the first instance the President made it clear that there shall be no general amnesty.

- Secondly, he pointed out that we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. However we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending the constitutional rights of those who were at the receiving end of gross human rights violations.

- Thirdly the President directed that any further processes should be left in the hands of the National Prosecuting Authority (NPA), for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. In this regard he further pointed out that, as part of this process and in the national interest, the NPA, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

- In the final instance the President indicated that in each case where any legal arrangements are entered into between the National Director and particular perpetrators as proposed, the involvement of the victims will be crucial in determining the appropriate course of action.

Following the President's announcement, and realising the importance for the NPA to deal with these matters on a uniform basis in terms of

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specifically defined criteria, the NPA started a consultation process to determine uniform Prosecuting Policy to deal with criminal matters arising from conflicts of the past.

In the process, the NPA consulted with other law enforcement agencies, relevant departments, the Minister of Justice and Constitutional Development (Minister), the Directors of Public Prosecutions and Unit Heads within the NPA.

These cases will be centralised in the Office of the National Director for the following reasons:

- To ensure that there is consistency in decision-making.
- The complexities implicit in these cases.
- The Priority Crimes Litigation Unit (PCLU), which Unit is based within the Office of the National Director, shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA will assist the PCLU in the execution of its duties.

During the middle of 2005 a draft Amended Prosecution Policy was submitted to the Minister for her approval as required by the provisions of the Constitution and the NPA Act. The Amended Prosecution Policy was submitted to Cabinet for its information and towards the end of last year the Policy was tabled in Parliament by the National Director and the Minister. This amended Prosecution Policy came into effect on 1 December 2005.

The Amended Prosecution Policy gives effect to the proposals of the President. Some of the most important features of the Amended Prosecution Policy are the following:

- It emphasises that Government did not intend to mandate the National Director to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

(a) **Section 204 of the Criminal Procedure Act,** 1977, in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

(b) **Section 105A of the Criminal Procedure Act,** 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA

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(c) The processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

- The amended policy provides for the procedural arrangements that must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past.

- Furthermore, the policy sets out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994. Secondly, the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3(a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

Issued by the National Director of Public Prosecutions, Advocate Vusi Pikoli.

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D.

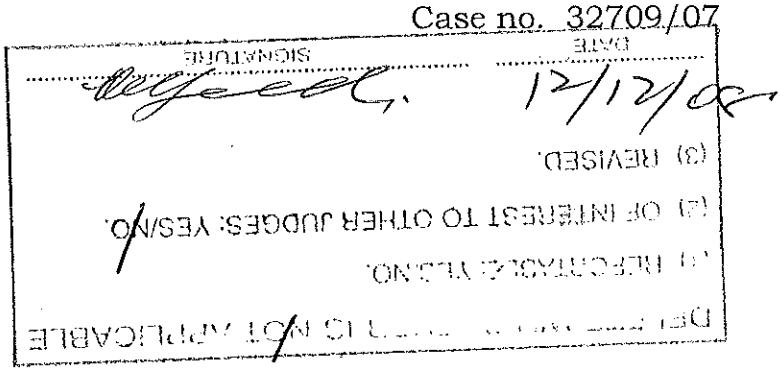
V.

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32709/07

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
Held in PRETORIA

Case no. 32709/07



In the matter between:

THEMBISILE PHUMELELE NKADIMENG	1st Applicant
NYAMEKA GONIWE	2nd Applicant
NOMBUYISELO NOLITA MHLAULI	3rd Applicant
SINDISWA ELIZABETH MKHONTO	4th Applicant
NOMONDE CALATA	5th Applicant
KHULUMANI SUPPORT GROUP	6th Applicant
CENTRE FOR STUDY OF VIOLENCE AND RECONCILIATION (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	7th Applicant
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	8th Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent

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THE MINISTER OF JUSTICE	2nd Respondent
ERIC ALEXANDER TAYLOR	3rd Respondent
GERHARDUS JOHANNES LOTZ	4th Respondent
JOHAN MARTIN VAN ZYL	5th Respondent
HERMANUS BAREND DU PLESSIS	6th Respondent
WILLEM HELM COETZEE	7th Respondent
ANTON PRETORIUS	8th Respondent
FREDERICK BARNARD MONG	9th Respondent
MSEBENZI TIMOTHY RADEBE	10th Respondent

JUDGMENT

Judgment reserved: 24 November 2008
Judgement handed down: 12/12/08.

LEGODI J,

INTRODUCTIONS

1. In this application, the applicants seek relief as follows:

> *"1. Pending the final outcome of this application, the coming into force and operation of the amendments to the National Prosecution Policy dated 1 December 2005 ("the policy amendments") is suspended and stayed.*
>
> *2. Declaring the policy amendments to be inconsistent with the Constitution of the Republic of South Africa, 1996 and unlawful and invalid.*
>
> *3. Alternatively to prayer 2 above*
>
> *3.1 Reviewing and setting aside the adoption of the policy amendments in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).*

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3.2 To the extent that it is required, condoning the applicants' non-compliance with the time period set out in section 7(1) of PAJA

4. Ordering that such of the respondents as may oppose the matter pay the applicants costs.

5. Granting the applicants further and/or alternative relief.

PARTIES

2. This application was instituted by the first five applicants and other applicants, whose particulars and interests are briefly set out hereunder as follows:

2.1 The first applicant is the sister to one Nokuthula Aurelia Simelane (hereinafter referred to as Nokuthula) who disappeared after being abducted by the then Security Brach. In the early eighties she operated as a courier for Umkhonto We Sizwe, the armed wing of African National Congress).

2.2 During the Truth and Reconciliation Commission (TRC), it was established that Nokuthula disappeared while on a mission in Johannesburg after meeting with one Norman Mkhonza, who was apparently working with the Security Branch.

2.3 It emerged during the TRC proceedings that she was abducted by the Security Branch with the help of Mkhonza. To date, Nokuthula has not been found nor has her remains been found.

2.4 During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and or killing of Nokuthula. No one has however been charged. The first applicant is challenging the

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prosecution policy amendments in question as the sister of Nokuthula.

2.5 The second and fifth applicants are challenging the policy as the widows of what is commonly referred to as the "Cradock four".

2.6 Their husbands were on the 27 June 1985 scheduled to attend a meeting in Port Elizabeth. This was a meeting which was arranged by the United Democratic Front (UDF).

2.7 On the way, they were apparently, intercepted and or stopped by the security branch members. Few days thereafter, their bodies were found burnt, mutilated and spread all over a wide area in the Redhouse or Bluewater Bay, on the outskirts of Port Elizabeth.
Their bodies and especially their faces were deliberately dosed with petrol and set on fire with the intention or rendering them unrecognisable and not identifiable.

2.8 During the TRC, several security branch officials were implicated, some of them are still alive. These people who were implicated many of them have not been prosecuted yet.

2.9 The second to the fifth applicants are challenging the prosecution policy amendments referred to in paragraph 1 above. They are challenging these policy amendments as the widows of the Cradock Four.

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3. The sixth to the eighth applicants are non-governmental organizations challenging the prosecution policy and directives concerned as interested parties in the protection of the constitution.

4. In terms of section 179(5) (a)(b) of the Constitution, the first respondent with the concurrence of the second respondent, and after consulting with the Directors of Public Prosecutions, must determine prosecution policy which must be observed in the prosecution.

5. Section 21(2) of the National Prosecuting Authority Act 32 of 1998 provides that the first prosecution policy issued under the Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.

6. The first prosecution policy was issued some time before 2005. The applicants are challenging the amendments to the first prosecution policy issued by the first respondent.

BACKGROUND

7. During or about 2005, the first respondent produced amendments to the prosecution policy. In terms of the amendments paragraph 8A was added to the first prosecution policy.

8. In terms of the addition, the first respondent purporting to act in terms of section 179(5) of the Constitution, introduced prosecution policy and directives in Appendix A (hereinafter referred to as policy amendments), to deal with prosecution of cases arising from conflicts of the past which were

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committed before the 11 May 1994. The policy and directives aforesaid in Appendix A are repeated as follows:

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCE EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. *In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy are as follows:*

   (a) *It was recognised that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.*

   (b) *A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take party in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.*

   (c) *As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.*

   (d) *Therefore, persons who had committed crimes before 11 May 1994, which emanate from conflicts of the past, could enter into agreements*

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with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these works still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. *In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:*

   (a) *The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.*

   (b) *The constitutional right to life.*

   (c) *The non-prescriptivity of the crime of murder.*

   (d) *The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed political motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.*

   (e) *The dicta of the Constitution justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See* ***Azanian People Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC****).*

   (f) *The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.*

   (g) *Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.*

   (h) *The dicta of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See* ***The State v Wouter Basson CCT 30/03****).*

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(i) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations and for them to be dealt with.

(j) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(k) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes the provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others-

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process:

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(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a prima facie case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire protection.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interes.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the

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NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994.

1. *A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above, (the applicant) must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.*

2. *The NDPP must confirm receipt of the affidavit or affirmation and my request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The applicant may also mero moto submit further written sworn affidavit or solemn affirmation to the NDPP containing representations.*

3. *All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.*

4. *The Priority Crimes Litigations Unit (PCLU) in the office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.*

5. *The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.*

6. *The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:*

    (a) *The National Intelligence Agency.*

    (b) *The Detective Division of the South African Police Services.*

    (c) *The Department of Justice and Constitutional Development.*

    (d) *The Directorate of Special Operations.*

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7. *The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.*

8. *The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status a section 204 witness and all section 105A plea and sentence agreements.*

9. *The NDPP may obtain the vies of any private or public or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.*

10. *A decision of the NDPP not to prosecute and the reasons for the decision must be made public.*

11. *In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister of Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this proceeding policy relating to conflicts of the past.*

12. *The NDPP may make public statements on any matter arising from the policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.*

13. *The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representatives, guidelines and established practice. The victims must, as far as reasonably possible be consulted in any such further process and be informed should the accused's representations be successful.*

14. *The NDPP may provide for any additional procedures.*

15. *All stage agencies, in particular those dealing with the prosecution of all alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the*

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prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. *CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST*

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past.

1. *The alleged offence must have been committed on or before 11 May 1994.*

2. *Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.*

3. *If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must,* ***in a balanced*** *way, be applied by the NDPP before reaching a decision whether to prosecute or not;*

   (a) *Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.*

   (b) *Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered.*

      (i) *The motive of the person who committed the act, commission or offence.*

      (ii) *The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.*

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(iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or supporter.

(iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued but does not include any act, omission or offence committed-

(aa) for personal gain; or

(bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose-

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular-

(i) whether the ill-health of the other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

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(iv) *the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;*

(v) *renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and*

(vi) *the degree of indoctrination to which the alleged offender was subjected.*

(e) *Whether the offence in question is serious.*

(f) *The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.*

(g) *Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.*

(h) *If relevant, the alleged offender's role during the TRC process, namely in respect of co-operation, full disclosure and assisting the process in general.*

(i) *Consideration of any views obtained for purposes of reaching a decision.*

(j) *Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision*

9. These prosecution policy amendments and directives are challenged by the applicants briefly on the following grounds:

9.1 that the policy amendments introduce a prosecutorial indemnity;

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9.2 that such prosecutorial indemnity is in breach of the Constitution on various grounds including:

9.2.1 infringement of the rule of law;

9.2.2 infringement of various constitutional rights,

9.2.3 non-compliance with international law, etc. All of the rights challenged as aforesaid are set out in details in paragraphs 42 and 43 of the applicants' founding affidavit,

9.2.4 that the prosecutorial indemnity is inconsistent with the right to just administrate action contained in section 33 of the Constitution and the requirements of Administrative Justice Act 3 of 2000,

9.2.5 that the applicants seek to review the policy amendments in terms of section 6 of PAJA.

10. The respondents resist these challenges on the basis that the policy amendments do not allow the respondents to make a decision not to prosecute on the basis of the criteria in A, B and C of the policy amendments referred to above, where there is sufficient evidence to support prosecution. Secondly, that even if the policy allows this, it does not amount to an effective indemnity from prosecution, because the perpetrators would still be exposed to private prosecutions and civil remedies.

11. Further, the defence raised by the respondents appears to be that, until such time as a decision not to prosecute is made on the basis of the policy amendments, the challenge is not justifiable at the instance of the applicants. Lastly, the defence is that the applicants' claim is not justified because the first respondent does not intend to ever implement the

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policy amendments in the manner complained by the applicants.

12. In the supplementary heads of argument submitted on behalf of the respondents, another issue is raised. It is contended that what the applicants are claiming for, do not relate to resolution of real and concrete controversies involving persons who have interest in the resolution of the disputes. The facts upon which the applicants rely on for the relief sought are said to be totally unconnected to the prosecutorial policy. In short, it is contended that the matter is not ripe for adjudication by the court. The relief sought by the applicants is said to be academic and does not relate to material prejudice.

ISSUES RAISED

13. As I see it, the issues raised narrowed and argued before me are as follows:

- **Whether the application is academic, unripe and having no material effect to the applicants?**

- **Whether the policy amendments allow for an amnesty, indemnity or a re-run of the TRC? Or**

- **Whether the policy amendments in relation to a decision not to prosecute will have the effect of allowing for an amnesty or indemnity equivalent to a re-run of the TRC?**

DISCUSSIONS, SUBMISSIONS & FINDINGS

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14. I find if necessary to deal with the two latter issues identified in paragraphs 13 above.

14.1 In a somewhat introduction to the issue, counsel for the respondents in paragraph 30 of his written heads of argument stated as follows:

"30. As stated above, the policy amendments were adopted with the object to achieve the Constitutional mandate placed on the NDPP, which mandate is the prosecution of crime. If the applicants' case is not about the intentions of the NPA, in relation to the application of the policy amendments, or mala fide on the part of the NDPP, then it must be accepted that when the amendments to the prosecution policy were adopted, they were adopted in accordance with constitutional mandate placed on him by the Constitution with the objective of the prosecution of crime. Therefore, the applicants' contention that the policy amendments were adopted for an ulterior purpose is without merit".

14.1.1 Surely, the intention by the first respondent (NDPP) to comply with its constitutional mandate to prosecute crimes is one thing. But the issue as I see it is, whether such intention is implicit in the policy amendment? If not, the next issue is whether the policy amendments should be allowed to exist in their apparent contrast to the intention and constitutional mandate and obligation of the first respondent.

14.1.2 It appears therefore, that one should look closely at the policy amendments, with a view to find in them,

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purported intention of the first and second respondents, in having brought about the policy amendments.

14.2 The applicants' contention is that, the purpose of the policy amendments is to allow the first respondent to conduct what is effectively a "re-run" of the Truth and Reconciliation Commission (TRC)'s amnesty process. Remember, TRC was specifically introduced and authorised in terms of the Interim Constitution. The main objective thereof was to deal with political commissions of offences in the past and, in particular the objective being to forge or bring about reconciliation in our country.

14.2.1 The response to this contention by the applicants was disputed and summed up as follows in the respondents' written heads of argument:

"32. It was submitted that the policy amendments correctly considered are not intended to be a process that can become a constitution or a re-run of the amnesty process of the TRC.

33. It must be appreciated that the purpose of the amendment policy is to ensure that the objects for which the Interim Constitution authorised the reconciliation process through the TRC process, should not be undermined.

34. The TRC process was a specific legislative process that authorised amnesty subject to the terms and conditions of that legislation.

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35. The policy amendments are conscious that they are not a process in terms of which individuals are to receive any amnesty. The NDPP is not authorised to grant any amnesty.

36. It is therefore denied that the policy amendments can be considered to be re-run of the TRC process or to have an impact of undermining the constitutional compact that the South African society made with the victims of human rights"

14.2.2 What is quoted above, in my view captures the essence of the attack against the applicants' cause of complaint. In addition to this, it is the respondents' case that, as the first respondent exercises its power and obligation to institute prosecution proceedings, it would prosecute and if need be, only conclude agreements as envisaged in sections 204 and 105A of the Criminal Procedure Act.

14.3 The applicants in their heads of argument seek to identify the issue as follows:

"Firstly, the applicants do not allege that the policy amendments allow for an amnesty, indemnity or a re-run of the TRC, as the respondents suggest. Rather, the applicants allege that, the application of the policy amendments in relation to a decision not to prosecute will have this effect. As it will be seen below, the applicants alleged that, in light of the enormous difficulties associated with private prosecutions, a decision not to prosecute (on grounds other than the absence of evidence) on the basis of criteria that are strikingly similar to those applied by the

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TRC amnesty committee constitute an effective re-run of the amnesty provisions of the TRC"

15. Before I turn to deal with the documents that contain the policy amendments under attack, I find it necessary to refer to the debate that ensued during the discussion. During the discussion, issues were further raised as follows:

- *Whether the applicants have demonstrated the existence of a prima facie case on which factors enumerated in part C of the policy amendments were relied upon in taking a decision to grant prosecutorial indemnity?*

- *Whether parts A, B and C confer a power not to prosecute where a prima facie case is established? And if so,*

- *Which provisions of the policy amendments empower the first respondent, a power not to prosecute, where prima facie is established?*

15.1 I see the question raised above as refining the issues to be decided. According to Mr Marcus on behalf of the applicants, in a response to an enquiry by the court, whether he understands part C as entitling the first respondent not to prosecute in the face of a prima facie evidence, he stated as follows:
"It says so, much explicitly. It says what it means"

15.2 I must pause for a moment to deal with the documents containing the policy amendments. Such policy amendments are quoted in paragraph 9 of this judgment.

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I found it necessary to quote the policy amendments in their entirely for completeness sake and better understanding of the amendments. For this purpose, and in dealing with the interpretation or construction of the policy amendments, I will not repeat the quotation unless it becomes necessary to do so.

15.3 Apart from parts A and B of the policy amendments, the actual amendments are contained in part C. Part A deals with the introduction and the basis for bringing about the policy amendments as contained in part C. Part B deals with the procedure that has to be strictly followed in respect of persons wanting to make representations to the NDPP and in respect of those cases already received by the office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994. Any reference to any provision in parts A, B and C of the policy amendments will be referred to in this judgment as "paragraph".

15.3.1 Two classes of persons can seemingly make representations in terms of Part B paragraph 1 thereof, namely, those who are facing possible prosecution and secondly, those who wish to enter into an arrangement with the NPA as contemplated in paragraph1 of part A. Remember, in terms of section 179 (5)(d) of the Constitution, the first respondent may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the first respondent, from the accused person, the complainant and any other person or party whom the first respondent considers to be relevant.

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

15.3.1.1 In my view, the representations envisaged in paragraph 1 of part B of the policy amendments are not covered and sanctioned by the Constitution. Such representations as sanctioned in section 179(5)(d), are for a review of a decision, the review being in respect of a decision previously taken to prosecute or not to prosecute. For example, if a decision was previously taken not to prosecute A on a charge of murder of B, but later review such a decision and decide to charge A on the murder of B, A might be required to make representations in terms of section 179(5)(d), as to why the initial decision not to prosecute should not be reviewed.

15.3.1.2 Invitation for representations in terms of paragraph B.1 of the policy amendments are in my view, in respect of those who are facing possible prosecution, where a decision is not taken on their fate. Secondly, the representations relate to those persons in respect of whom their cases have already been received by the first respondent, but a decision is not taken to prosecute or not to prosecute them in respect of offences relating to the conflict of the past and committed before 11 May 1994.

15.3.1.3 In terms of paragraph A1 (c) of the policy amendments as part of the normal legal processes and in the national interest, the first respondent working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements, that are standard in the normal execution of justice and prosecuting mandate and are accommodated in the existing legislations (my own emphasis). During the discussion

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Mr Semenya on behalf of the respondents, was quizzed on the reasons for the representations as envisaged in paragraph B1 of the policy amendments. His answer thereto was firstly, that the legislations referred to in paragraph A1 (c) of the policy amendments are sections 204 and 105A of the Criminal Procedure Act. Secondly, he contended that such agreement referred to in A.1.(c) are therefore in terms of the two sections.

15.3.1.4 Mr Semenya obviously had some difficulties in expanding on his submission as referred to in 15.3.1.3 above. His submission cannot be correct, for the following reasons: Firstly, representations in terms of paragraph B1 of the policy amendments are aimed at enabling the first respondent to decide whether or not to prosecute. Secondly, section 105A relates to a situation where a decision to prosecute has already been taken. Thirdly, section 204 can only take place where a decision to prosecute has already been taken against other persons or person and indemnity is granted by the court and not by the prosecution to a witness who testified in the proceedings. Implementation of sections 105A and 204 is therefore subject to judicial consideration, and are entirely matters of discretion by the trial court. The decision to prosecute or not to prosecute in terms of the first respondent's constitutional obligation and also as envisaged in the policy amendments, is entirely a matter falling within the domain of the first respondent.

15.3.2 All of these, in my view, raise another question. If indeed the policy amendments are intended to and or should be understood to be subject to the provisions of section 204 and 105A, why then the need for the amendments? Or to

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put it differently, if indeed the policy amendments are not intended to authorise the first respondent to grant indemnity or amnesty, why then the need for the amendments? Remember, when the first prosecution policies were introduced, clear guidelines relating to prosecution of offences were set out. For example, reference is made in paragraph C.2 of the policy amendments to paragraph 4 of the said first prosecuting policy of the first respondent. The first prosecuting policy and directives, in my view, are adequate enough to deal with any decision to prosecute or not to prosecute in respect of any offence whether or not committed in conflicts of the past.

15.4 In my view, there is no need in the light of detailed first prosecuting policy to introduce and adopt a procedure as set out in parts A and B of the policy amendments. Of course, this has to be seen in the light of the ultimate policy amendments as contained in part C thereof. This should then bring me to deal with the interpretation of part C of the policy amendments as fully set out in paragraph 9 of this judgment.

15.4.1 Remember, when Mr Marcus on behalf of the applicants, was quizzed by the court, whether his understanding was that the prosecution can in terms of the policy amendments decline to prosecute in the face of a prima facie case, he stated as follows"

"It says so, much explicitly. It says what it means"

15.4.2 Part C, of the policy amendments sets out criteria that should be followed for the prosecution of cases arising from conflicts of the past. Paragraphs C1 and C2 thereof

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in my view, are important, in particular C2 (read paragraph C.2 quoted in paragraph 9 of this judgment).

15.4.3 If the answer to paragraph C 2 of the policy amendments is in the affirmative other criteria set out in paragraph C 3(a) to (L) must still be considered. Immediately the question is "*What else is required for the purpose of taking a decision to prosecute or not to prosecute in the face of the strength of adequate evidence* (my own emphasis). Of course, the question must be seen amongst others in the light of the following criteria which must still be considered in terms of paragraph C 3:

15.4.3.1 the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society. (**see paragraph C 3 of the policy amendments quoted in paragraph 9 of this judgment**). This should be seen in the light of an introduction to these policy amendments as set out in paragraph A1 quoted in paragraph 9 of this judgment. The respondents wished to seek to deny that there is any reference to consideration of reconciliation and reconstruction in the policy amendments. Of course this is incorrect. The wording of the policy amendments should be seen in context. In my view, they were correctly referred to by Mr Marcus as a copy or duplication of the guidelines set out for and used during the TRC hearings. For example, "Why should the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation have any bearing on the decision to prosecute or not to prosecute, especially in the light of the

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

strength of adequate evidence? Why should the extent to which the prosecution or non-prosecution of the alleged offender, be dictated by national project of nation-building through transformation, reconciliation, development of our society? (**See paragraph C 3 (f) of the policy amendments**). What is stated in paragraphs C 3 (d) (iv) and C.3 (f) is indeed like a "copy cat" of the TRC's guidelines.

15.4.4 When there is sufficient evidence to prosecute, the first respondent must comply with its obligation. Entitlement by the first respondent, to refuse to prosecute where there is a strong case and adequate evidence to do so, would in my view be unconstitutional. Paragraph C 2 read with paragraph C 3 of the policy amendments, allow the first respondent even where there is a strong case and adequate evidence not to prosecute. This is contrary to the first respondent's constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted.

15.4.4.1 Perhaps Mr Marcus was right in expressing himself, as indicated in paragraphs 15.1 and 15.4.1of this judgment. I am mindful of the first respondent's assertion that, it was not and it is still not its intention not to prosecute where there is a strong case and adequate evidence to backup the prosecution. Surely, this is understandable, because the very existence of the first respondent is to prosecute crimes. The submission as I understood it is that, there is no need for the applicants to panic. That might be so, however, the real issue as I see it is whether the policy amendments which do not properly reflect the

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

intention of the respondents should be allowed to remain in the book. I do not think so.

15.5 In paragraph 14.3 of this judgment, I quoted paragraph 2.1 of the applicants' written heads of argument. At the risk of repetition, the applicants aver that it is not their case that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, rather that the application of the policy amendments in relation to a decision not to prosecute will have this effect. This submission should be seen in the light of paragraph C 2 read with C 3 of the policy amendments.

15.5.1 This submission on behalf of the applicants, suggests a broader interpretation or construction of the policy amendments. I do not intend referring to legal principles and case laws dealing with the manner of interpretation, where a literal meaning does not seem to make sense or does not properly reflect the intention of the legislature, in the instant case, the intention of the respondents who produced the policy amendments. The policy amendments have the effect of legal binding.

15.5.2 The many criteria referred to in paragraph C3 are to enable the first respondent in deciding whether or not to prosecute offences committed before 11 May 1994 arising from conflicts of the past. However, many of these criteria in my view, are not relevant in deciding whether or not to prosecute. Remember, these criteria as contained in paragraph C3 are subject to two factors. Firstly, the offence or offences must have been committed on or before 11 May 1994. (**See paragraph C1**). Secondly,

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

there must be a strong case supported by adequate evidence (**see paragraph C2**).

15.5.2.1 As I said, once criteria C 2 presents itself in a particular case, the first respondent is constitutionally bound to prosecute. The many factors referred to in C3 are factors which in my view, should be considered when the first respondent decides to enter into negotiations or agreement in terms of section 105A. Section 105 A, has nothing to do with the decision to prosecute or not to prosecute. It can only be invoked once a decision to prosecute has been taken and an accused person is on trial. It is a provision which is under judicial consideration. Decision to prosecute or not to prosecute is not. Many factors as set out in C3 in my view, are relevant and important in deciding whether a sentence agreed upon in terms of section 105A is appropriate or not, but not in deciding whether to prosecute or not to prosecute.

15.5.2.2 As I said earlier in this judgment, section 204 is a process which is followed on the strength of a state's case and on whether a particular individual who participated in the commission of the offence is prepared to assist in successfully prosecuting his or her co-perpetrators. The section does not require representations and I do not think it is necessary for such representations to be made. The question again arises, why then representations as envisaged in paragraph B1 of the policy amendments if not to give indemnity other than in terms of section 204?

15.5.3 Looking at what is envisaged in paragraph B 1, one sees a recipe for conflict and absurdity. What is conspicuous in

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paragraph B 1 regarding the representation is absence of the status of such representations. Put it differently, how does the first respondent intend dealing with representations in terms of paragraph B1 in a situation where it decides to prosecute a person referred to in C3 after having made such representations in terms of paragraph B 1?

15.5.3.1 If indeed representations in terms of B1 are intended to enable the first respondent to take a decision to prosecute, and not to grant indemnity, how does it hope to have a full disclosure as intended in B1? Surely, unless it intends not to prosecute those who make a full disclosure, in terms of paragraph B1, it cannot hope that any person who runs the risk of being prosecuted by his or her own full disclosure will come forward as envisaged in B1. Remember, this full disclosure as envisaged in B1 is emulation of a full disclosure as it was in terms of the TRC guidelines.

15.5.4 The whole procedure as envisaged in part B1, is a recipe for conflict and absurdity, because on the one hand it does not provide protection for such a disclosure. On the other hand, the first respondent says it is not indemnity or amnesty. It is a recipe for conflict, for example, the first respondent may wish to use the representations once it has decided to prosecute and the person who made such representations is on trial. It is a recipe for absurdity, because the first respondent insists that it does not intend to grant indemnity. The need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty. Broad interpretation or construction of parts A, B, and C of the policy

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

amendments displays amnesty or indemnity or agreement, contrary to that allowed in terms of section 204 and 105A of the Criminal Procedure Act and also contrary to the intention of the first respondent seen in the light of its insistence that it was never its intention to act other than in terms of its obligation to prosecute and to utilise sections 204 and 105A The result of this is that the policy amendments are not only unconstitutional but absurd and cannot continue to exist.

16. I now turn to deal with the other issue which was intended to be raised as a preliminary issue. The issue was in detail dealt in the respondent's supplementary written heads of argument. The argument was that the applicants' application is not ripe. The issue was introduced as follows in the first respondent' heads of argument:

"1. One of the cardinal policies or principles of judicial function is the adjudication of real and concrete disputes between the parties. Stated differently domestic, foreign, as well as international courts have consistently said that the function of the courts is never to answer abstracts, academic or hypothetical questions"

16.1 Having said this, Mr Semenya then at length dealt in detail with the principles applicable to the issue as raised. Having referred to the applicable principles the submission was concluded as follows on pages 8 to 9 of the respondents' supplementary heads of argument:

"2. The authorities said above, more than amply demonstrate that as a matter of policy, the courts should concern themselves with the resolution of real and concrete controversies involving persons who

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

have interests in the resolution of those disputes. We submit in the present case, what the applicant call the "stories of five South African families" is totally unconnected to the prosecutorial policy under question. We say so for the following reasons:

2.1 There is no evidence that any one has been arrested in connection with the victims of the cases cited in the applicants' papers (Nokuthula Aurelia Simelane; Mathew Goniwe, Sicelo Stanley Mhlauli; Sparrow Thomas Mkhonto and Fort Calatha).

2.2 The applicants have furnished no evidence indicating that the police have secured sufficient evidence to mount a prima facie case against anyone in respect of the victims on whose behalf the application is launched;

2.3 There is no basis offered by the applicants that the first respondent has taken any decision to grant "prosecutorial indemnity/immunity" to anyone;

2.4 More importantly, the applicants have not shown any concrete facts which meet the facts cited in the prosecutorial policy to inform the decision whether to prosecute or not to prosecute. For instance, whether there is "adequate evidence" whether there has been full disclosure of all relevant factors alleged in the offences; whether the offences were associated with political objectives" the motive of persons who committed the acts; the personal circumstances of the offender" or whether the offences are serious". All of these factors must be first established before the applicants can contend for the "effective indemnity".

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4. *The other reason why the application should fail, is that the applicants are seeking a declarator, a power which a court exercises in terms of section 19(1)(a)(iii) of the Supreme Court Act, which courts have a discretion to grant even where a proper case has been made out. The courts have consistently said"*

16.2 I do not intend referring to authorities relied upon for the submission as quoted above. However, I find it necessary to look at the submission closely.

16.2.1 The contention by the first respondent should be seen in the light of its insistence that it intends enforcing the policy amendments as they are. In other words, that, it will continue to require persons who qualify in terms of the policy amendments to make representations in terms of paragraph B1. Secondly, that it will continue to decide whether or not to prosecute and to consider other factors as set out in paragraph C3, once a strong case and adequate evidence are established as envisaged in paragraph C2 in respect of offences referred to in paragraph C1 (**refer to the provisions of the paragraphs as quoted in paragraph 9 of this judgment**).

16.2.2 Coming back to the submission as quoted in 16.1 above, it is necessary to elaborate on the submission.

16.2.2.1 The stories of the first five applicants are described as totally "unconnected to the prosecutorial policy". I do not think so. Firstly, their stories relate to conflicts of the past committed before 11 May 1994. Secondly, the five applicants have direct interest in the prosecution of those

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who are connected to the crimes alluded by them in the founding affidavit. Thirdly, some of these persons who were involved or might have been involved have not been granted indemnity, either because they did not apply or they were found not to have given a full disclosure. Lastly, the first respondent is under obligation to prosecute them once a strong case and adequate evidence is established.

16.2.3 The reasoning for the submission as set out in paragraph 2 of the first respondent' supplementary heads of argument quoted above should also be considered closely.

16.2.3.1 I do not think that anyone connected with the commission of the crimes cited in the applicants' papers need to be arrested before the applicants could be entitled to bring the application on the basis that their application would then be ripe or not academic. The essence of the application as I see it is prompted by the introduction of the policy amendments and the desire by the first respondent to enforce the policy amendments complained of. I did not understand counsel for the respondents to suggest that any of the applicants is not a party or persons referred to in section 38 of the Constitution. This concession in my view, should settle the score.

16.2.3.2 Clearly, the second to the fifth applicants are widows of the Cradock four who were killed in gruesome manner during 1985. The killings were politically motivated. Some of the people who were involved or might have been were not granted amnesty during the TRC proceedings. Some did not apply for amnesty and have not been prosecuted yet. If the first respondent was to deal with

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these people receive their representations as contemplated in paragraph B1 and receive adequate evidence suggesting a strong case for prosecution as contemplated in paragraph C 2; the first respondent may still decide not to prosecute as contemplated in paragraph C3, after having considered the criteria therein. The applicants' interests lie in the first respondent's obligation to prosecute in circumstances as might prevail under paragraph C 1 and C 2. Paragraph C3 is threatening such interest. Therefore, such people as referred to in B1 in respect of offences referred to in C 1 do not have to be arrested before the applicants could be entitled to bring an application of this nature.

16.2.3.3 The basis of the attack against the policy amendments really is not much of what the applicants can provide to the first respondent regarding possible prosecution of particular persons. The applicants are not asking for prosecution of certain people, that is not part of their prayers. In any event, I do not think that they have to furnish evidence as suggested in paragraph 2.2 of the respondents' supplementary heads of argument. Crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted. Victims of crimes rely on these institutions for investigation and prosecution. As I said, the essence of the complaint is that the policy amendments allow the first respondent not to prosecute even in circumstances where there is a prima facie case seen in the light of paragraphs C 2 and C 3 of the policy amendments.

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16.2.3.4 The respondents did not have to take a decision not to prosecute, to grant indemnity, and or immunity to anyone, before the applicants could bring the application. **(See paragraph 2.3 of the respondents' supplementary heads of argument)**. Lastly, the applicants did not have to show any concrete facts which meet the factors cited in paragraph C 3. of the policy amendments as suggested in paragraph 2.4 of the respondents' supplementary heads of argument. At the risk of repeating myself, paragraphs C 2. and C 3 state or suggest that the first respondent may still not prosecute, despite adequate evidence against a particular individual having committed an offence referred to in C 1. Alternatively paragraphs C 2 and C 3 broadly interpreted confer such a power to the prosecution, contrary to its constitutional obligation. This is a real threat to the applicants' constitutional rights. This threat cannot be side stepped by an undertaking that it will not happen. For as long as the first respondent insist that it will enforce the policy amendments, the applicants should be entitled to have the policy amendments impugned on the ground that it is unconstitutional.

COSTS

17. The first to the fifth applicants have direct interest in the institution of the present proceedings. They should therefore be entitled to costs. The first five applicants having decided to institute the present proceedings, I do not think that it was necessary for the other applicants to join forces.

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CONCLUSION

18. Consequently I make the order as follows:

18.1 The policy amendments to the National Prosecution Policy dated the 1 December 2005 is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.

18.2 The first respondent to pay the costs of the application for the first to fifth applicants.

M F LEGODI
JUDGE OF THE HIGH COURT

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E.

I.

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BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH AND RECONCILIATION COMMISSION

[HELD AT PORT ELIZABETH]

In the applications of :

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 DECEMBER 1989

DECISION

These are unusual proceedings involving applications for amnesty and launched in terms of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 as amended ("the Act"). This is a special sitting of the Amnesty Committee which falls under the Truth and Reconciliation Commission established under the Act.

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The operation of the provisions related to amnesty ceased during December 2000 or January 2001 after being extended a few times prior to that.

During the operation of the Act, the Applicants and others made application for amnesty in respect of the murders of Sergeant Amos Temba Faku, Warrant Officer Mbala Glen Mgoduka, Sergeant Desmond Daliwonga Mapipa and Xolile Shepherd Sakati, alias Charles Jack ("the deceased") on or about 14 December 1989. The applications were refused.

The Applicants were charged together with others for the murders of the deceased and convicted accordingly in the South Eastern Cape Local Division of the High Court during June 1996. The first three deceased were members of the Security Branch of the South African Police in Port Elizabeth and the latter was an informer who was a converted ANC operative. All four Applicants were also members of the Security Branch in the South African Police.

The decisions of the original amnesty committee to refuse amnesty to these applicants were taken on review to the Cape of Good Hope Provincial Division of the High Court of South Africa. The decisions to refuse amnesty to the Third and Fourth Applicants were unanimously

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set aside and the majority of that court also set aside the decision to refuse amnesty to the Second Applicant.

The court consequently ordered that the Minister of Justice establish an Amnesty Committee (presumably in terms of the Act) which would consider applications for amnesty by the Second, Third and Fourth Applicants (in respect of the same incident) afresh.

Consequently this committee was established in terms of the Act and the four applicants brought these applications before it. The applications are opposed by the families of the deceased. The family of Sakati were only represented later in the hearing.

Amongst the applications, there was one by Nicholaas Jacobus Janse Van Rensburg who was cited as the First Applicant. The committee was informed that his application was included in anticipation of review proceedings being brought in the Cape of Good Hope Provincial Division of the High Court seeking relief that would allow him to make a fresh application for amnesty as the Second, Third and Fourth Applicants had been allowed to do in terms of the aforementioned court order.

No such order was placed before this committee and it seems that no review proceedings were ever launched by or on behalf of the First

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Applicant in the Cape of Good Hope Provincial Division of the High Court. Consequently the application for amnesty on behalf of the First Applicant is not properly, if at all, before this committee. The contents of Van Rensburg's application can therefore not be taken into consideration, especially because it was never tested, even in deciding the applications of the other applicants. However for the sake of convenience, the other Applicants will be referred to in this decision as cited in the papers and in the heading hereof.

When the proceedings commenced, Mr Ntsebeza, counsel for Mrs Faku, Mrs Mgoduka and Mrs Mapipa, wives of the first three deceased, applied for a postponement so that the families of the deceased would have an opportunity to obtain the services of other counsel. He explained that his withdrawal was voluntary and based on a possible perception that he had a conflict of interest in appearing for the families when in fact he was an erstwhile member of the Truth and Reconciliation Commission established in terms of Section 2 of the Act. The postponement was granted.

Upon resumption, Mr Naidoo appeared for the families of Faku, Mgoduka and Mapipa. Later in the course of the proceedings, Mr Naidoo informed the committee that at that stage, he was also representing the family of deceased, Sakati, having been briefed shortly before then. There were no objections in this regard and Mr

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Naidoo continued to represent the families of all the deceased for the remainder of the hearing.

There are one or two aspects which need mention at this juncture.

Firstly, during the course of the evidence, there was a suggestion that Mr Carl Edwards, who was a colleague of Mr Niewoudt, knew of the plan to kill the deceased and had had prior knowledge that he would be hosting some of those involved in the plan to do so and/or its implementation. On account of the possibility that he might therefore be implicated in the killings in one way or another, proceedings were adjourned so that he could be informed of the situation as required by law.

Mr Mpshe, the evidence leader, was directed to inform Mr Edwards of the situation and that he should attend the hearing the next morning at 09H30 in order to indicate what his attitude was and in particular to request time to employ representation if he wished to do so.

The next morning, the committee was informed by Mr Mpshe that he had communicated with Mr Edwards as directed and had handed him a written résumé of the situation. Mr Mpshe told the committee that Mr Edwards signed a copy of the written résumé which was handed to him and indicated that he had no interest in the proceedings and did

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not wish to attend the hearing. Mr Edwards had no objection to it proceeding without him. The proceedings continued accordingly.

Before any oral evidence was tendered, counsel for the three Applicants sought to amend their applications for amnesty. Written amendments were submitted on behalf of Third and Fourth Applicants and read as follows:

> "Ek doen hiermee aansoek om amnesties (sic) vir moord, sameswering tot die pleging van moord, medepligtigheid tot moord, beginstiging, opsetlike saakbeskadiging, as ook enige ander misdryf en/of delik wat voortspruit of afgelei word uit die voorval waartydens Adjudant-Offisier Glen Mogoduka, Sersant Amos Faku, Sersant Desmond Mapipa en Xolile Sheperd (sic) Sakati (ook bekend as Charles Jack) gedood is te Motherwell".

It must be pointed out that while not specifically referred to, the amendment was clearly intended to include any offence incidental to the commission of the murders and any offence by any of the Applicants in keeping secret the manner in which the deceased were murdered and the identity of those involved in the commission thereof. The Second Applicant made the same application.

There was no objection to the amendment(s) and the applications, including that of the Second Applicant. It follows in any event that should amnesty be granted in respect of the murders which are the

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focal offences, then amnesty for any other offence incidental to the commission or concealment thereof should also be granted. The converse of this also applies.

We were informed that the parties had agreed that the committee would not be presented with certain relevant records or portions thereof. These included the record of the criminal trial related to this incident and the record of the previous amnesty application. Despite them being informed that the committee did not consider itself bound by their agreement, the committee did not refer to any of these records in considering these applications.

It is common cause that the deceased were all killed while travelling in a motor vehicle in which explosives were installed by Third Applicant and others. The Second Applicant was the source of information in terms of which the decision to kill the deceased was made and he activated the explosives which caused the deaths of the deceased. The Fourth Applicant was party to the said operation and attended in order to put into operation an alternative operation should the death of any of them not have ensued in the first instance.

The Third and Fourth Applicants merely acted on the instructions of their superiors in this regard.

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The Second Applicant's written application is contained in two–hundred and eleven pages. Much of the written part of his application deals with his personal circumstances, and his connection with the Security Police of the time. He proceeded with his oral evidence and confirmed, in very general terms, the correctness thereof.

His written application also contained an attached document entitled "Submission to the Truth and Reconciliation Commission", dated 21 October 1996 and authored by General J. van der Merwe. Attached thereto is a document titled "The role of the South African Police in the conflict of the past" and authored by Generals Geldenhuys, Coetzee, De Wit and van der Merwe, all of whom were Commissioners of the South African Police at various times in the past.

The Second Applicant also associated himself with the contents of both documents and sought them to be read into his application and within the context thereof.

He explained that he became a member of the Security Branch of the Police on 1 April 1975. He was stationed at Port Elizabeth. Previously he was a member of the South African Police stationed at Johannesburg and Transkei before being transferred to the Security Branch in Port Elizabeth where he was always stationed until he left the force.

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His application also contained a general background of his experiences and evaluation of circumstances which led to this specific incident. He broadly confirmed the allegations in this regard as contained in his written application.

While the written application was broadly referred to, he was specifically led by his counsel on the material aspects related to the relevant incident(s).

The committee was informed that while he would not be led on all the details save for what he and his representatives considered important, he was nonetheless also willing to answer specific questions about the allegations contained in his written application. Counsel was informed that the application should be placed before the committee as Second Applicant and his representatives thought fit.

In dealing with the events, the Second Applicant explained that from 1983 he was in charge of the Intelligence Component of operations within the Port Elizabeth Security Branch. In 1986, during the State of Emergency, he was transferred to the investigation unit and in 1989 he became the Head of the Regional Intelligence Component of the Security Police in the region.

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He testified that during 1989, Brigadier Gilbert was Head of the Security Police in Port Elizabeth and Colonel Isaac Nel was second in command. Under them, the hierarchy consisted of the administrative component, the black component, the white component, and the coloured and Asiatic component. He explained that these components were administrative sections of the Security Police all of which investigated what was termed 'black organisations'.

The Second Applicant explained that part of his duties in the intelligence component during 1989 was to establish covert intelligence capacity. This included the assessment of the political climate of the time, the development of an effective database in regard to organisations and individuals, groups and institutions who were responsible for what he referred to as the anarchy of the time. This clearly referred to organisations, individuals, groups and institutions that opposed the system of apartheid. This information was used for *inter alia* counter espionage operations.

The Second Applicant then proceeded to testify about the deceased. He testified that Warrant Officer Mgoduka joined the Security Branch in 1977, when he shared an office with the Second Applicant in the aforementioned black component.

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Sergeant Amos Faku joined the Security Branch in 1980 also as part of the black component. Sergeant Desmond Mapipa was transferred to the Security Police in 1986 and attached to the investigation component which was part of the black component.

He described the deceased Xolile Shepperd (sic) Sakati alias Charles Jack as a 'trained terrorist' who was arrested in 1983, and later testified on behalf of the state in criminal prosecutions against those accused of subversive activities. Ultimately he was placed within the black component. He also provided information to the Security Police.

The Second Applicant stated that on one occasion he was interrogating a 'trained terrorist' in the company of the four deceased. He explained that because of the situation prevailing at the time, he used the opportunity to enhance his employment goals broadening the network and database. In pursuance thereof he managed to get the interrogatee to write a letter for him and wherein he (the interrogatee) requested from an ANC operative in Swaziland, weapons and the establishment of a Dead Letter Box (DLB) within South Africa. He explained that a DLB is a safe place where weapons within South Africa could be kept.

The letter was sent to Swaziland with an agent who was incarcerated a short while later at Quattro Camp, a detention camp in Angola, where

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people who were suspected of being untrustworthy were held by the ANC.

The Second Applicant then went on to testify about the killing of a person in Lesotho. It was clearly not the agent with whom the aforementioned letter was sent but everything points to the fact that it was one Toto Mbali.

It is quite apparent from the evidence of the Second Applicant that only he and Warrant Officer Mgoduka knew Toto Mbali had been recruited by the Security Branch. This piece of evidence was obviously intended to demonstrate that Warrant Officer Mgoduka was the source of this information to the ANC. No other evidence was tendered in this regard.

The Second Applicant proceeded to explain that he then suspected the four deceased, in particular Warrant Officer Mgoduka, of being the source (s) of the leaking of confidential information to the ANC. He gave no details of the 'confidential information' he referred to and allegedly leaked by all of the deceased.

He testified that as a result thereof, he discussed the issue with Brigadier Gilbert as a matter of urgency because the whole information/ intelligence system was at risk and the names of Security Police and

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their agents and certain important addresses where some of the agents and Security Police resided could be revealed to the ANC. This could result in attacks on Security Police and agents as a result of which they could be killed.

He however testified that the late Mr Sakati was only involved in the incident of acquiring the letter sent to Swaziland and that it was only to that extent that he was a potential threat to the system which the second Applicant sought to protect. This was over and above the identity of persons he (Sakati) had got to know over the time he spent with the Security Police.

The Second Applicant however did not believe that the deceased had knowledge of the identity and addresses of all the Security Police agents but certainly some important information in that regard and other important information.

The Second Applicant stated that he told Brigadier Gilbert of the situation in this regard during July 1989. As a result, Gilbert then ordered him to initiate a discreet investigation into the source(s) of the leaks and the role of the four deceased therein.

In pursuance of this order, he arranged the installation of a listening device in the tea room at the offices of the Security Police at Port

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Elizabeth. He also intercepted mail. He explained that he arranged with members of the technical division who used to fetch the mail from the post office to intercept certain mail, open it and read it. The operation also included monitoring telephone conversations and following and monitoring the four persons in question.

The Second Applicant said that during the investigation, he discovered that Warrant Officer Mgoduka had registered a post box under a false name at the Korsten Post Office, Port Elizabeth. He stated that this was established from the intercepted mail and the aforementioned observations. The Second Applicant personally established that the false name of 'Thandoxolo' was used. He checked the official form at the Post Office and discovered that it had been completed in Warrant Officer Mgoduka's handwriting, which he recognised. The Second Applicant then arranged for the mail received in that post box to be intercepted and monitored.

According to the Second Applicant the monitoring of the mail revealed that communication in this regard was by means of codified language. Consequently this raised further questions and strengthened the suspicion that Warrant Officer Mgoduka was in contact with the ANC. The foreign addresses were of places such as Lesotho, London and Canada and were known to the Security Branch. This fact

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ultimately confirmed to the Second Applicant that Warrant Officer Mgoduka had contact with the ANC.

The Second Applicant also testified that when the four deceased were talking in the tea room, he detected that they had already made contact with an overseas ANC aligned relative of Warrant Officer Mgoduka, Christopher Mgoduka. He also concluded from what he overheard that they had changed allegiance and also that they felt used in protecting the white government and keeping it in power. He interpreted their position as one in which they were dissatisfied with the government and the way they were being treated.

Finally, he referred to a letter sent from a Korsten address to Mr Isaac who, according to the Second Applicant, was known to the Security Police in Port Elizabeth as 'Roje Skenjana', an ANC commander in Lesotho. The content of the letter was encoded, as was customary and referred to as pending wedding. The Second Applicant stated that he recognised the handwriting therein as being that of Warrant Officer Mgoduka. As had become practice, the letters were steamed open, copied, resealed and sent on to its intended destination.

The Second Applicant later testified that this letter was typed and he identified the type as that of the manual typewriter used in Warrant Officer Mgoduka's office.

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Second Applicant explained that he was aware of a request by Mr Skenjana for Mr Mgoduka to identify a motor vehicle for the purposes of placing a limpet mine in it.

As a result of all this information, he was convinced that the four deceased, in particular Warrant Officer Mgoduka, were a serious security risk.

The Second Applicant then reported the situation to Brigadier Gilbert during the first half of December 1989. He testified that the options of how to deal with the matter were discussed between them and they arrived at the conclusion that all the deceased should be killed.

While he did not volunteer details of these options, upon being questioned, he explained that amongst the options was that they should be subjected to criminal prosecution. He could not remember why this option was rejected but he was wary that his whole network could have been exposed and that it was not clear to him at the time how criminal charges could be proffered against them.

Nonetheless, he and Brigadier Gilbert parted, and about two days later, Brigadier Gilbert spoke to him directly and gave him an order to go and see General van Rensburg in Pretoria at the Security Police Head Office about this situation. Brigadier Gilbert gave him a ticket to

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travel to Johannesburg by air and then on to Pretoria. According to the Second Applicant, he had Head Office authority to carry out the said covert operation.

Second Applicant also testified that Brigadier Gilbert mentioned at that time that Brigadier Strydom, head of detectives in Port Elizabeth, had informed him that Warrant Officer Mgoduka and Shepperd Sakati were suspects in a scam involving the defrauding of what was termed 'anti-government organisations and workers' unions'. This aspect further complicated matters and had the potential of embarrassing the Security Police and exposing the role of the Security Police in serving the political ends of the government of the day, because the two were also involved in other hitherto undisclosed covert criminal offences committed by the Security Police. According to the Second Applicant, though he did not know much about this, he was told that they had threatened to disclose the role of the Security Police in Port Elizabeth in the 'Cradock Four' killings as it is known. He further stated that they were using their knowledge of the Cradock Four incident to negotiate a position for themselves in terms of which they would avoid the risk of being charged for fraud. He, however, did not pay much attention to this. All he was interested in was the plan to kill them.

The Second Applicant then left for Pretoria on 12 December 1989, with instructions to meet General Van Rensburg at his home early the next

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morning. He knew General Van Rensburg, who had previously been stationed within the Security Branch at Port Elizabeth.

He met Van Rensburg as arranged and the latter was clearly not fully briefed about the situation. Second Applicant stated that he then tendered further information to Van Rensburg.

He explained that Colonel De Kock later joined them at the invitation of Van Rensburg. He briefly told De Kock what the situation was. He could not remember everything he told De Kock, but stated that he told him that some of the deceased had already made contact with the ANC.

He testified that because Brigadier Gilbert was senior to Van Rensburg and De Kock, neither could change a decision to kill the four deceased. He explained that the purpose of going to Pretoria was to fill in the details and reasons for the proposed elimination of the four deceased so that the logistics in connection with the implementation thereof, could be arranged accordingly. This explanation was tendered after he was constrained to concede that Van Rensburg had the authority to direct that the operation be aborted. I will refer to this aspect presently.

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After he had explained to De Kock why the operation had to take place, Van Rensburg instructed De Kock to arrange the technical requirements to ensure the success of the operation. According to Second Applicant, he left Van Rensburg's home with De Kock and they proceeded to the Third Applicant's office where they were introduced to each other. He testified that he briefly explained the situation to the Third Applicant. In particular, he explained that the four deceased had made contact with an anti-apartheid organisation and that the effects of the proposed operation should be made to look like the work of the ANC. He could not remember if he had told the Third Applicant that authority had been obtained to do what was being prepared for. Again he explained that he tendered this brief explanation to the Third Applicant in order to help him understand what was logistically required.

Thereafter De Kock and Second Applicant went to Vlakplaas where they contacted the Fourth Applicant, amongst others. Later the Second and Fourth Applicants and two others, Snyman and Vermeulen, drove to Port Elizabeth in two motor vehicles. Fourth Applicant was not informed of anything by the Second Applicant who seemed to suggest that it must have been De Kock who tendered the details to him, if any.

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Second Applicant, without going into any detail, testified that during their journey he explained everything to them including the motivation for what was obviously going to occur.

The Second Applicant then explained that he took the other passenger of the motor vehicle he was travelling in to a safe place in Port Elizabeth and thereafter went home to rest. He had left the others with one of his local colleagues.

He received the expected telephone call from Third Applicant early in the morning. He collected him in a suburb known as Summerstrand and took him to a secret place where they met the other Vlakplaas operatives.

The Second Applicant then left that place to look for a motor vehicle in which explosives would be installed. He succeeded in obtaining a motor vehicle and delivered it to the place where the others were waiting in the area of Greenbushes near Rocklands. The bomb was then installed in the motor vehicle as was planned.

He stated that he was given instructions as to how to detonate the bomb by means of a remote controlled device. He explained that in the late afternoon, they went to a place identified as the Monument Crossing in the Motherwell suburb. He showed Third and Fourth

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Applicants and Vermeulen where he intended the said motor vehicle to be when he activated the planted explosives, so that they could ensure that they were out of danger when it happened.

He further confirmed the contents of his written application in respect of the actual detonation and what occurred immediately before then. He explained that he held the relevant motor vehicle in safe keeping at Louis le Grange Square and at about 20H00 that night, he consulted an informant from whom he allegedly received information about a freedom fighter hiding in Motherwell and who intended to commit an offence by installing explosives in a police vehicle on 16 December 1989 and then blowing it up. He used this opportunity to put his plan into operation and at the same time, enhance the impression that it was the work of the ANC because it coincided with its alleged plan to blow up a police vehicle.

He then arranged for the four deceased to come to where he was and explained that they should use a motor vehicle which was not known to be that of the Security Police in order to facilitate the observation and possible arrest and interrogation of the alleged freedom fighter.

Eventually the four deceased boarded the motor vehicle, which was brought to the rendezvous point in Motherwell by Warrant Officer Lotz.

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The four deceased then left *en route* to Hintsa Street where the freedom fighter was allegedly hiding.

The remote control was in the possession of the Second Applicant who had insisted that he be the one to activate the explosives when it was opportune to do so. The Vlakplaas members, including Third and Fourth Applicants, were hiding a distance away.

When the motor vehicle had travelled a short distance but still within view, the Second Applicant detonated the explosives in that motor vehicle by means of the remote control. The resultant blast killed all four of the deceased instantly.

The Second Applicant testified that he then went to the scene of the blast and planted a detonator, the use of which was at the time associated with the ANC. This ploy was obviously employed to fortify the impression that the blast was committed by members of the ANC in terms of its offensive against the police and other institutions regarded as supportive or protective of apartheid and in line with its planned attack scheduled for 16 December.

He confirmed that the political aims of his actions, as set out in the written section of his application, were to protect the government of the day.

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In summary, this included compliance with his obligation of ensuring the safety of South Africa, protecting the country, protecting the government of the day and the National Party from attack by liberation armies and movements. It was also intended to protect the integrity of South Africa, the government and the National Party as well as its continued existence and control of government. In particular, it was intended to avoid sensitive information related to the aforementioned aims from being divulged to the opposition, in order to protect the lives and property of members of the South African Police, agents, informants and colleagues within the Security Police and to protect the earlier successes in attaining those aims, especially in the light of the trouble it would involve in replacing the system under threat.

The Second Applicant testified that he was unable to say whether all the information he sought to protect had been revealed to the opposition or to what extent this had been done over the period of approximately five months prior to the killing and during which the alleged communication between the deceased and the ANC had continued.

The Second Applicant also conceded that after the blast, he did not follow up the situation in respect of the freedom fighter allegedly hiding in Hintsa Street, Motherwell. He stated that he mentioned the matter to

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another section of the Security Police, Port Elizabeth because, as he was in the Intelligence Section, it was not within his formal competency. He was unable to say if anything was done in respect thereof even from an intelligence perspective.

Eugene Alexander De Kock ("De Kock ") was called by the Evidence Leader of the Amnesty Committee, Mr Mpshe, to testify about the events and the subsequent killing of the deceased.

De Kock joined the Uniformed Branch of the police force during January 1968 and was stationed in the East Rand. He stayed there until he was transferred to the then South West Africa and stationed within the Security Unit at Oshakati during 1983. He was a founder member of the Combat Unit known as 'Koevoet' akin to the Selous Scouts, which countered revolutionaries in the mid-African area. Through infiltration they neutralised South West African Peoples Organisation and other opposing structures in South West Africa within two years of formation. Koevoet existed until the end of 1989 / 1990 when there were peace negotiations for Namibia.

In 1983 he was transferred back to South Africa. He became the commander of Vlakplaas on 1 July 1985 and was placed in charge of Section C-1, which was under Brigadier Schoon. Section C-1was entrusted with combating terrorism, and specifically the activities of the

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ANC and Pan-Africanist Congress. Members of both organisations who infiltrated the country were either killed or recruited and converted into members known as “Askaris”. The Askaris were a group of converted members of liberation armies used by the Security Police to identify insurgents and generally provide information about their former revolutionary organisations.

De Kock obtained his orders from Brigadier Schoon as to how the ANC and PAC insurgents were to be killed. When attacking the “enemy” and in the field of operation, he had a wide discretion to deal with situations as they unfolded in any given operation. These operations were inside the country as well as outside the borders of South Africa, e.g. Lesotho and Swaziland. Some of the members of the ANC and PAC were identified by Askaris through photographs. These Askaris would also give information about safe places of either the ANC or PAC members inside and outside South Africa.

De Kock is currently serving a sentence of life imprisonment imposed in October 1996.

He stated that he testified in the criminal trial in respect of this incident against the Applicants and others.

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He testified that during December 1989 he was instructed by General Van Rensburg, who was then his chief, to consult with him at his Security Branch offices. He was informed that the Second Applicant, of the Port Elizabeth Security Branch, would be arriving the next day and that he should accompany the Second Applicant to Van Rensburg's house, which was situated in a complex for police officials. De Kock was living in the same complex.

At 06H00 Second Applicant came to De Kock. They walked to General Van Rensburg's house. Van Rensburg invited Second Applicant to tell De Kock the purpose of his visit. Second Applicant explained that two Security Branch members and an Askari, a former member of the ANC, were involved in fraud. They intercepted cheques in the post which were destined for the unions, liberation movements and the South African Council of Churches. They exchanged these cheques and utilised the money for their own purposes. The exposure of this scam would put the integrity of the Security Branch in Port Elizabeth at risk. This led one of the members to threaten that should they be charged, he would expose some of the other crimes, such as motor vehicle theft, committed by the Security Branch in Port Elizabeth. He did not identify this person.

A short discussion ensued between the three. General Van Rensburg told De Kock to render assistance to Second Applicant so that these

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members should be prevented from making such disclosures. They had to be 'silenced'. This was a euphemism used in the Security Branch for killing people. Thereafter the discussion focused on the methodology of how the deceased should be blown up and killed.

This would also make it appear as if it was an operation carried out by the ANC and that no suspicion could be cast on the Security Branch in that regard. No personnel from Port Elizabeth should be involved, lest for unforeseen reasons they may be recognised.

De Kock would deploy members from Vlakplaas. He would arrange for the Third and Fourth Applicants, together with some other members, to ensure the successful execution of the operation.

This was at the time when the Harms Commission had been appointed to investigate the alleged atrocities perpetrated by Vlakplaas members. De Kock was then on compulsory leave in order to assist General Engelbrecht to cover up the operations of Vlakplaas. De Kock would then not be suspected of any involvement in Vlakplaas operations.

Whilst walking back to his house with Second Applicant, he became concerned about the reasons for the intended killings. He said he questioned why people who worked on the same side with them and

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had meted out untold harm on the ANC should be killed for reasons of hiding fraud.

When he reached home he drove to General van Rensburg's office. He does not know what happened to Second Applicant but assumed that he arrived by a motor vehicle since he had flown from Port Elizabeth to Johannesburg and must have left the same way.

His feeling was that if it was only to conceal the fraud, the Port Elizabeth members should themselves kill the deceased as this was not foreign to Second Applicant and his colleagues. All of them had in the past killed without hesitation. The situation here was different. He was prepared to help but not kill for something so minor. The fraud(s) could have been covered up or alternatively they would have been removed from the machinery of the law or in some illegal way, as had often been previously done.

At his office, Van Rensburg, in response to De Kock's query about the reason for the intended killing of the deceased, explained that the members would even disclose the Goniwe killings and other details of the activities of the Security Branch, their safe houses, details of the *modus operandi* and so forth. This was sensitive since it touched on the security of the country. The Cradock Four incident concerned General Van Rensburg and De Kock because they were also involved in it. This

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convinced De Kock that they should then be killed since it would reveal the political agenda of the government and the lengths that the security forces would go in order to protect themselves and the Nationalist Party.

According to De Kock, when they were briefed by Second Applicant the discussion did not concern the Cradock Four or the PEPCO three (3) murders or any other murders which were perpetrated by the Security Police members in Port Elizabeth. The discussion only centred around the fraud. The revelation would have put pressure on the state structures. The image of the state would have suffered irreparable harm and it would have involved senior personnel as well as the generals who had always denied their involvement in such atrocities. What had to be borne in mind was that these incidents were secretive and committed to protect the State from these “insurgents”.

De Kock despatched his personnel under the command of the Fourth Applicant. The Third Applicant and others were deployed only in case it became necessary to implement an alternative plan. On his return to Pretoria, the Fourth Applicant reported to him that the operation was successful.

Under cross-examination he stated that it seemed that the decision to kill the deceased had already been taken prior to the discussion

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between Van Rensburg, Second Applicant and himself. Second Applicant was sent to Pretoria to elicit expert assistance on how the plan to blow up the deceased should be implemented. De Kock was adamant that this was however not discussed but he conceded that it might have been. He was emphatic though, that when Van Rensburg arranged the meeting, his impression was that Second Applicant was to apprise them of the situation and how to prevent the deceased from making any of these disclosures.

He was resolute that Second Applicant spoke of two members and one Askari. The meeting was called for Second Applicant to inform him of the situation in Port Elizabeth. He was only told of fraud. He used strong language that Second Applicant lied to him about the reason. He believed that he should kill and fraud was not a good enough motivation for such drastic action nor was anything said about the deceased wanting to defect to the ANC. He said the Third and Fourth Applicants were involved because he instructed them to carry out the elimination. Had it not been his instructions, they would not have participated.

Lionel Snyman testified on behalf of the Second Applicant and stated that he had joined the police force in 1971. He subsequently joined the Section C-1 under De Kock. At the time of the incident, he was a Warrant Officer.

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During December 1989 Vermeulen, Fourth Applicant and himself were called by De Kock and instructed to accompany Second Applicant to Port Elizabeth. He testified that it was explained that there was a problem because some members within the Security Branch in Port Elizabeth and an Askari wanted to defect to the ANC. They had received information about that from the Security Branch in Port Elizabeth. He was however, not sure who disclosed this information. He was also informed that members from Vlakplaas would have to arrange for the killing of those troublesome persons.

He said that at some stage he also heard about fraud but was not sure from whom. He was furthermore, not sure how many people were to be killed.

After the operation he returned to Pretoria.

Under cross-examination it became quite apparent that Snyman had no independent recollection of whatever happened in regard to this incident either before, during or after it occurred. He said that he only heard of the Cradock Four incident after this operation had been completed. He admitted that his evidence consisted of what he had heard, reconstruction and guesswork. His evidence could not be relied upon to assist the committee in any way.

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Third Applicant testified that he prepared his application without any legal assistance.

At the time of the incident he was the Officer Commanding of the Technical Division of the Mechanical Section of the South African Police. He rendered service to the Security Branch and also to the Vlakplaas component.

He further testified that on the morning of 13 December 1989 he was visited by Colonel De Kock and the Second Applicant. They informed him that there were problems in which members of the Port Elizabeth Security Branch were involved. De Kock did most of the talking although he could not remember "who said what".

At a later stage he was told that these people were also involved in fraud. It was also mentioned to him that these people were about to defect to the ANC with all the information regarding networks of the Security Branch which they had at their disposal.

He said that he was informed that the operation to kill these people had been decided upon at Head Office, more particularly by Brigadier Van Rensburg, that it was urgent and that it was necessary for the Technical Division to assist with the execution of the decision. He was not in a position to check the information conveyed to him and he

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accepted the version and orders as conveyed to him by De Kock in a *bona fide* manner as correct and properly authorised.

He was further informed that it was decided at Head Office that explosives should be used. He was not involved in the identification of the victims, the planning of the operation or in the decision-making. He was told that the operation was to be conducted in such a way that it should appear that the ANC or a similar organisation was responsible for it.

He immediately proceeded to task Kobus Kock, a member of his staff, to pack all the tools, explosives and radio apparatus needed for the operation.

De Kock had made a vehicle available to him and Kock, who was to accompany him to Port Elizabeth. Since the Technical Division only had marked vehicles, none of them could be used for such a covert operation. He was given a key to an unmarked motor vehicle and an envelope which contained money to cover their expenses. They left for Port Elizabeth that evening.

He testified that they arrived in Port Elizabeth early the next morning, where they were met by Second Applicant and taken to a house

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where they found Vermeulen and Snyman. He could not remember whether the Fourth Applicant was present or not.

The Commanding Officer of the Security Branch in Port Elizabeth, Brigadier Gilbert, arrived later and outlined the situation to them. Gilbert told them that the persons were in the process of defecting to the ANC with sensitive information regarding the information networks and other secret operations that were conducted by the Security Branch in the Eastern Cape. He could not remember whether Niewoudt (Second Applicant) was present at the safe house at the time.

He stated that Second Applicant thereafter met up with them in a white Volkswagen Jetta motor vehicle. It was then taken to an uninhabited area where it was equipped with explosives. The explosives were placed under each of the seats of the motor vehicle in such a way that it could be detonated by a remote control, the operation of which was demonstrated to Second Applicant.

After the vehicle had been so prepared, he returned to Pretoria. He had not gained any benefit from the operation and did not harbour any personal feelings of malice or resentment towards any of the victims. He did not know any of the deceased, how many victims

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there were to be killed and did not have any problem with any of them.

Fourth Applicant testified that he was a former member of the operational group “Koevoet” and later became a member of the Vlakplaas group. Acts committed by him were acts as a member of the South African Police in the execution of his duties. He was intent on protecting the government of the day. He testified that he supported the system of apartheid, but that he did not have any problem with black people as such. For him the real issue was terrorism against the country.

He met De Kock at Head Office on 13 December 1989 and accompanied him to the office of Brigadier Van Rensburg. De Kock told Van Rensburg that he would be sending him (Ras), Snyman and Vermeulen to Port Elizabeth whereupon Van Rensburg wished him good luck. He then left and De Kock remained behind.

Later on that day he again met up with De Kock at Vlakplaas, where he was given the order to assist the Second Applicant in the operation. He was told that he would fall under the Second Applicant’s command during the trip to and during his stay in Port Elizabeth. He could not remember the details of the discussion with the Second Applicant whilst travelling to Port Elizabeth, but he did remember a

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conversation with the Second Applicant about the persons who wanted to defect to the ANC and the dangers thereof.

He did not see the Third Applicant at the safe house the next morning and remembered that he had been out to the shop. On his return, the Third Applicant was not there. They all later departed to the area where the motor vehicle was equipped with explosives and whereafter the Third Applicant and Kock returned to Pretoria. He and his colleagues from Vlakplaas assisted in the installation of the explosives and devices in the said motor vehicle.

They were then taken to the proposed scene of the explosion during the afternoon in order to familiarise themselves with the terrain so that they could keep safe at the time of the explosion. The rest of the afternoon was spent at the beach and at a braai at the home of Security Branch policeman, Carl Edwards. He testified that during this period, Edwards mentioned to him that two of the members were involved in fraud, in that they appropriated money intended for banned organisations for their own benefit. It was explained to him that on the instructions of former State President P W Botha, the said money was meant to be intercepted by the Security Branch. Such intercepted money had to be paid into a secret fund, but there were instances when it was retained by members and not paid into the secret fund.

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Later that evening, he and his colleagues, including the Second Applicant, gathered at the scene of the planned explosion and attended to the activation of the ignition device. He and Snyman then hid in the bushes but were unable to observe who arrived or how many persons arrived. He was in any event not in a position to have aborted (even if he wanted to) the operation at that late stage since the Second Applicant was in charge of the operation.

He explained that the primary reason for travelling to Port Elizabeth was that if the main operation did not succeed, he and the other members from Vlakplaas could assist in an alternative operation to kill the deceased.

He testified that the deceased arrived in what is referred to as a 'combi' motor vehicle and, as previously arranged by the Second Applicant, switched vehicles. They drove off in the Jetta motor vehicle. Shortly thereafter, the Second Applicant detonated the explosives in the motor vehicle and as a result, the vehicle exploded and all of the deceased were killed. They then went to the scene where he took the remote control from the Second Applicant, then left for Pretoria with the other Vlakplaas members. He later returned the device to De Kock at Vlakplaas.

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In regard to what De Kock told him, he testified that he was told that the intended victims were about to defect to the ANC and that they wanted to disclose Security Branch involvement in the Cradock Four killings.

During the Second Applicant's evidence in chief, an application for postponement was made and granted. It seemed that his representative thought it wise for him to attend a psychiatrist. The postponement was for a substantial period.

On resumption, it turned out that the Second Applicant was indeed seen by Dr Crafford, a qualified psychiatrist who was called to testify before the Second Applicant resumed his evidence. Dr Crafford's qualifications were not challenged and consequently, this need not be dealt with.

Dr Crafford's evidence relates to two distinct aspects of the Second Applicant's case. The first involves the question of the Second Applicant's mental health and secondly, the impact thereof on the testimony he gave during the period prior to seeing Dr Crafford in April 2004, when the hearing was postponed.

It is important to bear in mind that, according to his evidence, Dr Crafford's initial contact with the Second Applicant was in 1995 when

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the latter was referred to him by the Old Mutual Insurance Company for an opinion regarding disability. Dr Crafford had then diagnosed that the Second Applicant suffered from post-traumatic stress disorder. There is no reason to doubt that diagnosis as was suggested by counsel for the families, who initially clearly stated that he did not challenge the diagnosis.

However, the more important aspect of Dr Crafford's evidence relates to his opinion of the effect the Second Applicant's state of mind had on that part of his evidence tendered prior to the postponement. He stated *inter alia*, that in cases of post-traumatic stress disorder, *"... there is often a problem with concentration and this had become very bad with Mr Niewoudt when he last went to see me in April. People with post-traumatic stress disorder ... lose track of conversations of what they are saying ... or they might lose track of what is being said to them in a conversation – this was the case with Niewoudt in April 2004. He is certainly a lot better now."*

The import of his evidence is that he saw the Second Applicant in April 2004, after the application for postponement was granted and his opinion was based on the assumption that the Second Application was again suffering from post-traumatic stress disorder. He stated that the Second Applicant has since improved sufficiently and was capable of resuming his testimony free from any negative effect of his condition.

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Under cross-examination, however, it turned out that Dr Crafford had not tested the Second Applicant's information by applying any of the customary psychiatric tests which investigates the possibility of feigning symptoms and so forth. He explained that he could confirm his diagnosis as genuine by just looking at the Second Applicant. He could not say how he could make this diagnosis about the mental condition of the Second Applicant during April 2004 in this manner.

In challenging the objectivity of Dr Crafford's report, Mr Naidoo put it to Dr Crafford that he was biased in favour of the Second Applicant and queried his conclusion "... *that prior to the said postponement, the Second Applicant was having difficulty in following what was going on in court, he was having difficulty in getting his thoughts together and answering questions clearly*." Dr Crafford conceded that apart from speaking to his counsel he relied on the Second Applicant for that deduction.

In the light of the above, Dr Crafford's evidence in regard to the impact the Second Applicant's state of mind had on his initial evidence, must be approached with a great deal of circumspection. The lack of any scientific support for his conclusion makes it extremely difficult to accept the evidence of Dr Crafford as reliable, especially in relation to the effect of the Second Applicant's state of mind on his

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initial evidence. Clearly, Dr Crafford had not properly established the Second Applicant's mental condition at the material time.

In the circumstances, Dr Crafford's evidence with regard to his conclusion of the Second Applicant's mental condition is tainted, especially, by the lack of objectivity. Dr Crafford's testimony with regard to any negative effect the Second Applicant's mental state might have had on his evidence in this hearing prior to the postponement, can therefore not be relied upon.

George Andre Johannes Steenkamp was called to testify on behalf of the families. He was at the material time a Superintendent in the South African Police Services.

Steenkamp's evidence revolved around a docket that he handed to Colonel Eric Strydom, a former Head of the Murder and Robbery Unit of the Police in Port Elizabeth. He stated that Colonel Strydom had said to him that the Security Branch should sort out their problems. Steenkamp did not elaborate on this.

Steenkamp further testified about an alleged invitation by the Second Applicant to have tea at his office. He stated that the Second Applicant had a criminal docket with him.

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Counsel for the Second Applicant then objected to this evidence on the ground that it had not been put to the Second Applicant when he testified.

Counsel for the families conceded that this was an oversight on his part and he subsequently requested that Steenkamp's evidence be disregarded. In the circumstances, it will be disregarded.

It might be well to point out that the process as established by the Act is *sui generis*. As it developed during its relatively short life span, the Act and in particular decisions as to amnesty applications were not subject to the system of precedent. Indeed it could not have been so because, by the very nature of the commission, there was no time to develop precedents. In any event, panels were dealing with Applications at the same time and hence they could not have been subject to any precedent in doing so. There is no reason to deal with these applications differently.

All that is required in terms section 20 (1), is that the [sitting] Committee be satisfied (own emphasis) that the requirements as set out therein have been complied with.

It would be convenient to deal with the applications of the Third and Fourth Applicants first and then with that of the Second Applicant.

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Section 20 of the Act is of application and the relevant portions of subsections (1) and (2) provide that:

"(1) If the Committee, after considering an application for amnesty, is satisfied that –

(a) the application complies with the requirements of the Act;

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and

(c) the applicant has made a full disclosure of all relevant facts,

it shall grant amnesty in respect of that act, omission or offence."

In assessing whether section 20 (1) and in particular subsection (1) (c) has been complied with, it must be noted that human frailties such as forgetfulness can have an impact on the evidence. With the passage of time it is possible to forget details pertaining to certain fundamental aspects. Applicants should not be penalised for forgetting certain details as long as the relevant fundamental aspect(s) are covered in the evidence.

If the relevant fundamental aspects are indeed covered by the evidence, then, I would think that section 20 (1) (c) would have been substantially, and therefore satisfactorily complied with. If these aspects are not properly and acceptably testified to, then section 20

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

(1) (c) cannot be said to have been complied with, substantially or otherwise.

Section 20 (2) provides that :-

> "(2) In this Act, unless the context otherwise indicates, 'act associated with a political objective' means any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date by –
>
> (a) any member ... ;
>
> (b) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement, and which was committed *bona fide* with the objective of countering or otherwise resisting the said struggle;
>
> (c) any employee ...;
>
> (d) any employee ...;
>
> (e) any person ...;
>
> (f) any person ...;
>
> (g) any person ..."

The Second, Third and Fourth Applicants clearly fall within the category of persons referred to in section 20 (2) (b).

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

The Third and Fourth Applicants became involved in the killing of the deceased when they were instructed to provide logistical assistance to the Second Applicant by their commander, Colonel De Kock. In the light of such directives emanating from a senior officer, both assumed that proper approval had been secured for the intended operation and hence their participation as members of the Vlakplaas Unit. In the case of the Fourth Applicant, such *bona fide* belief was fortified by a visit to Brigadier Van Rensburg, who had wished him luck on his trip to participate in the operation.

They were both employees of the State and members of the South African Police Services, attached to a unit attending to the security of the country. They both had express authority to act within the course and scope of their duties as such against, as they believed, supporters and intended members of liberation movements engaged in a political struggle against the State and who were about to divulge sensitive information to the self same movement.

Each had the *bona fide* belief that they were acting in the interests of the State and were countering and resisting an attack(s) on the government of the day. The explanation and motivation provided to both were broad and scant. Even on their way to Port Elizabeth, they were merely advised about the broad reasons for the operation. Both accepted what they were told and relied thereon. Neither of them

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were furnished with any details which led to the conclusion that the deceased were such threats to the State that they had to be killed.

Viewed in the context that they were given instructions by Colonel De Kock (supplemented by Van Rensburg's good wishes), it is not too difficult to understand that they accepted that their superiors would have sanctioned the operation after having satisfied themselves (superiors) about the appropriateness thereof.

It is understandable therefore, that they did not bother themselves with the underlying details by which the decision to kill the deceased was arrived at.

Their conduct clearly demonstrates that they acted in terms of instructions and did not go further than that. Both did not know any of the deceased and clearly did not participate in the operation for personal gain. There is also no suggestion that either of them acted out of personal malice, ill-will or spite directed at any of the deceased. Given their positions and what they were told and understood, they believed that this operation was urgent and the only solution.

In the circumstances, it is clear that their applications comply with the requirements of the Act, that their specific roles were associated with a political objective and committed within the course of the conflicts

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

as envisaged in section 20 (1) (b), read with section 20 (3) of the Act. We are satisfied that both have also made a full disclosure of all the relevant facts in so far as they were affected in this regard. Consequently, their applications for amnesty as applied for herein, must be granted.

It is now necessary to deal with the application of the Second Applicant.

The Second Applicant was involved from the beginning of the series of events which culminated in the deaths of the deceased.

It seems that Van Rensburg, as ultimately conceded by the Second Applicant, had the power to veto any planned operation sanctioned by Brigadier Gilbert and/or the Second Applicant. This then acquired much importance in the leading of evidence and so much so that the dispute between De Kock and the Second Applicant as to what the latter told Van Rensburg was focused on for a substantial time during the hearing and in argument.

This is understandable because of the nature of the dispute with regard to this aspect. If the Second Applicant had told Van Rensburg, as testified to by De Kock, that the deceased were to be killed to prevent them from disclosing the common law crimes of fraud, then the deaths

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could not be considered to be politically motivated, as required by the Act and amnesty could not then be granted. The application would fail at that point and on that ground alone.

If he did tell Van Rensburg, as he testified, that the planned killings were motivated by the necessity to protect the image of the government, the security network of agents, members of the force and their addresses then the operation would clearly fall within the definition of 'political motivation' and then further enquiry into the application would follow.

Colonel De Kock testified broadly on the secret operation of his unit.

He testified about the conversation between Van Rensburg and the Second Applicant in his presence. It is in this respect that there is a dispute between his evidence and that of the Second Applicant.

However, towards the end of his testimony, De Kock stated that the Second Applicant had lied about the motives for killing the deceased. It is not absolutely clear in what context he alleged that the Second Applicant had lied. It is possible that he referred to the evidence of the Second Applicant in this hearing or he could have been referring to the conversation between the Second Applicant and Van Rensburg.

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In this event, such a 'lie' would give rise to a number of interpretations on the import of his evidence.

It is too dangerous to speculate or even second guess De Kock's evidence in this regard. There are a number of other criticisms levelled at Colonel De Kock's evidence and in particular, reference was made to his emotional state and attitude towards his erstwhile superiors and his feeling that he had been betrayed by them. His evidence should therefore be approached with even greater care before accepting it and relying on it.

The argument that he might have a score to settle with certain people who were then his superiors and that, his evidence might therefore be tainted, does not hold water. There is no evidence to support this line of reasoning and is at best, speculative.

It is, however, not necessary to deal with all the other criticisms levelled against him because of the ultimate approach adopted towards his evidence.

In view of the uncertainty of the context in which he stated that the Second Applicant had lied, it would, without making any finding on his credibility, be safer to ignore the evidence of Colonel De Kock in determining the application of the Second Applicant. This approach

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

would in any event satisfy the argument that his evidence was untrue and unreliable.

Having adopted that approach, the application will then have to be decided on the evidence of the Second Applicant and the other acceptable evidence in so far as it is relevant to his application.

The Second Applicant was the sole source of the relevant information and having provided the information to the authority upon which he relies in his application, it is imperative to examine his evidence as to the reasons for the ultimate decision to kill the deceased in order to establish whether section 20 of the Act has been satisfactorily complied with. Furthermore, other evidence, especially that of the other applicants cannot serve to support the Second Applicant's version since he was the source of the information they were given in this regard. Hence, on the fundamental information, he stands alone.

Section 20 (1) (a) seems to have been complied with, if it is to be interpreted as 'formalities' that had to be complied with. The subsection could not have been intended to refer to requirements of the Act, as there are so many requirements to be found in the Act, many of which would not be of any application in this type of application. e.g. procedures related to certain types of applications by victims of apartheid.

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It is subsections 20 (1) (b) and (c) which are of particular relevance in the application of the Second Applicant.

It is necessary to deal with the evidence of the Second Applicant. It must be pointed out that aspects such as demeanour do not play any role in assessing his evidence because of the possibility of his unsound mental state during the first part of his evidence in chief. It must be noted that there is no intention to create any precedent in this approach to his evidence.

Nonetheless, although he carries no onus to provide evidence himself, (such evidence can be received from another source), it so happens that the only person who had first hand information about the events and factors relied upon to arrive at the decision to kill the deceased, is the Second Applicant himself. It is against this backdrop that the success or otherwise of the application must be based.

In examining the evidence of the Second Applicant, there are a number of fundamental and material aspects which must be dealt with.

It must be pointed out that, at this stage, the scrutiny of his evidence is not directed at the wisdom and/or the merits of the decision to kill the

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deceased, but at whether section 20 (1) (c) of the Act has been complied with or not.

The Second Applicant relied mostly on the authority of his superiors as the basis to explain the murders. In this regard he referred to his superiors *viz* Gilbert and Van Rensburg. While he relied on this authority, combined or otherwise, it is clear that he was the only source of the information which was relied upon to make this decision and to execute it. The others, particularly the Third and Fourth Applicants, relied on what they were told.

His evidence on the very authority he relies on is unsatisfactory. At first he maintained that it was the authority of Gilbert which was irreversible and upon which he relied. Yet, later in his evidence, he conceded that if Van Rensburg was not satisfied with the reasons for the planned murders, he was able to give instructions that the plans, though authorized by Gilbert, be aborted. The Second Applicant would then have gone back to Gilbert to deal with the issue further. However, he stated that Van Rensburg in fact approved of the proposed killings.

As his evidence proceeded, it became apparent that he began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased. For example, initially he stated that he fed the information to Gilbert and that they discussed the situation with

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one another. It is clear that the Second Applicant did not play an insignificant role in the decision making process and indeed rejected certain less drastic suggestions made by Gilbert. At some stage in his evidence he said that they took the decision together. Yet, later in his evidence he placed such responsibility squarely on the shoulders of Gilbert. While technically this is correct, he clearly tried to minimise his role in the decision towards the latter part of his evidence.

This raises doubt as to what he disclosed to Gilbert and to Van Rensburg for that matter, in order for them to grant authority for the murders.

This in turn raises questions as to what his actual role in the developments really was.

During his evidence it seems that divulging information of Security Police complicity in the Cradock Four incident played a role in the decision making process. As far as the Second Applicant is concerned, and on his own evidence, this did not play a role, as the decision to kill the deceased had already been made by the time mention of the Cradock Four was made.

He furthermore explained that he used the opportunity of the alleged presence of a trained ANC member to lure the deceased into the

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motor vehicle which was subsequently blown up. Yet, especially in the light of his position as Head of Intelligence, he did not follow up on what had happened to this ANC member after the incident. He testified that he mentioned it to another section for steps to be taken in that regard. However, he did not find out what transpired in that regard thereafter, and if this person was found and arrested, whether anything important was disclosed during any interrogation. This raises serious doubt as to whether this person, and indeed the circumstances of his presence, ever existed. The Second Applicant's inability to explain why he did not follow this issue to its logical conclusion exacerbates the situation.

When he went to collect his travel documents prior to going to Pretoria, Gilbert told him about the threat by some of the deceased to divulge information regarding offences committed by members of the Port Elizabeth Security Police if charges regarding fraud were not withdrawn or in some way made to disappear. It is strange that Gilbert seemed to mention this almost by chance when the Second Applicant collected his air-ticket. It is to be expected that the threat of such disclosures, which would have had a similar effect of passing on information to the ANC, would specifically and pointedly have been reported to the Second Applicant who was personally dealing with the situation and indeed the future of this group of would-be turn-coats. Such

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information would be cardinal to the material considerations at the time.

In the circumstances, the almost casual allusion to the fraud, as referred to by the Second Applicant, is illogical and far fetched. Moreover, the Second Applicant's virtual disinterest in it is similarly unbelievable and indeed improbable.

It is also significant that he did not provide details of the information he obtained through the scheme of intercepting mail allegedly belonging to Warrant Officer Mgoduka.

He alleged that such information gleaned from the intercepted mail played an important role in assessing the situation and in arriving at the conclusion that at least Warrant Officer Mgoduka was in the process or about to cross over to the ANC. Such details would in all probability have been unusual and not experienced on an everyday basis. This operation of eavesdropping on and intercepting mail of colleagues was indeed, by all accounts very unusual in itself. The details of who did the interception, when it was done and why no action was taken to counter the plans contained in the correspondence, cannot be easily forgotten and the failure to testify in regard thereto is significant. Indeed, the alleged information provided sufficient grounds to arrest

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Warrant Officer Mgoduka and possibly charge him in terms of the security laws. The failure to do so remains unexplained.

The information the Second Applicant alleges that he had, was markedly different to that which he said pertained to Warrant Officer Mgoduka and that which he stated pertained to the rest. The information that he testified to in relation to the rest was meagre to say the least. This raises the question as to whether he really had any or sufficient information to base a decision on or, more importantly, whether the situation he attributed to them indeed existed at all.

He testified that he thought that one or some if not all of the deceased were leaking information to the ANC. He explained that he discovered that the agent he sent out of the country after being briefed in the presence of all four of the deceased, had been arrested by the ANC. He concluded that it had to be one or more of the deceased who had betrayed the agent to the ANC. At the time he had no other information against any of the deceased. When he went to Gilbert, he intended to obtain formal authority from his superior to kill all the deceased. His intention to kill them was clearly based on suspicion and indeed could not, in the circumstances, have been directed at a specific person or persons. It is difficult to believe that such drastic conduct would be resorted to on such flimsy grounds. This begs the question as to what information, if anything at all, remotely suggested

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

that any of them had, at the time, links with the ANC, let alone that any of them had intentions to divulge sensitive information and in doing so, cross to the ANC, so as to justify killing them.

As it turns out, probably in an attempt to justify the ultimate decision to murder, he testified that the courier of the letter elicited from an ANC member had been betrayed and as a result, had been killed.

When it was pointed out to him that this could not be so, he stated that the person who had been killed was one Toto Mbali. From the context of his initial evidence, it is clear that the courier was not Toto Mbali. The Second Applicant did not explain this contradiction. It is furthermore noteworthy that the name of Toto Mbali did not feature prior to that, either in his testimony or his written submission. In any event he gave no detail as to the role Toto Mbali or his alleged killing played in the killing of the four deceased germane to this application.

In regard to the evidence of the Second Applicant, the aforementioned are, *inter alia*, material issues which give rise to concern. Each on its own present sufficient disquiet so as to cast doubt on the veracity of his evidence. Most of the issues defy logic, while others are either improbable or are self-contradictory. What is more, their importance is fortified by the fact that each is alleged to have played a significant role in arriving at the conclusion that all the

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

deceased were in contact with the ANC and consequently, because they were each a risk, had to be murdered.

The globular effect of these criticisms enhance the reservations in respect of his evidence, in particular, those relating to the reasons for these murders. On the conspectus of the relevant evidence, it is still not clear what was taken into consideration in deciding to murder the deceased either as a suggested solution or in terms of granting authority to commit these murders.

In the circumstances it is extremely doubtful as to whether the Second Applicant has fully disclosed all the relevant facts pertaining to why and how the decision to kill all the deceased was arrived at. From the evidence, it cannot be said that the Act has been sufficiently complied with in this regard.

In the circumstances therefore, the Second Applicant has not, even substantially, complied with section 20 (1) (c). We are not satisfied that the Second Applicant has substantially made full disclosure in regard to this application.

Furthermore, even if the version of the Second Applicant were to have been regarded as a full disclosure, which we do not find, there is also another aspect in this application that needs to be dealt with. In

Ole Bubenzer-"Post-TRC Prosecutions in South Africa"-Martinus Nijhoff Publishers-2009

considering section 20 (1) (b), the committee must have regard to section 20 (3) of the Act.

Section 20 (3) reads as follows:-

"Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) the motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objectively pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted –

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(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed."

Section 20 (3) of the Act directs that in establishing whether section 20 (1) (b) has been complied with, reference to the criteria listed therein must be had. While it has been argued that this list of criteria is an exhaustive one, the approach of the amnesty committee in the form of the panels which presided in similar hearings always regarded the list as not exhaustive. There does not seem to be any reason to adopt any other approach in this hearing.

In any event, the facts of this application do not seem to require consideration of criteria which fall outside the list. Indeed none were suggested. Of importance in this list, are *inter alia*, subsections (c) and (f).

The gravity of the acts in question is most important because the deceased were killed. Not much importance can be placed on the manner in which they were killed as this was intended to be made to

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look like the work of the ANC. However, in the context of the situation as described by the Second Applicant, the gravity of his actions is not insignificant.

According to the Second Applicant, the political objective sought to be achieved by his actions, was to protect his network of operation within the area of his duties as Head of the Intelligence Section of the Security Police in Port Elizabeth. He suspected all of the deceased of having contact, in varying degrees, with the ANC over the previous approximately five to six months.

At the time, there were various pieces of legislation available to the Security Forces of the country to use in order to curtail or deal with persons considered a threat to the safety of the citizens of the country, the government of the time and the erstwhile ruling party.

Specifically, the Internal Security Act No. 74 of 1982 was in operation at the material time. That Act contained clear provisions for the arrest and/or detention of persons suspected of being a threat to the Internal Security of South Africa.

Indeed, history records that many people were arrested and detained for long periods of time in terms of that Act and without a hearing and/or trial. The provisions also included detention designed to obtain

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information to the satisfaction of the interrogator. This was regularly used by the Security Forces of the time.

Then there was also the common law crime of treason available and with which people were charged from time to time.

In applying these criteria to the version of the Second Applicant, the conduct of the applicant must be measured in terms of the directness and proximity of his conduct in relation to what was sought to be achieved thereby and indeed the proportionality of the conduct in relation to what was being sought to be achieved, so as to place his conduct into proper perspective and context in order to determine whether the act, omission or offence in question falls within the provisions of the Act.

Second Applicant stated that in discussing the options with his superior, Gilbert, all the alternatives, including less drastic actions, were considered. These were discussed between them and killing the deceased was regarded as the only option in the circumstances. Save for stating that other lesser options were not appropriate, he did not venture any explanation as to why those options were regarded as inappropriate. The argument that he might have been wrong in making the ultimate choice raises the question of whether, in

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considering notions such as proportionality, the conduct in question must be measured objectively or subjectively.

In applying the directives of the Act, it is clear from section 20 (3) that the conduct under scrutiny must have been proportionate to the purpose of the objective of the conduct. This must be measured objectively. In testing the severity and deleterious effects of the conduct, the standards set by society in general in determining the justification must be used as the social barometer to do so. It is this social yardstick that places the exercise within the boundaries of objectivity.

Placed within an objective context, the killing of the deceased must be measured against the interests sought to be protected, which must of necessity fall within the political objective pursued. In examining the proportionality between the consequences of the Second Applicant's conduct and the political objective sought to be achieved, it is clear that the conduct cannot be justified if the purpose it was intended to serve was either non-existent or objectively of insufficient importance or if it would clearly not achieve its intended purpose.

The more severe the deleterious consequences of the conduct, the more important the achievement of the objective must be if the

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conduct is to be objectively regarded as reasonable and justified in the circumstances.

See : *R v Oakes* [1986] 1 SLR 103 – CANADA

There must also be proportionality between the conduct and the intended beneficial consequences of that conduct.

The conduct must be proportionate to the ultimate benefit sought.

See : *Dagnenais v Canadian Broadcasting Corporation* [1994] 3 SLR 835 - CANADA

While these decisions serve to assist in gaining insight into the objective approach required to deal with this aspect of proportionality, the enquiry must be put into the South African context.

The benefit sought by the Second Applicant in this case was the protection of the identities and addresses of his colleagues and security police agents and hence the government of the day and its image.

The victim in the Johnson application, Mrs Hanabe, was a school principal and a member of the Klipplaat Municipal Council. During

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1991, the local ANC Youth League, of which Johnson, the applicant in that matter, was an executive member, decided to pressurise the councillors to resign from council in order to render that tier of government ineffective. The strategy seemed to be very important to the youth league and its members took it very seriously. Mrs Hanabe refused to do so and after her house was set on fire, she fled to Uitenhage.

In February 1991, the Executive Committee of the local ANC Youth League discussed the matter and decided that Mrs Hanabe should be killed. Later that month, Johnson and some of his fellow members followed Mrs Hanabe to church and waited for her. When she came out, Johnson shot at her in an attempt to kill her in pursuance of the decision. She did not die but sustained serious injuries as a result of which she was rendered disabled. Accepting that the campaign to end the system of apartheid entailed, *inter alia*, strategies such as non-collaboration with such a system, the amnesty committee accepted that the strategy fell within and complied with the provisions of the Act in so far as it was based on political considerations and pursued with a political objective.

However, it reasoned that in considering section 20 (1) it had to refer to section 20 (3) of the Act. It reasoned further that the aim to render to municipality ineffective had in any event been achieved when Mr

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Hanabe fled Klipplaat. The political objective had therefore been achieved in that regard. It followed therefore, that the subsequent attempt to kill her was not proportional to achieving what it sought to achieve because despite her not resigning, she had been rendered ineffectual in that regard. The attempt to kill Mrs Hanabe was consequently found not to be proportional *vis-à-vis* the objective so pursued, and as a result the offence for which amnesty was applied for was not an act associated with a political objective. The application was thus refused.

The reasoning in the decision of Ntsikelelo Don Johnson, clearly illustrates the approach adopted in the Second Applicant's present application. Reference to this decision is made for illustrative purposes only, and nothing else.

It has been argued in regard to proportionality, that other policemen were granted amnesty for similar crimes and therefore the Second Applicant should benefit in the same way. Without wanting to embark on a debate on this aspect and bearing in mind that the process is not based on precedent, it is necessary to point out that this application is unique.

The murders of members of liberation movement by members of the State Security Staff was based on the necessity to avoid international

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focus and political embarrassment which would arise during such political trials of members of liberation movement. It therefore became a norm for the Security Forces to resort to covert means to deal with certain members of liberation movements in such a manner in order to avoid unwanted focus.

Charging members of the Security Forces would attract far less international (and indeed local sympathy) and attention that would be the case when charging members of liberation movements. Within this context, the murdering of members of the Security Force would therefore be far less objectionable than would be the case in the killing of members of liberation movement. (It must however be emphasised that in neither event are the murders condoned). It would consequently attract far less attention.

Furthermore, in order to be accepted into the ranks of the ANC, it is common knowledge that the deceased would have had to prove their *bona fides* and prove their loyalty to the organisation. It is also improbable that after five months of communication with the ANC, the deceased would not have divulged the key information which the Second Applicant sought to protect. In the circumstances it is probable that the information had already been communicated to the ANC. There was therefore nothing to protect and the deaths of the

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deceased would not, in the circumstances, have served any political objective as envisaged by the Act.

The Second Applicant's application must therefore fail on this ground also.

The failure of a family member of any of the deceased to testify and deny that any of the deceased were connected to the ANC, was raised as a matter which should enhance the application of the Second Applicant. It does not follow that the failure of any of the deceased's family members to testify would have assisted the committee any way. None of them were privy to the planning or commission of the murders. Neither does it follow that such failure would attract any inference which dilutes their opposition to the application. The fact of the matter is that this process is conducted under the umbrella of a commission, the decision (of which) must be based on the evidence placed before it. Consequently the absence of evidence on behalf of the families of the deceased does not enhance the application of the Second Applicant.

We have therefore not been satisfied that the Second Applicant has complied with Section 20 (1) of the Act.

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In the circumstances, the Second Applicant's application falls to be dismissed.

In the result,

1. Second Applicant's application for amnesty is refused;
2. Third Applicant's application for amnesty is granted;
3. Fourth Applicant's application for amnesty is granted;
4. In the light of the next of kin of the deceased already having been declared victims for the purposes of the Act and were referred to the Committee on Reparation and Rehabilitation for consideration in terms of section 26 of the Act, it is not necessary to deal with their status in this regard again.

Dated at _____ on this _____ day of _____ 2005

_____
R PILLAY
JUDGE OF THE HIGH COURT

_____
N J MOTATA
JUDGE OF THE HIGH COURT

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E.

II.

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BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH AND RECONCILIATION COMMISSION

(HELD AT PORT ELIZABETH)

In the applications of:

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEUWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 December 1989

MINORITY DECISION

I have read the decision of Pillay and Motata JJ.

I do not agree with the decision in so far as it concerns the refusal of amnesty in the application of the Second Applicant, Gideon Johannes Nieuwoudt. My reasons for disagreeing are set out below.

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The Second Applicant's application for amnesty was refused by Pillay and Motata JJ on the grounds: (a) that they "were not satisfied that the Second Applicant has substantially made full disclosure in regard to his application" and (b) that even if the version of the Second Applicant were to be regarded as a full disclosure "the deaths of the deceased would not in the circumstances, have served any political objective as envisaged by the Act."

The facts relating to the incident and the evidence presented at the hearing have been adequately summarised in the majority decision. I shall, however, in dealing with Second Applicant's application highlight some differences in my approach to and my understanding and assessment of his evidence.

Furthermore, I generally agree with the majority's assessment of the evidence tendered by the other applicants and by witnesses who testified at the hearing.

In so far as the Second Applicant's application is concerned, it is common cause that he has complied with all the formal requirements of the Act.

I also agree that the Second Applicant falls within the category of persons referred to in section 22(2)(b) of the Act. He was an employee of the state and a member of the South African Police Services attached to a unit attending to the security of the country. He had express authority to act within the course and scope of his duties as such, against, as he believed, supporters and intended members of a liberation movement engaged in a political struggle against the State and who were about to disclose sensitive information to that organisation. He had the *bona fide* belief that he was acting in the

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interest of the state with the objective of countering or resisting the said struggle.

Although the Second Applicant knew all the deceased and most probably their families well, there was no evidence or even a suggestion that he acted out of personal malice, ill-will or spite directed at the deceased. Like the applicants, Du Toit and Ras, he acted upon the orders of a superior, in his case, Brigadier Gilbert, and to some extent Van Rensburg, the latter having given the order in regard to the logistical support to be rendered to Second Applicant to effect the killings.

Admittedly, the Second Applicant's position differs from that of the other two applicants in that he had set in motion a series of discussions and events when he first reported to Gilbert his suspicions in regard to the deceased. He also participated in discussions, even pressing for a decision that the suspects should be eliminated. However, he did not have any independent decision-making authority, nor did he have the authority to order the killing of the deceased. Indeed, he obeyed the instructions of his superior when he was told to first monitor the activities of the deceased and later to kill them. The fact that he was a more than willing participant in the execution of the order that the deceased be killed does not make him the author of the ultimate decision.

The Second Applicant did not deny that other factors, such as the threat of the disclosure of the Goniwe murders, had entered into the picture at the time that Gilbert ordered him to go to Pretoria. At this stage, the names of the perpetrators of the Goniwe incident were not within his knowledge. All he knew was that the threat of prosecution for fraud had caused the deceased or at least two of the deceased to threaten that they would disclose other misdeeds ("wandade") of the

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Security Police to the ANC. The issue of the fraud, according to the Second Applicant, was not the reason for the decision to kill because the decision that they should be eliminated had already been taken. It was, as he put it "the catalyst" for the order issued by Gilbert. It is perhaps understandable that the Second Applicant was not particularly perturbed by the threat of disclosure of the Goniwe incident because a decision had already been taken to kill them and he had no personal interest in the Goniwe matter. Van Rensburg and De Kock would have been the persons to feel perturbed since they had participated in the murder of Goniwe and this probably account for their willingness to have readily lent logistical support in the killings.

Admittedly, the Second Applicant's evidence is not without any difficulties and there were certain inconsistencies as well as certain instances where his evidence differed from that of the other applicants. Thus, for example, Du Toit was under the impression that the number of persons to be killed was three while Ras testified that he did not know the exact number. Taking into account the time period that has lapsed between the date of the incident and the hearing, as well as the agitated mental state of the Second Applicant, which in my view was clearly evident during the hearing, it cannot be said that these differences and inconsistencies render the Second Applicant's evidence so flawed that it justifies a finding that he had not made a full disclosure of all relevant facts.

The only real challenge to the Second Applicant's evidence was the evidence of De Kock which was tendered to show that the deceased were killed as a result of their participation in acts of fraud. As stated in the majority decision, De Kock's evidence should be approached with great care and I fully agree "that it is safer to ignore the evidence of De Kock in determining the application of the Second Applicant". I

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therefore accept Second Applicant's testimony that the fraud issue arose after the decision to kill had been taken.

There is one common thread that runs through the evidence placed before the Committee and that is that the prime reason for the killing of the deceased was the fact that they were about to defect to the ANC. Especially Ras, the Fourth Applicant, was emphatic in his evidence that he had been told by both De Kock and Second Applicant that the deceased were about to defect to the ANC. He added that Second Applicant, on their way to Port Elizabeth to carry out the order to kill the deceased, had also told him that they had already disclosed some information to the ANC. Having regard to the fact that the Fourth Applicant's application was prepared independently of that of the Second Applicant and that he was presented by a different lawyer, there is little reason to doubt the veracity of his evidence. His evidence in my opinion clearly militates against any conclusion that the Second Applicant's evidence on why the deceased were killed is not true or is a mere fabrication.

In regard to what De Kock told him the Third Applicant testified:

> "Mnr Kock (sic) het my meegedeel dat daar 'n probleem in die Oos Kaap was waar lede van die Mag betrokke was, wat onder andere betrokke was by koverte operasies en dat hulle, hierdie mense, by bedrog betrokke was en het hulle my dit eers later meegedeel Voorsitter die bedrog, maar dit is aan my genoem, maar hierdie mense het op die punt gestaan om oor te loop na die ANC met al die inligting waaroor hulle beskik het in terme van die inligting strukture van die Oos-Kaap."

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Although later in cross-examination Du Toit conceded that he was not sure who had said what to him, it is not without significance that he too, believed that the deceased were about to defect to the ANC.

I shall now deal more fully with some of the more detailed reasons for the refusal of amnesty to the Second Applicant on the ground of not having made a full disclosure of relevant facts, dealt with in the decision of Pillay and Motata JJ.

In the majority decision it is stated that: "[as] the evidence proceeded, it became apparent that he [Second Applicant] began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased."

In my reading and assessment of the Second Applicant's evidence he never tried to steer away from the fact that the decision to kill was taken on the information supplied by him. He never changed his evidence that he regarded the elimination of the deceased as the only solution or that he was more than a willing participant in all the activities that finally led to the killing of the deceased. What he emphasised throughout his evidence was that he operated within a very strict hierarchy of powers and that he did not have any independent decision-making powers in regard to the killing of the deceased, neither was he competent to give an order that they be killed.

The picture that emerged of the Second Applicant, on his own evidence, was that of a ruthless security policeman, but one who would only have acted within the structures, strictures and hierarchy of powers that prevailed at that time. Had he not disclosed the fact that the decision-making powers lay with his superiors and that they had

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issued the final order, it could certainly have been construed as him not having made a full disclosure in order to protect his superiors. His uncertainty or even contradiction as to whether Van Rensburg could have reversed Gilbert's order cannot in my view be regarded as material. Only Gilbert and Van Rensburg, both dead now, could have clarified what transpired between them. It is of significance, however, that in his written application Van Rensburg application states that the order was given by Gilbert and approved by a member or members at Head Office.

The fact that the Second Applicant did not follow up on what became of the trained ANC member whose presence he had used to lure the deceased into the vehicle in which they were killed certainly presents a difficulty in regard to credibility and he was extensively questioned on this. His testimony that his instructions to the deceased in regard to the ANC cadre was just a ploy to get them into the vehicle and his explanation that the arrest of the ANC cadre was a matter to be dealt with by the investigation unit who had been fully appraised of his presence do not make his evidence in this regard so improbable as to reject it as false. He testified that the presence of the suspected cadre was generally known amongst the security police and that "die swart lede reeds aan diens geplaas was om patrollies uit te voer." Had his instructions to the four deceased been intended to be carried out by him, the inference sought to be drawn in the majority decision would have been a fair one.

I also find myself in disagreement with the statement in the majority decision that the Second Applicant did not provide details of the information he obtained through the scheme of intercepting mail. There was clear evidence by the Second Applicant of an encoded letter from the deceased Mgoduka addressed to one Mr Isaac

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(identified by the Second Applicant as Roje Skenyana, a commanding officer of the ANC in Lesotho) mentioning a forthcoming "wedding". This letter was later decoded by him (Second Applicant). He also testified where letters came from and from whom.

There is no onus on the victims to give evidence at a hearing. However, in a matter such as this, one would have expected the families of the deceased to have assisted the Committee were they able to do so. Surely, if the families truly believed that the deceased had no contact with the ANC, they must have had some factual basis for this belief which could have assisted the Committee. Where the loyalties of the deceased lay, especially in the politically charged atmosphere at the time of the incident, must surely have been within the knowledge of their immediate family members who also had to suffer the consequences in their own communities as a result of their husbands' activities as members of the Security Branch.

The fact that no member/s of the families testified at the hearing, for example, precluded Counsel for the Second Applicant perhaps to have obtained some clarification on the question as to how it came about that it was stated by Counsel for the families at the inquest proceedings regarding their death, that the reason for the killing of the deceased was their contact with the ANC. The argument put forward by Counsel for the Families that it would have been embarrassing for the families to testify at the hearing as a result of the deceased's involvement with the security forces of the time is not convincing

The issue of proportionality was also raised.

In this respect too, I do not agree with my fellow committee members. Even if it were to be accepted that Second Applicant, Nieuwoudt, was

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the co-author of the actual decision to kill the deceased, the issue of proportionality should not be allowed to stand in the way of granting him amnesty. I do not agree with the argument that as a result of the five months that had lapsed between the time that the deceased were first suspected of leaking information to the ANC and their killing, "the deceased would not have divulged the key information which the Second Applicant sought to protect". Admittedly some information may have slipped through the net, but, according to the Second Applicant, they were at all times under surveillance, their mail was being monitored and security measures been tightened.

Proportionality was always a difficult issue to deal with in amnesty applications and although the precedent system does not apply in amnesty applications, a committee should at least strive towards some degree of consistency in applying the various provisions of the Act. Amnesty was granted in a number of applications where persons who were only suspected of having been collaborators of the Apartheid Regime were necklaced in a most brutal way. In the case of the murder of Amy Biehl, who was a foreigner and an innocent outsider, and in the case of the St James Massacre, innocent churchgoers were killed. In all these case the issue of proportionality did not prevent amnesty being granted.

It is true that on Second Applicant's own evidence the possibility of transferring the deceased and other steps were mentioned and discussed when he first reported the situation around the deceased to Gilbert. However, the situation had become more problematical as time progressed. It must also be borne in mind that at this time the leaking of information to the liberation movements had become a real threat to the Government of the day as a result of the disclosures made by Dirk Coetzee and other former security policemen. Surely,

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proportionality must be judged within the context of prevailing thought and circumstances at the time.

Furthermore, if proportionality were to be an obstacle in the application of Second Applicant it is hard to understand how amnesty could have been granted in any of the applications of security policemen. In all those instances, other options available in terms of the law were also available.

In the result, I am of the opinion that amnesty should also be granted to the Second Applicant, Gideon Johannes Nieuwoudt, for the murder of the deceased in Motherwell on 14 December 1989.

F J Bosman
Member of the Special Amnesty Committee

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F.

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

CASE NO: 3626/98
3859/98
3729/98

Before the Honourable Mr Justice Conradie
Before the Honourable Mr Justice Foxcroft
CAPE TOWN: Friday 8th May 1998

In the matter between:

THE NATIONAL PARTY OF SOUTH AFRICA	1st APPLICANT
JAMES MARREN SIMPSON	2nd APPLICANT
AND	
THE CHAIRPERSON, COMMITTEE ON AMNESTY OF THE TRUTH AND RECONCILIATION COMMISSION	1st RESPONDENT
THE TRUTH AND RECONCILIATION COMMISSION	2nd RESPONDENT
JANUARY BOY MASILELA	3rd RESPONDENT
DUMISANI HENRY MAKHAYE	4th RESPONDENT
LORD WILFRED HENDRICK MATSANE	5th RESPONDENT
COLIN CECIL COLEMAN	6th RESPONDENT
CHARLES NQAKULA	7th RESPONDENT
BARRY PHILIP GILDER	8th RESPONDENT
ABDULAH MOHAMED OMAR	9th RESPONDENT
BASIL KENYON DUMISANI MAFU	10th RESPONDENT
MONGANE WALLY SEROTE	11th RESPONDENT
BALEKA MMAKOTA MBETE-KGOSITSILE	12th RESPONDENT
PETER RAMOSHOANE MOKABA	13th RESPONDENT
NOSIVIWE NOLUTHANDO MAPISA	14th RESPONDENT
THABO MVUYELWA MBEKI	15th RESPONDENT
SATHY ANDRANATH R. MAHARAJ	16th RESPONDENT
JACOB GEDLEYIHLEKISA ZUMA	17th RESPONDENT
JOHN KGOANA NKADIMENG	18th RESPONDENT
P.R.F. MDLULI-SEDIBE	19th RESPONDENT

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LAMBERT LEHLOHONOLO MOLOI	20th RESPONDENT
BILLY LESEDI MASETLHA	21st RESPONDENT
RUTH SEGOMOTSI MOMPATI	22nd RESPONDENT
JACOB SELLO SELEBI	23rd RESPONDENT
ZWELEDINGA PALLO JORDAN	24th RESPONDENT
GARTH RICHARD STRACHAN	25th RESPONDENT
ESSOP GOOLAM PAHAD	26th RESPONDENT
NAKEDI MATHEWS PHOSA	27th RESPONDENT
PRAVIN JAMNADAS GORDHAN	28th RESPONDENT
SIPHO SIDNEY MAKANA	29th RESPONDENT
ALFRED NZO	30th RESPONDENT
JOE JOHANNES MODISE	31st RESPONDENT
ANDREW MANDLA LEKOTO MASONDO	32nd RESPONDENT
LINCOLN VUMILE NGCULU	33rd RESPONDENT
SNUKI JOSEPH ZIKALALA	34th RESPONDENT
KEITH MATILA MOKOAPE	35th RESPONDENT
JOSEPH MBUKU NHLANHLA	36th RESPONDENT
BIKI SAMUEL VICTOR MINYUKU	37th RESPONDENT
MTIKENI PATRICK SIBANDE	38th RESPONDENT
JOHANNES MUDIMU	39th RESPONDENT

Having heard Counsel for the APPLICANTS

and having read the documents filed of record;

IT IS ORDERED THAT:

1. In Case No 3626/98, the decisions made by the Committee on Amnesty (First Respondent) at Cape Town on 28 November 1997, to grant amnesty to the Third to Thirty-Ninth Respondents under the provisions of the Promotion of National Unity and Reconciliation Act, 34 of 1995, are reviewed and set aside.

2. The Committee of Amnesty is to consider afresh the applications for amnesty of the Third to Thirty-Ninth Respondents, including the issue of whether such applications properly comply with the relevant requirements of the Promotion of National Unity and Reconciliation Act. 34 of 1995.

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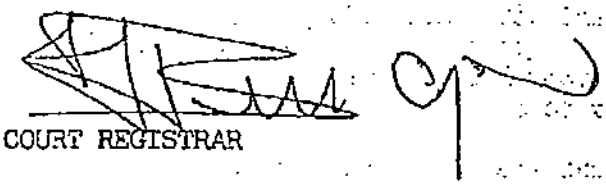
3. In consolidation application, Second Respondent in Case No 3626/98 (The Truth and Reconciliation Commission) is ordered to pay to Applicants in Case No 3626/98 the costs of one counsel taxed at the senior rate.

4. In the main application under Case No 3626/98, Second Respondent (the 'TRC') is ordered to pay to the applicants in that application their costs on an unopposed footing which are to include the costs of two counsel and the costs of today.

5. In the application for substituted service (Case No 3859/98) the Second Respondent ('TRC') is ordered to pay to Applicants (the National Party and Mr Jmaes Warren Simpson) 50% of their costs which are to include the costs of two counsel.

6. In regard to the intervention application (brought under Case No 3729/98) the Truth and Reconciliation Commission is to pay the wasted costs of the National Party and Mr James Warren Simpson on the footing that the costs of two counsel are allowed.

BY ORDER OF THE COURT



COURT REGISTRAR

Haarhoff Fourie & Butler
per: Willem Lodewikus Fourie
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/mg

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G.

NPA decides not to re-charge Wouter Basson

The National Prosecuting Authority of SA (NPA) has concluded that a fresh prosecution of Dr. Wouter Basson on the charges originally quashed by the Pretoria High Court is in law not permissible.

This follows the NPA's thorough consideration of the judgment by the Constitutional Court passed several weeks ago, and all the relevant principles relating to the doctrine of double jeopardy.

Dr. Basson was originally prosecuted in the Pretoria High Court on charges ranging from conspiracies to assassinate members of the liberation movements, misappropriation of State funds and dealing in drugs.

The trial court quashed charges relating to conspiracies to murder persons outside the borders of the Republic on the basis that the South African courts lacked jurisdiction to try such offences. The trial court later granted the accused discharge on other charges and ultimately acquitted him on the remainder of the charges.

The State sought to appeal to the Supreme Court of Appeal on legal grounds. The trial Court only granted the State leave to appeal on limited and conditional grounds. The State petitioned the Chief Justice in respect of the other grounds where leave to appeal was refused.

The Supreme Court of Appeal found that the State was only entitled to appeal on grounds of law and in that regard, was bound further by its earlier ruling. The Court found that all the grounds relied on by the State were factual and consequently, no appeal could result therefrom, even if such findings were incorrect. The Court also implied that the State had no right to a fair trial and that the Constitution protected only the rights of an accused. Consequently, the State was denied leave to appeal.

The NPA took the decision of the SCA to the Constitutional Court. The appeal was based on three grounds, namely:

* Bias on the part of the Trial Court
* The exclusion of the bail record as evidence in the main trial; and
* The quashing of the conspiracy charges

At a preliminary hearing in November 2003, the Constitutional Court found that the State was entitled to the protection of the Constitution in the prosecution of the criminals and that the above grounds were in fact constitutional matters in respect of which the State could appeal.

The leave to appeal was argued in February 2005 and the judgment was handed down in September 2005. On the issue of bias the Constitutional Court found that although the State was entitled to appeal on this ground, it had failed to establish that the judge was in fact biased, although it accepted that the judge had made a number of incorrect findings in law and on facts and found that the version of the accused on the commercial charges was improbable. On the second issue, the Constitutional Court likewise found that the State was entitled to appeal against the exclusion of the bail record, but it failed to prove that the judge's ruling was incorrect. In respect of both these grounds, the appeal was dismissed.

On the third ground, the Constitutional Court found that both the Trial Court and the SCA had erred in finding that a South African Court could

not try the conspiracy charges. It set aside the order quashing the charges and indicated that the State could now, at its discretion, re-institute these charges, provided that it could overcome the obstacle of double jeopardy. It decided that the issue of double jeopardy had to be adjudicated by the Trial Court if a fresh prosecution was instituted.

It is an intrinsic principle of South African law that an accused cannot be tried twice on the same offence or on substantially the same offence irrespective of whether he was convicted or acquitted in the first trial.

In this matter, the State had originally formulated six individual charges of conspiring to kill persons outside the boarders of the Republic as well as other charges relating to conspiracy to kill persons inside the boarders. The State also added an additional charge, namely count 63, which incorporated all the conspiracies which had been charged as individual counts, in essence therefore, count 63 was an exact duplication of the individuals counts.

The Trial Court quashed the individual counts relating to external conspiracies on the basis that it lacked jurisdiction to try them, but allowed the State to lead evidence on the self same charges for the purposes of count 63. In its final judgment on count 63, the Trial Court analyzed the evidence presented by the State on these charges, found that the evidence failed to established the guilt of the accused and acquitted him.

The NPA's view is that had the trial court been consistent, it would have refused to make a finding on the external conspiracies referred to in count 63 as it had earlier ruled that it lacked jurisdiction on such charges. The upshot of this is that Dr. Basson has in fact already been acquitted on the quashed charges.

Issued by Makhosini Nkosi, NPA Spokesman. Tel: 012 845 6760 or 082 824 2576. E-mail: media@npa.gov.za.

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H.

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APPENDICE "B" HANDED IN BY

GENL. K'NOBEL

VERWYSING • REFERENCE	TYDPERK • PERIOD TOT • TO	BESKIKKING • DISPOSAL

KANTOOR • OFFICE

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B

STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

DECEMBER 1992

A van der Merwe
SANDF

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General Knobel
Sanjen Genl.
Copy 5 of 5 Copies.

MF KENNEDY
GENERAL MANAGER
COUNTER-ESPIONAGE
25/2/93

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STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

INTRODUCTION

1. **Background.** Annexure A (attached) was compiled from various sources of information, and the document has already been handed to Lt-Gen Steyn. Based on the allegations contained in the document, the following has surfaced:

   a. Some members, contractual workers and co-workers of certain SADF components were involved. In some instances they are still involved in illegal and unauthorised activities that are detrimental to the safety, interests and welfare of the state.

   b. To a great extent some members of the senior command structure are trapped in the momentum of activities of the past, activities which are being subjected to prominent negative publicity at present. However, it cannot be ruled out that other members might be furthering an own agenda.

2. The conclusion reached after an all-inclusive examination of the information picture reflected in Annexure A, is that a revolutionary intervention will be required to eradicate all identified corrupt practices at once.

3. **Instruction.** Chief Director CI has instructed that the above information as well as other relevant information/intelligence be evaluated with a view to submit meaningful recommendations to the Steyn Commission.

4. **Aspects that will affect the execution of the assignment**

   a. **Unverified information.** The greater part of the information available is unverified allegations that need to be substantiated/refuted before proper evaluation is possible. However, indications and weight of allegations were of such a nature that the all-inclusive information picture, as reflected by the allegations, could serve as point of departure in the argument.

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b. **Period.** The short period allowed for a very comprehensive assignment might have a negative effect on the quality and evaluation.

c. **Manpower.** The sensitive nature of the matter has required that only one person could handle the matter.

OBJECTIVE

5. The purpose of the document is to make recommendations for action in respect of alleged precarious activities of components/individuals in the SADF on the basis of an evaluation of available information.

AREA

6. The report is structured as follows:

a. Evaluation/summary of/comment on information of precarious activities as contained in Annexure A. Details appear in Annexure B.

b. Evaluation/summary of/comment on information of individuals mentioned in Annexure A and detailed in Annexure C.

c. Summary of other relevant information/intelligence at the disposal of Division Intelligence (SDCI) that has been submitted to the Steyn Commission, and of which particulars are contained in Annexure D, E and F.

d. List of general conclusions.

e. Comment on possible actions.

f. Recommendations.

EVALUATION/SUMMARY OF/COMMENT ON INFORMATION OF PRECARIOUS ACTIVITIES OF SADF COMPONENTS

7. Annexure A is a complete base document containing precarious activities of SADF

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components, compiled from source reports. Further details of the events appear in Annexure B.

8. Essential aspects regarding the SADF components can be summarised as follows:

a. **Directorate Reconnaissance (Special Forces)**

i. It would appear that Project Pastoor had served as a peg for nearly all official operations/activities of Directorate Reconnaissance. In terms of the Project's objectives, it would appear that the Project had come into being in view of the conventional threat. However, the Project is still running. At the same time, it would appear that individuals are abusing Project Pastoor for activities not in line with Government policy, e.g. alleged weapons caches in Portugal for utilisation during an internal uprising, weapons caches in the RSA and Southern Africa, and clandestine transport of weapons by means of a modified aeroplane; alleged instruction to murder two Portuguese operators in detention; alleged training provided to resistance movements of other countries; alleged involvement in violence on the East Rand and alleged involvement in train murders in cooperation with Transnet's communications network.

ii. Even if the initial objective of Project Pastoor would have been kosher and would remain needful, it apparently developed and/or had been distorted to such a degree that even unauthorised and self-initiated actions of individuals are regarded as having been authorised by those concerned themselves.

iii. **Conclusion.** Project Pastoor and all other related projects/operations must be investigated in detail in terms of :

(1) Desirability to continue with the project in this point of time.

(2) Possible deviations from the original objective, with special reference to possible self-initiated actions under official pretext.

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b. Allegation regarding DCC

i. Allegedly, especially members of the Terrorism Section are involved in destabilisation actions against the ANC on own initiative and in cooperation with Brig Ferdie Van Wyk of GS2, Col Mielie Prinsloo of Directorate Reconnaissance (Special Forces) and Col Eugene De Kock of the SAP. A specific group of persons is said to include individuals whose agenda includes the discrediting of the AN; instigation of violence; facilitation for the failure of negotiations with the Government, etc. Alternatively, previous approved projects/actions are continued in a self-perpetuating manner or extended on own initiative to maintain an official slant.

ii. A proper evaluation of alleged activities on the basis of a "miscalculation table" ("verrekeningblad ???") with a view to come to a meaningful conclusion, is not feasible without further investigations and knowledge of normal duties of those involved. Whether additional alleged activities have been officially sanctioned or not (including instructing PAC members to murder AN members in Transkei; involvement to overthrow Holomisa; the training and arming of IFP members and involvement in SAP Col Eugene De Kock's Askaris), they are not in line with the Government's political objectives. This could create a serious credibility problem for the SADF and the Government.

iii. Allegedly various DCC members are involved in corruption or criminal activities, which likewise might lead to serious embarrassment for the SADF and the Government. It would appear that individuals involved in the above agendas integrate them in such a way with activities of an official nature that not only court-related evidence is being hampered, but those concerned might also implicate the SADF as "partner" (which is not the case).

iv. **Conclusions**

(1) An incisive investigation of the mandate and objectives of Section Terrorism is required. Other official instructions to individuals (such as an alleged assignment to Col At Nel to render intelligence support for discrediting actions), as well as their activities in this regard also require incisive investigation.

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(2) All allegations of corruption and criminal activities by members of DCC must be referred to the SAP or Directorate Provoos for investigation.

c. **Army Intelligence (GS2)**

i. Allegations mainly pertains to BEVKOM's involvement in discrediting campaigns against the ANC and a possible misrepresentation by the Bevkom component of the nature and extent of the threat in reports compiled by Brig Van Wyk. Should this be the case (which an evaluation of his reports might prove), it would indicate that Brig Van Wyk has his own agenda and that he uses Bevkom's existing mandate (whatever it is), for that purpose.

ii. Once again it would appear that authorised and official matters have been integrated with self-initiated objectives that high-hierarchy decision-makers had lost track of the initial objectives and real mandate. However, an investigation is required to confirm or refute these conclusions.

iii. Other alleged GS2 activities focuses on the allegation of intelligence support to VR's pseudo-capability in actions against the internal structures of the ANC and the PAC. These operations, whether they have been authorised or not, are also not in line with the Government's current political policy.

iv. It is also being alleged that Lt-Genl Miring gave instruction that Directorate Reconnaissance should not collect information on the right wing or on right-wing organisations, and that he wants to be informed of who stands where in Directorate Reconnaissance. In this regard Lt-Gen Miring's instruction would probably be in line with particular contingency planning. Directorate Reconnaissance plays an important role in this matter, and the conclusion arrived at is that Lt-Gen Miring wanted to make sure what the position was with regard to the authority (mandate) for the utilisation of power. This conclusion also corresponds with other information that Lt-Gen Miring is an avowed realist concerning reform initiatives in the RSA, as well as a supporter of these initiatives. Furthermore, one should guard against the wrong interpretation of his remark concerning the execution of a possible coup, should it be necessary. The remark was probably intended to refer to

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official emergency action in case of an attempted coup d'etat from either the left or the right wing.

v. **Conclusion**

(1) All aspects of Bevkom's mandate and instruction must be subjected to incisive investigation, and their desirability or not must be deliberated in view of the Government's political policy.

(2) Monthly reports and motivations for Bevkom's activities must be investigated to determine whether they do not serve as basis to obtain official approval for a self-initiated programme.

d. **7 Med Bn Gp**

i. The core aspects in respect of alleged activities of 7 Med Bn Gp centre on the privatisation of the chemical and biological warfare programme. The fact that the programme is still in the process of privatisation allegedly involves great risks for the SADF and the Government.

ii. Furthermore, information pertaining to activities of Brig (Dr) Wouter Basson in respect of an alleged chemical attack on Frelimo soldiers in Mozambique, an alleged poison disrepute action against the ANC, alleged execution of SADF elimination instructions and that he lives beyond the means linked to his rank.

iii. If these allegations are true, it is unlikely that these actions have been authorised because they are against the spirit of the current political process. Had these allegations been false, they would have the potential to cause unprecedented damage to the SADF and the Government because:

(1) Brig (Dr) Basson is indeed involved in chemical research: (And what is more, he is said to be related to Gen Lothar Neethling).

(2) The public would find it hard to accept the opposite in the light of previous official denials of other events (such as Ferdi Barnard's attachment to the SADF), linked to Brig (Dr) Basson's and the SADF's real involvement in chemical and biological research.

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iv. Without considering other facts, on the surface it would appear that Brig (Dr) Basson had adapted and developed an initial Project with pure objectives to a stage that self-initiated actions are the order of the day, which could only lead to embarrassment of a serious nature.

v. **Conclusions**

(1) Although aspects of Brig (Dr) Basson's project is being investigated by the Auditor-General, an incisive investigation regarding the desirability of the Programme in its totality, including cover firms, is required if it had not been done by this time.

(2) Instructions and mandates to Brig (Dr) Basson must be investigated and evaluated against alleged activities as to identify double agendas.

9. **General Conclusion.** The assignments, mandates, objectives, projects and submissions for activities of Directorate DCC (mainly Section Terrorism), Directorate Reconnaissance, Bevkom and 7 Med Bn Gp (which must include Brig (Dr) Basson), must be subjected to incisive investigation.

EVALUATION/SUMMARY/COMMENT OF/ON INFORMATION REGARDING INDIVIDUALS

10. Annexure A, which is a summary of allegations concerning risk activities of SADF components, contains names of various SADF members that require further explanation. Annexure C contains the explanation. Summarised, these individuals can be divided in three categories, i.e.

a. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.
   i. Gen Kat Liebenberg
   ii. Lt-Gen C.P. Van der Westhuizen
   iii. Individuals who can be discredited for activities by subordinates by virtue of their command positions. Individuals in this regard are:
   iv. Lt-Gen G. Meiring
   v. Gen-Maj H.J. Roux

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vi. Brig J.C. Swart
vii. Brig Tolletjie Botha

b. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously). Individuals in this regard are:

i. Brig Ferdi Van Wyk
ii. Brig (Dr) Wouter Basson
iii. Brig Oos Van der Merwe
iv. Col At Nel
v. Col H.A.P. Potgieter
vi. Col Mielie Prinsloo
vii. Col Bert Sachse
viii. Col Hannes Venter
ix. Comdt Anton Nieuwoudt
x. Comdt Henry Van der Westhuizen

11. If the allegations (mainly unsubstantiated information) of SADF components' activities (Annexure B) are judged in general, the impression (no substance) is gained that:

a. there is a possibility that certain general staff and senior officers had lost sight of the initial mandate and approved objectives of projects, and that they approve/accept/initiate actions that in actual fact involve additional unauthorised objectives and do not necessarily serve the interests of the State;

b. projects afford members the opportunity to follow a self-initiated agenda under an official cover.

12. Significantly, the individuals involved in the alleged activities are the same persons who have been mentioned in most of the alleged risk activities described in Annexure A and B.

13. **General Conclusion**

a. SADF components that must be subjected to incisive investigation (as indicated in the previous conclusion), must be investigated by an independent SADF working group to attain true refinement of mandate, assignments, objectives and to re-establish credibility.

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b. It is unlikely that mandate refining itself would bring about credibility in "the SADF and future continuous "clean" SADF actions". A ridding of incumbents from SADF components may also be required. In this regard, those individuals referred to in the three categories mentioned in Par 10, would be affected. The three categories are :

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities/possible double agendas of individuals whose names appear in Annexure B, is required.

INFORMATION/INTELLIGENCE MADE AVAILABLE TO LT-GEN STEYN

14. For the sake of completeness, documents concerning OP CRUSEN and OP WIDOW, which have been made available to Lt-Gen Steyn, are attached as Annexure D and E (Crusen) and F (Widow). The purpose of their inclusion is

a. to have a consolidated document at command;

b. to utilise it as reference when necessary.

15. To sum up, the following information is contained in the documents:

a. **Annexure D** (Op Crusen) : Individuals allegedly employed by or having contact with Division Intelligence and who act suspiciously, whether in connection with violence or criminal actions. (The documents contain recommendations regarding action.)

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b. **Annexure E.** Individuals not in direct contact with the SADF with potential concealed agendas and/or possibly involved in activities that can relate to acts of violence. (Recommendations for action have been proposed.)

c. **Annexure F.** Former BSB and SADF members (of whom some serve in the DCC), who might be involved directly or indirectly in activities that could have a bearing on acts of violence. (Recommendations for action have not been made.)

LIST OF CONCLUSIONS

16. Project Pastoor and all other related projects/operations must be investigated in detail in terms of:

    a. Desirability to continue with the project in the present dispensation.

    b. Possible deviations from the initial objective, with specific reference to possible self-initiated actions under official cover.

17. The mandate and objectives of Section Terrorism must be investigated incisively. Other official instructions to individuals (such as an alleged instruction to Col At Nel to render intelligence support for discrediting actions), and their activities in this respect, must also be investigated incisively.

18. All allegations of corruption and criminal activities by DCC members must be referred to the SAP and / or D Provoos for investigation.

19. All aspects of Bevkom's mandate and instruction must be investigated incisively, and its desirability, whether or not, must be deliberated in the light of the Government's political policy.

20. Monthly reports and motivations for Bevkom actions must be investigated to determine whether official approval for a self-initiated programme had not been sought.

21. Although aspects of Brig (Dr) Basson's Project has already been investigated, an incisive investigation is also required if it has not been done as yet, concerning the desirability for the continuation of the Programme in its entirety, including cover firms.

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22. Instructions and mandates to Brig (Dr) Basson must be investigated and matched against alleged activities to identify double agendas.

23. **General conclusions**

a. SADF components to be subjected to incisive investigation must be investigated by an independent SADF working group to attain a true refinement of mandate, assignments, objectives and re-establishment of credibility.

b. It is unlikely that mandate refining by itself would bring about credibility "in the SADF and future "clean" SADF actions". A ridding of incumbents form SADF components might also be required. In this regard, those individuals referred to in the three categories mentioned in Par. 10, would be affected. The three categories are:

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the State (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities / possible double agendas of individuals whose names appear in Annexure B, is required.

REACTION ON POSSIBLE DRASTIC ACTION

24. It is unlikely that a few adjustments would clean the record, in the light of the current credibility crisis of the Defence Force and the balance of allegations (albeit unconfirmed), regarding SADF components who apparently act outside their mandate, individuals attached to components who apparently exceed their mandate and / or pursue own agendas under official pretext, along with individuals in positions of command who have lost pace with true objectives. The only alternative would be drastic intervention.

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25. It is expected that the reaction of various groups with regard to drastic intervention in the SADF, would be experienced differently. Intervention may include refining of mandate, objectives and role; curtailment / cancellation of assignments; rationalisation of functions; large scale post transformations and retrenchments.

26. **General.** The timing for such measures and the manner the issue is to be approached, are regarded as crucial factors in determining the eventual reaction. Factors such as the general security situation, the Government's position with regard to moral high ground, the progress of the process of transition and the economic prospects will have to be considered in the timing. It is anticipated therefore, that the general reaction would coincide with the positive and / or negative general mood in the country.

27. **Anticipated reactions**

a. **Individuals who would be affected as a result of albatrosses of the past or possible discrediting due to activities of subordinates.** The most important factors that would affect their reaction are anticipated to be the manner in which it is to be performed and the acceptability of the motivation for the action. Individuals in these categories are regarded as realists who probably would accept the situation if it is handled correctly.

b. **Individuals involved in double agendas.** Among these individuals are two categories who would react differently:

i. **Those involved in alleged criminal activities.** No matter the circumstances, they would probably find fault with the dispensation, and would probably join particularly opposing right-wing groups.

ii. **Those who pursue self-initiated objectives under official pretext.** They probably believe that they act within their mandate and would feel aggrieved. The majority would probably join opposing right-wing groups.

Remark: Both categories would probably threaten to expose actions of the past, and might even proceed to expose them. However, that would be counterproductive because that would not only incriminate them, but would prompt the need for intervention for that very reason.

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c. **SADF components affected (including Division Intelligence).** Members of SADF components who might be affected by intervention, could react according to their political affiliation. The reaction would probably be less intense than that of members whose components might be closed down or drastically scaled down or be accommodated elsewhere in the SADF. Since the majority of SADF members are being regarded as apolitical and are professional soldiers, a realism prevails that the SADF should regain its credibility one way or the other. Should a drastic intervention be motivated as a solution, it would probably be accepted.

d. **The broad population.** The three respective categories that might react differently.

i. **Leftist grouping.** There will definitely be a propagandistic exploitation of the situation. The degree would be determined by the level of the transitional process. It can be expected that the more intense the reaction, the more negative the general reaction would be.

ii. **Right-wing grouping.** Intense reaction is expected, which would increase the right-wing threat potential for future violent actions. This will reinforce their ranks.

iii. **Central grouping.** It is expected that although the reaction would be negative, the intervention may be accepted with the correct motivation and the manner in which it to be executed and the timing.

28. **Procedure.** It is anticipated that :

a. In the light of the current negative mood, a sudden drastic intervention would harm stability.

b. An appropriate peg, such as the results of the Steyn investigation, would be the most acceptable action within a positive climate.

RECOMMENDATIONS

29. In the light of the above, it is recommended that :

a. Para. 16 to 22, which serve as conclusions, be implemented as recommendations.

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b. A drastic intervention, as recommended by the Counterintelligence Community and supported in the conclusions contained in the document, be considered. (Vide par. 24).

c. Should the proposed intervention be accepted as desirable, that it be performed in such a manner that it would have the least effect on stability. Individuals who would be affected for the time being are mentioned in Annexure C.

d. Actions as indicated in Annexure B be performed. Included are the allegations that require further internal investigation and / or committal to the Goldstone Commission, the SAP and D Provoos.

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ANNEXURE A
STAFF PAPER
DD DECEMBER 1992

RISK ACTIVITIES OF SADF COMPONENTS

This document represents source information and conclusions that have been made available to Lt-Gen Steyn. In addition to other information available, the intelligence picture has been used as basis for the Staff Paper.

1. An analysis of information available indicate that some members, contractual members and co-workers of the SADF were involved, and in some instances are still involved in illegal and unauthorised activities that harm the security, interests and welfare of the State. The spectrum of these activities includes murders, deeds of terrorism, disruption and influencing activities, destabilisation activities abroad, corruption, promotion of factional party political objectives and blatant disregard of Government policy.

2. The motives of individuals involved are diverse and vary from personal gain, reprisal, personal political agendas and pursuit of strategic and tactical objectives in conflict with Government policy. However, some role players are caught up in activities of the past that are unacceptable in this era.

3. Evidence at the disposal of the Counterintelligence Community on which the above statements rest, are based on facts, both confirmed and unconfirmed information from reliable sources, and indications are that these are true. The information is also based on evidence submitted in court and at other investigation forums.

4. A cursory examination of the information indicates that the above activities were mainly centralised at certain Defence components, i.e. the Directorate Covert Collection (DCC) of Division Intelligence, Army Foundation (GS2), and certain components of Special Forces and 7 Medical Battalion.

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5. Summarised the intelligence picture pertaining to the above Defence components is as follows:

a. **Directorate Covert Collection (DCC)**

i. Destabilisation of the internal political situation by means of planning and executing coups in self-governing territories and manipulation of important political role players.

ii. The instigation of unrest through murder, providing political factions with arms and executing intimidation activities.

iii. Members' involvement in planning to ruin the Government's reform initiatives through the escalation of violence.

iv. Corruption among members by means of illegal trading in weapons.

v. Involvement in planning and committing murders with major political consequences (e.g. FLORES case).

b. **Army Intelligence (GS2)**

i. Discrediting activities against the ANC and other political opponents.

ii. Influencing activities and perception creation in the mass media as well as in the SADF.

iii. Intelligence support for destabilisation operations.

iv. Members' participation in coup-related planning.

v. The dissemination of disinformation.

c. **Special Forces**

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i. Participation in destabilisation operations in black townships.

ii. Creation of arms caches and the development of operational launching positions in neighbouring countries.

iii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, including RENAMO.

d. **7 Medical Battalion**

i. Involvement in the SADF's chemical and biological warfare programmes.

ii. Involvemnt in the so-called "Poison murders".

iii. Involvement of some members in corruption vir personal gain.

iv. Involvement in Chemical attack on Frelimo.

v. Handling of drugs for operational utilisation.

6. When analysing the intelligence picture, it would appear that the senior command structure of the above Defence Force components are controlled by Lts-Genl G Meiring and C.P. Van der Westhuizen, who in turn are under the command of the Head of the SADF, Gen Kat Liebenberg. To a high degree, Generals Liebenberg and Van der Westhuizen are caught up in the momentum of activities of the past, which at present, receive prominent negative publicity, whilst Gen Meiring promotes a personal agenda against the interests of the State.

7. At executive level and in varying degrees, the following senior officers are linked to the above activities as a result of their positions of command or their personal involvement in the said activities.

a. Brig Jake Swart
b. Gen H Roux

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c. Gen Chris Thirion
d. Brig Ferdi Van Wyk (GS2)
e. Brig Tolletjie Botha (DCC) - Directorate Covert Collection
f. Col At Nel (DCC)
g. Brig Wouter Basson (7 Med) - 7 Medical Batallion
h. Col H.A.P. Potgieter (Special Forces)
i. Brig Oos Van der Merwe
j. Col Mielie Prinsloo (GS2)
k. Col Anton Nieuwoudt (DCC)
l. Col Bert Sachse (5VR) - 5 Reconnaissance Regiment/Commando
m. Col Hannes Venter (4VR) - 4 Reconnaissance Regiment/Commando
n. Comdt Henry Van der Westhuizen (DCC)

8. Strong interaction exist between the above four Defence Force components, which results in the major role players being relatively restricted.

9. The availability of secret funds, virtually unchecked delegated authority and the Total Onslaught Syndrome has led to a situation where these Defence Force components has become self-generating and self-perpetuating. New entry into the ranks of these components have soon declined in the pattern that have been brought about by their predecessors. The leadership and the unique milieu has afforded individuals of one mind the opportunity to move upward in the hierarchy order. This in turn, has resulted in these components having been caught up in particular value systems and ways of thinking.

10. With analysis of the information it has become apparent that an informal structure has been created, of which the major role players pursue the same agenda, which harm the State's interests.

11. It has also become evident that controlling officers of the said SADF components were either involved in malpractices at executive level or were aware of these practices. On the other hand, if they had performed their duty, they had to be aware of these malpractices.

12. It will not be feasible to mould this information into a suitable product that can be utilised in court-related actions, other legal proceedings or disciplinary hearings because

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a. Evidence has already been destroyed and is still being destroyed on large-scale.

b. Existing evidence has been acquired in an extremely sensitive manner and would expose agents to retaliation.

c. The powers of the members and groups involved are such that the life of a witness would have no value.

d. The role players protect eac other.

13. The security situation and the delicate stage negotiations for a new constitutional dispensation has reached, compel a revolutionary intervention to eradicate the malpractices that have been identified forthwith. This will not exclude court-directed or other administrative proceedings.

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ANNEXURE B
of Staff Paper
dd December 1992

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	a	b	c	d	e	f	g	h	i
1	Special Forces: 1. Establishment of arms caches and development of operational launching positions in neighbouring countries	Serving members: Gen Kat Liebenberg Lt-Gen G Meiring Brig JC Swart Col Mielie Prinsloo Brig (Dr) W Basson Brig Tolletjie Botha *(Documentary)*	DCC maintains close ties with Project Pastoor. There are joint projects, such as arms caching in Portugal that are being linked to arms caches for internal uprisings when required (so-called Palmeira Project). DCC and Pastoor share cover offices in Malawi *(Documentary as well as sources)*	Apparently Brig JC Swart is in command of Operation Pastoor (previously Operation Phantom), under the control of the SADF and Army. The operation is being staffed by members of Special Forces and old BSB members. Objectives are: i. Conducting warfare on an irregular basis ii. Establishing bases in Africa as launching positions for future operations. iii. Establishing arms caches abroad. iv. Development of Malawi as support country into the rest of Africa *(Documentary)*			X		Internal investigation into desirability of Project
			Arms caching is managed from and into the RSA. One of Pastoor's aircraft has been modified to stow weapons *(Reliable sources)*.	It would be a deviation from its imitial objective if arms caching into the RSA takes place under Operation Pastoor			X		Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig (Dr) W Basson	Two Portuguese operators of Pastoor have recently been exposed and arrested. Brig (Dr) W Basson instructed that the persons detained were to be mrudered if they could not be relieved. *(Reliable source, confirmed by another source.)* Fronts of Operation Pastoor are in Kenia, Zambia and Mauritius, mainly in the nature reservearea. Strong contact with the British SAS exists. *(Documentary)*	Allegedly Brig Basson travelled overseas for this purpose. If this was the case, actions probably were self-initiated beyond Project Pastoor's domain and mandate.			X X		Internal investigation Internal investigation into Pastoor
	ii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, inter alia Renamo.	Col Bert Sachse Shaun Gullen Rod Rodrigues Roelie Roelofse Sergeant Americo	Members of 1 Recoon Reg and 5 Reconn Reg (RR) present training to resistance movements in 8 countries. *(Various agents).* Individuals involved in training are Gavin Christie, Col Bert Sachse, Shaun Gullen, Rod Rodrigues, Roelie Roelofse & Serg America of 4RR & 5RR *(Various sources)*	Probably true. The question is whether this was or was not an authorised project. Further investigation is required.			X		Internal investigation
	iii. Participation in destabilisation operations in black townships		Operation Pastoor is involved in violence on the East Rand. *(Technical collection).* Concrete facts not available, but concluded from teleph conversations, evacuations & transfers	If this was the case, actions are beyond Operation Pastoor's domain. Further investigation is required.		X			Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			A discredition action was directed at the ANC to link the ANC to the use of poison. The young interrogators who had questioned the ANC member, were transferred to Pastoor to maintain control over them. This is a clear indication of the mutual relation between GS2, DCC and Pastoor *(Allegations by agent)*	Reporting of this case is obscure. However, if this was the case, actions are beyond Operation Pastoor's domain.		X			Internal investigation
		Serving member: Col Mielie Prinsloo Former members: Brig Archie Moore Col Daan Kershoff Nick Liebenberg Nick Basson Maj Buks Buys	Spoornet's intelligence network comprised former members of special Forces, i.e. Buks Buys, Nick Liebenberg, Nick Basson or Bosman, Archie Moore and Daan Kershoff, with the object to instigste violence by means of train murders. Buys, Liebenberg, Bosman resigned and established their own business. Nick Liebenberg often (the last time in March 1992) reported beforehand to Col Mielie Prinsloo where and when train murders were to take place, and implied that Special Forces are involved. *(Source reports and another Intelligence Service.)*	If the allegation was the truth, it probably was self-initiated. This is definitely not part of the Government's political policy. According to other information, it would appear that the ANC is in possession of similar information, but for one or otehr reason does not utilise it.. However, the allegations have the potential of serious embarrassment for the SADF and the State.			X		Goldstone

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
2.	DCC i. Destabilisation of the internal political situation through planning and execution of coups in self-governong territories, and manipulation of major political tole players.	Planners are: Brig F van Wyk Col At Nel Col Mielie Prisloo Tinus Hamman Comdt Henry van der Westhuizen *(Reliable source)* Possibly also Capt Pamela du Randt *(Reliable source)* **Executive at operational level are:** Comdt Anton Nieuwoudt Col Eugene de Kock (SAP) Comdt Henry van der Westhuizen *(Reliable source)* **Probable co-workers at operational level:** Brian Davis (London) Van Greunen Verne Lange Jimmy Nieuwoudt *(Various sources)*	Individuals involved in suspicious activities are members of Section Terrorism. The agenda of this group of individuals is: i. Discrediting of the ANC. ii. Instigation of public violence. iii. The failure of talks with the Government. iv. Increase in violence. v. De facto coup by the SADF to restore order. vi. Establishment/development and armament of Inkatha , and the creation of alternative right-wing political alliances. *(Allegations and reliable source)* The planning group meet clandestinely at a lodge (West stadium) at Loftus. Pamela du Randt is present often. *(Source reports and technical collection)*	Should this be the case, these allegations would be an indication of an own agenda that may have the potential of serious implications. This matter requires further urgent investigation. Further collection is essential.			X X		Internal investigation thereupon Goldstone Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Col At Nel Comdt Anton Nieuwoudt AO2 Clive Brink	The Ciskei Intelligence Service, controlled by Comdt Anton Nieuwoudt and AO2 Clive Brink. The coup and murder of Sebe was a planned action by Col At Nel and Comdt Anton Nieuwoudt *(Reliable source)*	Although Nieuwoudt controlled the Ciskei Intelligence Service, it has not been confirmed that he had planned Sebe's murder. However, according to a recent report, he is concerned about the fact that a judicial commission in the Ciskei is attmpting to "hang" the murder on Sebe round his neck (implicate him?)			X		Goldstone
			DCC is involved in Mozambique through agents Craig Williamson, Sakkie van Zyl and Celeste who are strongly linked to Renamo armament *(Various sources)*	A number of DCC members maintain contact with Craig Williamson, who, according to some reports, is involved in smuggling activities.			X		Goldstone
			DCC continues with planning to overthrow Holomisa and to substitute him with pawns. (Various agents and technical collection.) Individuals involved allegedly are Col At Nel and Comdt Anton Nieuwoudt.	According to another report, Nieuwoudt handles Col Duli of the TDF, and he along with Eugene De Kock and Chris Nel (alias Derek Louw) had planned to carry out a coup d'etat. Thus, the allegations have been confirmed and clearly point to self-initiated efforts to work against the policy of the Government.				X	Goldstone

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Participation of members in planning to ruin the Government's reform initiatives through the escalation of violence.	JC Prinsloo (DCC in Durban)	DCC agents are involved in the training of IFP members, whereupon they are placed at security firms (ubder IFP and SADF control), fully armed. Ex-Rhodesians wit Right-wing radical viewpoints control the security firms COIN, Shield and Hullets. *(Allegations by independent sources.)*	Allegedly, JP Prinsloo of the DCC's Durban office may be responsible for liaison wrt the training. If this proves to be true, it would probably be in pursuance of a self-initiated agenda.		X			Goldstone
			DCC has full control over the Zulu faction's participation in talks with the Government. Allegedly the infrastructure is such that 24 000 Zulus can be armed in the PWV area within 24 hours. *Various independent sources.)*	Further collection is essential for meaningful evaluation.		X			Goldstone
		Col De Kock Leon Flores Steve Bosch Col At Nel	The former 8-member "hit squad" of Vlakplaas was under the command of Col Eugene de Kock, Leon Flores and Steve Bosch, of whom the latter two became DCC members. Col de Kock maintains close ties with Col At Nel. *(Source reports and Technical collection)*	There were various accounts of contact between Col de Kock (SAP) and certain DCC members. From the veiled use of words, it could be concluded that the combination was involved in activities that harmed the interests of the State.				X	Goldstone

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Instigation of unrest through murder, armament of political factions and execution of intimidation activities. iv. Involvement in planning and committing of murders with serious political consequences (eg the Flores incident)	Col Eugene de Kock Leon Flores Col At Nel Steve Bosch HenryvdWesthuizen Rich Verster	12 former Vlakplaas askaris of Col Eugene de Kock (SAP) are still involved in operations and are handled by De Kock. All of them are fully equipped with weapons and supplied with arms caches, ammunition and supplies. Some of the askaris are hidden on DCC's holding (Olymus 73). *(Confirmed by various agents.)* Until recently Flores assisted the handling of askaris. His own weapons are cached on the holding of Tryon alias Trix alias Leonard. *(Reliable source)*	As mentioned above, the contact between Col De Kock (SAP) and DCC members is disturbing, and it would appear that a combination of individuals are pursuing an own self-initiated agenda.			X		Goldstone
		Brig (Dr) Basson Brig F van Wyk & probably Col At Nel	DCC in conjunction with Brig Ferdi vanWyk turned an ANC member to give evidence that the ANC uses chemical weapons ni Mozambique. (This was just after the chemical attack on the Frelimo group in Mozambique, vide section on 7 Med Bt Gp) *(Allegations by reliable source)*	Although the reporting is not clear, it would appear that an operation involving chemical weapons was launched in Mozambique, and that Col At Nel, Brig F Van Wyk & Brig (Dr) Basson were involved. The British organisation Chemical & Biological Defence Establishments investigated the area, and found that chemical weapons had definitely been used. It would appear that there were attempts to lay the blame on the ANC.		X			Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The caching of terrorist weapons in Swaziland are being planned by Cols Eugene de Kock and At Nel, and pointed out to the Swazi police, whereupon discredition takes place. *(Technical collection & reliable source)*	Apparently this is being done in pursuance of a self-initiated agenda or an existing assignment is conducted on own initiative but beyond limits.				X	Internal investigation
		Col At Nel & probably also Comdt Anton Nieuwoudt	DCC members handle elements of the PAC leadership in Transkei. Col At Nel instructed that the PAC had to proceed with murders on ANC members in the Transkei. *(Technical collection)*	These allegations, linked to the allegations mentioned elsewhere in this document, which maintain that DCC members continue to plan a coup d'etat in Transkei, once again are indicative of a self-initiated agenda conducted by certain DCC members.			X		Goldstone

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	v. Corruption among DCC members by means of illegal weapons trade.	Col At Nel Comdt Anton Nieuwoudt Comdt Henry wdWesthuizen Rich Verster Jeff Price Col Eugene de Kock (SAP) Piet Botha (SAP) Willie Nortje (SAP) Chappies Klopper (SAP)	The delivery of arms to the SAP located by so-called sources. Funds go to fictitious sources. *(Allegations)* The GS2 remuneration fund of the Army that handles arms located abroad, pays without asking questions, and a great number of fictitious sources are remunerated. *(Allegations.)* Anton Nieuwoudt keeps weapons at Plot 73, Olympus and in a container at a rented farm at Irene.	According to additional reporting, Col At Nel does not register internal sources anymore, and rpesumably they are remunerated from funds obtained form the delivery of weapons. It has also been alleged that munition depots are declared only partially. Allegedly, the remainder is hidden elswhere. Consequently, there is a possibility that other activities too might be funded. This is also an example of how as official responsibility, such as covert collection could be misused for own profit or for pursuance of a self-initiated agenda under official banner.				X	Investigation by D Provoos, whereupon investigation by Goldstone
3	GS2 Discrediting actions against ANC and other political opponents	Brig F Van Wyk Col At Nel	Disclosure concerning Winnie Mandela's disappearance of funds was a Ferdi Van Wyk/Col At Nel project. *(Allegations by source)*	If it was an official project in line with the State's political programme, it would be bona fide different. However, if it was self-initiated, then it would have a high-risk potential for embarrassment.			X		Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig F Van Wyk	The discrediting of the ANC and other political opponents against the Government is managed from the office of the Command. *(Various sources)*	On the basis of various reports, it would appear that official authorisation did exist. However, it would appear that Brig Van Wyk pursues more objectives that are self-initiated or that he attempts to convince his superiors to approve activities that are not always in the interest of the State. This will have to be investigated though.			X		Internal investigation
	ii. Influencing activities and creation of perceptions at the mass media and the SADF	BrigFvWyk	The emphasis on violence in BrigvWyk's report in a certain manner may establish misperceptions. *(Reliable source)*	It would appear that motivations for actions might be intensified to guarantee action. However, this is only a conclusion and needs to be investigated further.			X		Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Intelligence support to destabilisation operations		The pseudo capability of 5Reconnaissance Regiment receives intelligence support from GS2 to be applied to the ANC's and PAC's internal structures. *(Source reports and Technical collection).* According to report received on 14Dec1992, an ANC member was to give evidence at the Goldstone Commission to the effect that members of 5ReconReg 1ReconnReg were to perform operations in KwaZulu. The vehicle registrations to be used for this purpose were checked by OATI. These can be trailed to 5ReconnReg. *(SAP)*	If this was the case, activities would not be in line with Government policy, and this might lead to serious embarrassment. This matter requires urgent investigation.			X		Goldstone ?
		ColHerman van Niekerk (leader) TinusVStaden (OpsOffic) JimLaferty - ex-Rhodesian MikeKennedy - ex-Rhodesian MarkVDMerwe - ex-Rodesian	Rumours are that a pseudo group of 5ReconnReg are involved in train murders along with members of the Rhodesian Selous Scouts under HermanVNiekerk *(Allegations)*	This is probably the same group who were, ito the above allegation, involved in speudo operations in KwaZulu. The allegations require further urgent investigation.					Goldstone

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Paticipation of members in coup-related planning	Lt-Gen G Meiring	Gen Meiring instructed SpecialForces to determine which members of the present DefenceForce, the previous DefenceForce and the BSB are on "his" side, to enable him to know whom he could call up when it was necessary. He furthermore instructed that SpecForces was not allowed to collect information on right-wingers and rightwing organisations *(Reliable source)*	Since SpecForces would play an important role in countering a coup d'etat, it seems probable that GenMeiring would have wanted to know who were apolitical for utilisation. His behaviour is therefore evaluated as normal ito contingency planning.					None
		ColMiellePrinsloo	The selective leakage of information from ColMielie Prinsloo's group to Rightwing groups, especially early warnings against possible actions *(Confirmed by various independent sources)*	The evaluation was that Col Prinsloo is sympathetically disposed towards the Right Wing. This fact may endorse the other allegations contained in the document of his possible involvement in an own agenda directed against the ANC. This requires further investigation.				X	Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
4	7MED BN GP i. Involvement in the chemical and biological warfare programme of the SADF	BrigWouterBasson	There are several chemical firms that operate as private institutions in support of the chemical and biological warfare programme of the SADF. The privatisation of these firms is transparent, which might become serious risks for the SADF and the State in future. The firms are Roodeplaat Research Laboratory, Roodeplaat Tile firm, Delta-G, Protechnics, Ecotex. The activity is headed by Brig(Dr)WouterBasson. *(Documentary)*	The programme is performed under Project Jota. Privatisation does indeed take place. However, the allegation that the privatisation is transparent and might hold serious risks for the SADF and the State requires further investigation.			X		Internal investigation

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Involvement in chemical attack on Frelimo	Brig W Basson Brig Van Wyk Col At Nel	Allegedly the chemical attack on Frelimo soldiers in Mozambique (vide ser no 3.iv) was a practical training session. An small unmanned reconnaissance bomber was located shortly before the attack on Komatipoort. The toxic substance used in the attack was manufactured and stored by Petrotechnics. (Confirmed, and individuals involved are known)	Allegedly, the aircraft was tested shortly before the attack on Komatipoort. As stated, a British team of scientists established that chemical weapons were used in the attack on the Frelimo soldiers (finding - January 1992). Accor-ding to this and other information in this respect, DCC and GS2 members as well as Brig Basson directed a discrediting campaign against the ANC implicating the ANC as having a chemical warfare capability, is indicative of an attempted cover-up of either an own agenda or an authorised operation which had failed. However, this requires further investigation.				X	Internal investigation
	iii. Involvement in so-called poison murders	Brig W Basson Gen LotharNeethling	Members of Charl Naude's old group (SpesForces/BSB)formed a group under leadership of Brig W Basson responsible for all SADF elimination instruc-tions. Gen Lothar Neethling was intimately involved. (Evidence of members involved can be obtained) Johan Theron (4VR - Reconn. Regim.) And Johan Truter - financial manager (RN Lab), was also involved with the above. At Nel and Johan Theron have close	Vide all the info in the previous column. The allegation prompt-many questions that first need to be answered befor a meaningful evaluation can be made. Conside-ring the weight of allegations, it would appear that some of them might be true. According to reports received in Dec 1992, there was rummaging among certain DCC members at the time of Goldstone's visit to their offices because some beer tins had been "doctored" with poison. This has been confirmed.		X			

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		GenKatLiebenberg	GenKatLiebenberg has been kept posted during the course of events. Allegedly, until 1989 he himself was also involved in the planning. (Evidence can be obtained from a person who was involved.)	Recently it has also been reported that D Verk/Recoinn??(Spec Forces)had received toxic substances from 7 Med BnGp, which might be utilised for operational purposes, inter alia a poisonous substance which is a "new product" that can be administered in nearly any manner. Allegedly, Brig Basson made it available. However, a meaningful evaluation is not possible before affidavits are obtained and further investigations are completed.		X			
		Name can be obtained	A BSB operator was involved in elimination activities, and disposes of information which directly implicates GenLieben-berg in the murders. (Member has already prepared an affidavit.)			X			
		Allegedly Col AtNel CmdtAntonNieuwou dt CmdtHenryvdWest-huizen are involved	Recently there was an attempt to bring the person under the control of the "generals" by offering a contract to supply poisoned beer to Zulus in Transkei. Wouter Basson furthermore offered him 100 000 tablets per month for one year. (Allegations)				X		

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The above person is a key figure and is part of the group BSB members who instituted legal proceedings against the SADF. (Sworn affidavit can be obtained)				X		
			The death of one Holtzhausen who was involved in the SADF's ivory/wood/diamond smuggling trade with Angola might point to this group.(Allegation)				X		
			It is known that Wouter Basson's direct supervisor had no control over him and that he pursued his own agenda. (Technical sources of conversation with subordinates who made arrangements.)				X		

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Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Some members' involvement in corruption for personal gain		Corruption - Brig Wouter Basson has free access to the Lear Jet of Special Forces for private flights to rugby matches and buying sprees in foreign countries (Allegation - various sources)	Various reports have been received in respect of Brig Basson's misuse of official resources and the fact that that he lives exceptionally extravagant. Aspects are being investigated by the AG (Auditor-General/Attorney-General ??)				X	AG
			- Brig Basson invites others along and makes use of the most expensive accommodation. He has recently bought a house in France as well as corporate membership at a gholf club in France (Allegation by reliable source)					X	AG

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ANNEXURE C OF STAFF REPORT
DD DECEMBER 1992

INDIVIDUALS MENTIONED IN ANNEXURE A

Serial no	Individual	Allegations & circumstances wrt indivuals, supplied by individuals	Remarks	Conclusion
	a	b	c	d
1	Brig Jake Botha	- Supervises Reconn (Special Forces) - Entangled in the past & its momentum - Will not be able to detach himself from the past	It cannot be ruled out that he might be discredited in future due to alleged activities of subordinates	Ought to be included in the intervention
2	Gen-Maj HJ Roux	- Controls Project Pastoor - Supervises Reconnaiss Regiments - Ought to be aware of activities that might lead to embarrassment	Might be caught up in the momentum of activities that were acceptable in the past	Ought to be included in the intervention
3	Gen-Maj Chris Thirion	- In his current post he should be aware of DEC activities that might lead to embarrassment - Should be aware of possible misuse of Operation Pastoor for possible unauthorised activities	After having followed up allegations/ circumstances supplied by sources they were found to be based on wrong conclusions. It was concluded that he (Thirion) had taken over Gen Joubert's association with Project Pastoor when he had succeeded the latter.	NOT affected by possible intervention

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4	Brig Ferdi V Wyk	- Commands Bev Com (?) - Was aware of Flores' assignment - Arranged clandestine visit of a foreign journalist via RSA to discredit ANC, but referred him to Gen-Maj Tienie Groenewald - Involved in discrediting activities iro political opponents	May be subjected to serious discrediting actions in future	Ought to be included in intervention
5	Brig Tolletje Botha	- Have direct command over DCC - Was aware of Flores' double agenda	Was discredited	Ought to be included in intervention
6	Col At Nel	- Took initiative in various activities that might have led to embarrassment, such as: i. Discrediting campaigns ii. Attacks by PAC members on ANC members in Transkei	Was discredited and allegedly involved in several other activitiess that may lead to embarrassment	Ought to be included in intervention
7	Brig Wouter Basson	- Involved on poison murders - Involved in chemical attack on Frelimo - A founder of the underground organisation "Binnekring" ("Inner Circle")	His alleged activities are of such a nature that they might lead to serious embarrassment. They also have the potential to seriously harm the State	Ought to be included in intervention
8	Col HAP Potgieter	- Involved in destabilisation activities (probably unauthorised)	May be discredited. Allegedly pursuing own agenda.	Ought to be included in intervention

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9	Brig Oos VD Merwe	- Laid down intelligence requirements regarding the guard system at the SP's residence. - Said that he might be prepared to launch a coup to restore order.	May be discredited. Is to retire. Works against Government policy.	Ought to be included in intervention.
10	Col Mielie Prinsloo	- Involved in destabilisation operations on own initiative - Provides intelligence support, of which the official nature is being queried - Involved in coup-related planning/statements	May be seriously discredited. Allegedly pursues personal agenda or twists existing mandate for self-initiated objectives	Ought to be included in intervention
11	Comdt Anton Nieuwoudt	- Was involved in Ciskei coup and Sebe murder - Controls Askaris (probably unauthorised) - Involved in destabilisation activities (probably own initiative) - Involved in coup planning/statements	Was discredited and may still be discredited. May involve the SADF in his own alleged double agenda, which may lead to serious embarrassment (whether true or not)	Ought to be included in intervention
12	Col Bert Sachse	- Involved in training of resistence movements in neighbouring countries - Allegations of smuggling of rhino horns	May be discredited. Probably pursuing a personal agenda	Ought to be included in intervention
13	Col Hannes Venter	- Involved in destabilisation operations (probably own initiative)	May be seriously discredited and may involve the SADF	Ought to be included in intervention

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14	Comdt Henry VD Westhuizen	- Involved in destabilisation activities (probably own initiative) - Handles agents with questionable backgrounds	Allegedly pursues a personal agenda and allegedly entwined his official duties with his personal agenda	Ought to be included in intervention
15	Gen Kat Liebenberg	- In full command of SADF - Exposed to blackmail as result of previous involvement in unauthorised BSB activities - Allegedly involved in ivory smuggling (confirmed by independent sources) - Direct superior of Brig Wouter Basson, therefore he ought to know of the latter's probable unauthorised activities (Allegations by independent sources)	Probably caught up in albatrosses of the past that can result in him being discredited	Ought to be included in intervention

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16	Lt-Gen G Meiring	- Full command of GS2 and Special Forces - Authorised Flores' visit and itinerary abroad - Gave instruction iro efforts to determine Rightwing support within Special Forces in order ro ensure selective summons when required - Forbade collection by Special Forces on rightwingers or rightwing organisations - Told an inner circle that he was prepared to launch a coup if necessary (Reliable source)	May be discredited due to the Flores case. Wrt the allegation iro Rightwing, his activities are evaluated as part of contingency planning. Since he has full command of the Army, he might not be able to escape the responsibility , should it be found that that the existing mandate/assignments were developed for other objectives	Ought to be included in intervention
17	Lt-Gen CP VD Westhuizen	- In view of his position as commander of the DI and DCC he had to be aware of malpractices at these offices. - He has albatrosses round his neck from which he cannot espcape, e.g. i. Goniwe ii. Hammer Forces iii. Train murders caused by members under his command	Probably caught up in albatrosses of the past that are inescapable	Ought to be included in intervention

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Annexure D
of Staff report
dd December 1992

INDIVIDUALS ALLEGEDLY ATTACHED TO OR IN CONTACT WITH DIVISION INTELLIGENCE

Serial No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	JF Verster (Rich) i. ID no [redacted] ii. Alias iii. [redacted]	Member of Company	Allegedly individual is involved in : i. The smuggling of (1) drugs (2) ivory (3) gem stones (4) weapons (5) foreign currency (6) counterfeit money ii. Car and lorry theft			X X		Information regarding the smuggling & vehicle theft has been handed to the SAP (MID) for further investigation
2	JA Nieuwoudt (Comdt) i. J Nel; J Buitendag	SADF ex-Ciskeian Intelligence Service	i. Allegedly the individual is involved in cycad smuggling ii. Allegedly the individual is involved in organising an underground structure to serve as an alternative structure should the negotiation process fail	X X		X		The origin of the information is extremely sensitive and might compromise a total source network. Utilisation of the information must be cleared with the handler

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3	H VD WESTHUIZEN i. [redacted]	Member of Company ex-SADF (DI)	i. Allegedly the individual is involved in the smuggling of (1) cycads (2) gem-stones (3) counterfeit money ii. Allegedly the individual is involved in activities probably related to violence			X X X	X	information to confirm the allegations could not be obtained. In view of the nature of his position he was concerned with collection on MK
4	G Janse Van Rensburg i. [redacted] ii. Alias: Steven van Lill iii. [redacted] Str	Member of Company ex-NI	Allegedly the person is involved in the smuggling of drugs and Red Mercury	X		X		To date confirmation for allegations could not be obtained

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5	Tony Oosthuizen i. *Aliases (1) Tobie Esterhuizen (2) Michael O'Kelly (3) MJ Olivier ii. [redacted]	Member of Company ex-NI	Alleged agent for MI6			X		There were inve...ions in this regard. The allegations could not be confirmed.
6	AM VD Berg (Maj) i. [redacted] ii. [redacted]	SADF	Allegedly the said person misused official contacts for personal gain, and he is involved in an extramarital relationship	X				The allegations regarding the misuse of official contacts are being investigated by an RVO (??). Substantiation could not be obtained.
7	GD Price i. ID No [redacted] ii. Alias: A Wiltshire iii [redacted]	Member of Company ex-Rhodesian	Alleged agent for MI6			X		To date allegations have not been substantiated

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8	RI Wishart	Member of Company ex-Rhodesian	Alleged agent for MI6	X		X		Allegation not sub...ntiated
9	HJM Widdowson (Cmdr) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in theft of an R4 as well as espionage on behalf of a foreign intelligence service	X		X		Allegation not substantiated to date
10	HD Terblanche (Maj) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in smuggling of gem-stones			X		There are good indications that the individual is indeed involved in smuggling of diamonds
11	Stefan Snyders (Comdt)	SADF	Allegedly involved in smuggling of diamonds and emeralds			X		Snyders maintains very close contact with Henry VD Westhuizen
12	Vernon Lange ii. Alias P Page	Member of Company ex-BSB	Allegedly involved in smuggling activities	X		X		Nature and extent of activities not known

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13	JG Nieuwoudt i. Alias Neuman	ex-BSB Member of Company	Allegedly involved in extramaritsl relationship	X				No further negative information is known
14	JP Du Preez i. Alias J Du Plooy	ex-BSB Member of Company	Allegedly the said person has or had in his possession a number of unlicensed weapons of one Owen, ex-BSB member	X		X		No further negative information is known
15	LA MAREE (Chappies) i. ID No [redacted]	ex-BSB Member of Company	This person still has regular contact with former BSB members. No furhter information is known regarding his activities	X				The only negative information available about this person is speculation regarding the Webster murder
16	FL Smit (Maj)	SADF	Allegedly he is involved in i. the smuggling of weapons; and ii. the smuggling of Red Mercury	X		X	X	Not enough information available to substantiate the allegations. His involvement in arms transactions might be a result of his official duties

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17	DH Fourie i. ID No [redacted] ii. Address [redacted]	Company member ex-BSB	Allegations regarding this person are the following: i. He was retrenched by the SADF, and he threatens to go to court. ii. He is involved in the training of people in Ciskei, inter alia in VIP protection. iii. He maintains regular contact with former BSB members. iv. He made contact with one Chris VD Merwe in Windhoek with a view to the possibility to establish a cover firm in Windhoek that can be utilised by Fourie to import arms and ammunition to the RSA.	X			X	Although there are indications, the information is inadequate to substantiate allegations wrt any BSB type of activities. It is possible that the cover firm can be used to evade existing sanctions against the RSA. Allegedly Fourie was the operational manager of the BSB and had to approve all tasks.

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18	DF du T. Burger (Staal)	Member of Company ex-BSB	Allegations regarding Burger are as follows: i. He was dismissed by the DCC but he refuses to accept his dismissal and threatens with a court case. ii. He is involved in an extramarital relationship. iii. Involved in the smuggling of drugs, red Mercury, gold and diamonds. iv. Involved in suspicious special projects. However, the nature and extent are unknown. v. Maintains regular contact with former BSB members.	X		X	X	Existing information is inadequate to substantiate allegations
19	WJ Basson i. ID No [redacted] ii. Aliases (1) WJ Bester (2) M Barnard (3) M Reyneke (4) Christo Brits	Member of Company ex-BSB	No negative information wrt Basson has been obtained through monitoring actions. However, it clearly appears that he maintains contact with former BSB members and that he closely follows the investigations concerning the Webster murder	X				

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20	Mrs S De Beer ii. ID No [redacted]	Member of Company ex-BSB		X				No negative information is known regarding the activities of this person
21	Calla Botha	ex-BSB	He had contact with Rich Verster (a DCC member)	X				Nature and extent of activities not known at present
22	Ferdi Barnard i. Alias Lanco Heins	ex-BSB	i. He was utilised as a source by the DCC, but was dismissed in December 1991. However, he still maintains contact with members of the DCC, including Rich Verster, Wally Wilsenach, Frans Smit and Geoff Price ii. Allegedly he is involved in the smuggling of diamonds, Red Mercury and ivory			X		It is not known if the contact is official or not. However, it would appear that the contact might pertain to criminal activities

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23	Leon Flores	Former company member	i. Flores has regular contact with BSB members, inter alia with Col Eugene de Kock (Vlakplaas) ii Reports indicate that Flores might be involved in smuggling activities, possibly drugs (an amount of R120 000 for 60 gm was mentioned) iii. Allegedly he still operates from Vlakplaas offices iv. Flores maintains good contact with Henry VD Westhuizen v. Flores allegedly made available information to the press			X X	X	As a result of an i...ident in Britain, Flores was dismissed from the SADF. His continued contact with Eugene De Kock is suspicious

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Only Copy
ANNEXURE E
OF STAFF REPORT
DD DECEMBER 1992

Ser No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	**Anthony James Christopher White (Ant)** **i. ID No** [redacted] **ii. Aliases** (1)Anthony Greenstone (2) Anthony Greenwood (3) Anthony Greenway (4) James White (5) Abe White	Alleged ex-BSB	i. Allegedly, White, in cooperation with Mac Calloway and George Mitchell, smuggled arms (AK47s and AKMs) from Mozambique to Kwazulu where they were sold. Allegedly, SAO members were also involved in the matter ii. White also had contact with Craig Williamson iii. Allegedly White was also involved in ivory and rhenoceris-horn smuggling				X	

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2	**Mike Drummond**	Alleged ex-BSB	i. Drummond allegedly assists Ant White and Mac Calloway in the smuggling of weapons. Amongst other things he delivered weapons to Naas Van Zyl (Mossgas) ii. Drummond was also involved in insurance fraud by reporting a vehicle as stolen to have the insurance amount paid out iii. Allegedly Drummond is also involved in the smuggling of gold and shrimps			X X	X	Drummond owns an aircraft that is used for special assignments
3	**Joe Verster** i. **Address** [redacted]	ex-BSB ex-SADF	i. During July 1992, Verster allegedly recruited individuals in the Johannesburg area. *Remark:* It is not known for what purpose recruiting was done ii. Verster maintains contact with Eugene De Kock iii. Verster has access to large sums of money and is orgaanising an unknown action. There is talk of an amount of R100 million iv. Verster allegedly maintains contact with "Terror" Lekota of the ANC v. Verster has established a business which is concerned with a security firm as well as a firm which transports goods to the so-called Frontline States	X			X	Although the information that is available does not point to Verster being involved in incongruities, there are clear indications that he is busy with a type of "BSB" action. He was managing director of the former BSB

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4	Glen Gorman	Alleged ex-BSB	Statements by Gorman indicate that he is involved in an organisation that may be involved in violence. Gorman maintains contact with inter alia Pieter Van Zyl, Rocky Van Blerk and Dr Vernon Joynt. The said individuals all have BSB connections				X	Gorman has not been positively identified to date
5	**Eugene De Kock**	SAP	i. Allegedly, De Kock was to leave the SAP at the end of 1992 to join an organisation of Joe Verster. (*Remark:* The nature of the organisation is not known.) Allegedly, various former SAP colleagues of De Kock and Leon Flores were to join the organisation. It was alleged that De Kock would have brought with him to the organisation a large number of weapons cached in and outside the RSA. According to Ferdi Barnard, De Kock did not leave the SAP but was to take over underground structures of the SAP's D Section. ii. Allegedly De Kock is involved in smuggling trade, including Ferdi Barnard's alleged smuggling activities iii. De Kock has close contact with Henry VD Westhuizen, Ferdi Barnard and Leon Flores				X	
6	**Col Jan Breytenbach**	ex-SADF	Allegedly Breytenbach is engaged in recruitment for/creation of a resistence structure. Current as well as former members of the Security Forces allegedly are involved in the organisation	X			X	No further information regarding the resistence structure is available

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EXCLUSIVELY TOP SECRET

7	**AB Stander (Riaan)** i. Employed at Intercol Pty Ltd. Directors of this company are Craig Williamson, Stander And Ant White	Alleged ex-BSB	i. Stander maintains contact with Staal Burger. The nature of the contact is unknown. ii. Allegedly, Stander is involved in discrediting activities directed against the RSA Government iii. Allegedly, Stander is involved in currency fraud iv. During a recent search at his house/business concern (Kastech - Eastech ??), a large number of arms and ammunition was found. v. His business concern, Kastech - Eastech??? may have connections with the CIA			X X X		Stander's activities are investigated by the SAP

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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

AFFIDAVIT OF OLE BUBENZER

I, the undersigned

OLE BUBENZER

state under oath as follows:

1. I am an adult male, employed as a Senior Legal Counsel in the European Central Bank, and presently resident in Frankfurt, Germany.

2. I am the author of the book *Post TRC prosecutions in South Africa: Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process* (**the book**) that was published in 2009 by BRILL.

3. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

4. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me. A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in the Calata and Others Volume at bundle 7.

5. The research that I conducted for the book was largely conducted during a four-month trip to South Africa in 2006. I sourced information from court documents, written materials and interviews. I conducted more than 20 interviews with persons who were knowledgeable with the subject of post-TRC prosecutions.

_____

OLE BUBENZER

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ on _____ 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

_____

COMMISSIONER OF OATHS

Full names:

Business address:

Designation:

Capacity:

Divider 8

Affidavit of Michael Schmidt

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

Date: 17/01/2025
Certified a True Copy
of the Original
Nicola Irving
Nicola Grace Irving

22/11/2024 LC NG

THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

22/11/2024

LC

NG

I, the undersigned,

MICHAEL SCHMIDT

do hereby make oath and state that:

1. I am an adult male investigative journalist and author of the book Death Flight. Apartheid's Secret Doctrine of Disappearance ("**Death Flight**")

2. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I have read the notice of motion and a substantially complete version of the founding affidavit of Lukhanyo Bruce Matthews Calata and confirm the contents in so far as they relate to me and the content of Death Flight.

MICHAEL SCHMIDT

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ on this the ____ day of _____ 20____

22/11/2024

COMMISSIONER OF OATHS

Full Names: GRAHAM SANDERSON
Designation: PROFESSIONAL ACCOUNTANT (SA)
Address: 4 FINSBURY AVE, AUCKLAND PARK, JOHANNESBURG

22/11/2024

COMMISSIONER OF OATHS (RSA)
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Member No.: 34379
4 Finsbury Avenue, Auckland Park
Johannesburg

LC
NG



Michael Schmidt

DEATH FLIGHT

Apartheid's secret doctrine of disappearance

TAFELBERG

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To the families of the hundreds
of men – and one woman –
who were 'disappeared'
under Operation Dual
from 12 July 1979 to 12 December 1987

Contents

List of abbreviations 1
Foreword by Nkosinathi Biko 5
Prologue 9

PART I: The Rhodesian roots of SA's dirty war 13
1. A youth in the shadow of an insurgent war 15
2. From Pretoria bar to Rhodesian bush 25
3. Behold a pale horse: Rhodesia's biochemical warfare 29
4. Horrors and honours 39
5. Neo-Nazis and mercenaries enter the fray 46
6. 'The doctored bodies are in the back' 50

PART II: A secret killing machine takes shape **61**
7. Black-ops boon for South Africa 63
8. Recruiting a few hard men 73
9. Rhodesia's revenge 82
10. Mobilising against the 'Total Onslaught' 90
11. The 'hunter-killers' of Koevoet 95
12. South Africa's small-team recce pioneer 102
13. 'Ex-Rhodesians became cannon fodder' 108
14. Delta 40 embraces the 'Dark Side' 113
15. The first death flight 121
16. 'I never counted the bodies' 126
17. A death flight victim fights back 134
18. An old Recce gets blooded 139

PART III: The shackles come off: From Delta 40 to Barnacle 145
19. A mandate to kill 147
20. A war crime at Lanseria 152
21. Two hammers: Barnacle kills its own 158
22. The founding chief's last flights 161
23. Barnacle in its prime 166
24. 'Like a James Bond movie' 171
25. A changing of the guard 177
26. Barnacle's role in the Maseru raid 183
27. Small-teams success 187
28. Trained, betrayed, murdered 192
29. The Wonder Air death flight 198
30. A death flight over the Indian Ocean 205
31. Barnacle's final small-teams mission 208

PART IV: Dramatic expansion under the CCB 217
32. 'The Organisation' takes shape 219
33. Parallel pseudo-ops teams 227
34. The CCB's Inner Circle 230
35. The Cessna Caravan death flight 235
36. Resistance by Speskop's new Air Ops chief 238
37. The end of Operation Dual 241

PART V: Aftermath: Our Pact of Forgetting 245
38. The end of the Border War 247
39. The CCB shuts down 252
40. Shadow boxing: The Trial of the Generals 259
41. Half-truths at the Truth Commission 269
42. Dual exposed: the Wouter Basson trial 275
43. (Re)disappearing the disappeared 281
44. Quietus: The founding chief's exit 292

Acknowledgements 295
Endnotes 299
Index 319
About the author 326

Style Note: Translations from the original French, Afrikaans, Portuguese, or other language sources are by the author. I have attempted to accurately reflect characters' correct ranks at the relevant periods under discussion and to indicate where these changed as they were promoted; I have, however, continued using the ranks of pseudo-operators after they went 'civilian' so as to indicate their hierarchy. Lastly, contemporary geographic names are used throughout. For example, South West Africa and Rhodesia only become Namibia and Zimbabwe, respectively, after independence. This may conflict with current Namibian and Zimbabwean sensibilities but is historically accurate. The airfield codes in South West Africa (which all changed on independence) are cited as per the pilots' logbooks.

List of abbreviations

ANC	African National Congress
AZAPO	Azanian People's Organisation
BOSS	Bureau of State Security
BSAP	British South Africa Police
CBW	chemical and biological warfare
CCB	Civil Cooperation Bureau
CIA	Central Intelligence Agency
CIC	Coordinating Intelligence Committee
CIO	Central Intelligence Organisation
ConCourt	Constitutional Court
CSI	Chief of Staff Intelligence
D40	Delta 40
DST	Directorate of Special Tasks
EMLC	Elektroniese, Meganiese, Landboukundige en Chemiese Ingenieursvaardighede
EO	Executive Outcomes
FAF	forward airfields
FAPLA	People's Armed Forces of Liberation of Angola

FBI	Federal Bureau of Investigation
FNLA	National Front for the Liberation of Angola
FPLM	People's Forces of Liberation of Mozambique
FRELIMO	Mozambique Liberation Front
IFP	Inkatha Freedom Party
IWB	Irregular Warfare Branch
JMCs	Joint Management Centres
KIK	Co-ordinating Intelligence Committee
MI	Military Intelligence
MK	uMkhonto we Sizwe
MPLA	People's Movement for the Liberation of Angola
NIS	National Intelligence Service
NPA	National Prosecuting Authority
NSMS	National Security Management System
PAC	Pan Africanist Congress
PCLU	Priority Crimes Litigation Unit
PLAN	Peoples' Liberation Army of Namibia
RAR	Rhodesian African Rifles
RENAMO	Mozambican National Resistance
RLI	Rhodesian Light Infantry
SAAF	South African Air Force
SACP	South African Communist Party
SADF	South African Defence Force

SANDF	South African National Defence Force
SAP	South African Police
SAS	Special Air Service
SB	Special Branch
SF	Special Forces
SPO	Section of Pseudo-Operations
SSC	State Security Council
SWAPO	South West African People's Organisation
SWAPOL	South West African Police
SWATF	South West Africa Territorial Force
TRC	Truth and Reconciliation Commission
TREWITS	Teen-Rewolusionêre Inligtingstaakspan
UANC	United African National Council
UDF	United Democratic Front
UN	United Nations
UNITA	National Union for the Total Independence of Angola
US	United States
ZANLA	Zimbabwe African National Liberation Army
ZANU	Zimbabwean African National Union
ZAPU	Zimbabwe African People's Union
ZCIO	Zimbabwean Central Intelligence Organisation
ZIPRA	Zimbabwe People's Revolutionary Army
ZSOU	Zimbabwe Special Operations Unit

Foreword by Nkosinathi Biko

This book will make your stomach turn. Do not avert your eyes.

Our efforts to understand and document exactly how wide the footprint of apartheid's atrocities stretched, how far its violence travelled within and beyond our borders, have not gone far enough. *Death Flight* shines a much-needed light on some of the darkest corners of a regime waging a desperate and dirty fight against the inevitable. It is the first detailed exploration of the horrendous practice of flinging murdered prisoners into the depths of the Atlantic Ocean.

By following the thread of apartheid's violence into Namibia, Mozambique, Zimbabwe, Lesotho, Angola, Swaziland, and Zambia, *Death Flight* elucidates the transnational nature of this crime against humanity. In so doing, it raises fascinating questions about the role of international law in the attainment of hitherto evasive justice.

The general callousness with which apartheid's henchmen treated human life is an assault on one's senses. In the process, the book demolishes the supremacist argument central to apartheid, that at its core lay a desire to bring enlightenment to a 'backward' people.

I found it disturbing that most of the death flight victims in the book could not be identified because the interviewees chose 'not to remember' details. It is unimaginable that a system ostensibly operating on the basis of security intelligence would have disposed of people without knowledge of the risk (real or imagined) that

they presented and, most importantly, without knowing their identities – the basic construct of the world of intelligence.

One hopes that the names that did make it into the book will bring some closure to many a family who, to date, may have had little idea of what happened to their beloved.

And for those whose identities remain unverified, one hopes that, by turning the light on this hitherto 'concealed' class of victims, *Death Flight* will invite further scholarship and activism probing this issue. It appears that this important task escaped even the TRC.

Adding to the contemporary relevance of the book is the disturbing revelation of a covert, post-TRC process of exemption for perpetrators, as well as an inexplicable (if not unconstitutional) change to the policy of the National Prosecuting Authority. One hopes that this may provide impetus for the wheels of justice to once again start turning.

This part of the book resonates with the recent progressive judgment handed down in the Ahmed Timol matter by Judge Billy Mothle. The case has re-energised the efforts of many families in South Africa seeking justice for the unresolved political killings of their loved ones. The court proceedings, aimed at ensuring that João Rodrigues is held accountable for the murder of Timol, have exposed the conniving role played by some structures of the democratic government in protecting the perpetrators of apartheid.

The recent denial by former president FW de Klerk that apartheid was a crime against humanity triggered an outcry and a national debate about our past. The contents of this book make an irrefutable case confirming the commission – in the most brutal of ways – of such a crime. Furthermore, it raises serious questions about the role of members of the State Security Council, which at one stage included De Klerk himself, along with a broad network of other senior members of government.

Death Flight is a daring mission to salvage the ghosts of those

who were thought to have been eternally dissolved, by apartheid Special Forces, deep in the oceanic waters off our shores. It is destined to become an invaluable tool, connecting the dots in the quest to ensure that no victim of the deadly hand of apartheid is left unaccounted for.

Nkosinathi Biko
May 2020

PART V

Aftermath: Our Pact of Forgetting

38

The end of the Border War

The settlement that ended the Border War and led to the independence of South West Africa laid the groundwork for a complex set of manoeuvres by the apartheid military chiefs to ensure that the dirty warriors of D40, Barnacle, and the CCB escaped prosecution.

The war had escalated as it reached its end. In particular, a series of large-scale SADF and SWATF incursions into southern Angola attempted to block the Angolan armed forces and their Cuban, Eastern Bloc, and South West African allies from rolling over UNITA and changing the balance of power in the country.

Notably, Operation Moduler peaked with the Battle of the Lomba River (9 to 30 September 1987), the largest armoured clash on the African continent since the Battle of El Alamein in 1942. It resulted in victory for the SADF/SWATF and UNITA, which drove FAPLA and its allies back to Cuito Cuanavale. FAPLA lost 525 fighters in the battle – compared to the seventeen of the SADF – and its 47 Brigade was annihilated.

Despite the victory at the Lomba River, the SADF/SWATF was unable to achieve its tactical and strategic goals in subsequent battles. The resulting stalemate allowed for the initiation of peace talks on 3 and 4 May 1988 in London. On 22 December, the Tripartite Accords between South Africa, Cuba, and Angola, backed by the United States and the Soviet Union (SWAPO and UNITA were not signatories), were ratified by the United Nations in New York, officially ending the Border War. The agreement led

to the withdrawal of all foreign troops – Cuban, Eastern Bloc and South African – from Angola, and triggered the implementation of UN Resolution 435 on the independence of South West Africa, to become known as Namibia.

It was a stunning end to a 23-year conflict that had left some 2 500 South Africans dead, along with 12 300 Namibians, perhaps 5 000 Cubans – and countless Angolans.

Pretoria had fought the Soviet-backed Luanda to a standstill, but the changing geopolitical climate, partly brought about by Mikhail Gorbachev's policies of glasnost and perestroika in the Soviet Union, meant that South Africa was now prepared to agree to Namibian independence as a kind of test case for how peace might be achieved in South Africa itself. It was a tentative policy direction that became irreversible with the fall of the Berlin Wall on 9 November 1989.

Though the CCB continued its pseudo-operations in this period, these were increasingly marked by failure. For example, on 11 January 1988, the ZSOU's Team Juliet in Zimbabwe, consisting of Kit Bawden, Barry Bawden, Guy Bawden, Michael Smith, Senior Superintendent Kevin Woods, and Transkei-born Special Branch Sergeant Phillip Conjwayo, was broken when Woods, Smith and Conjwayo were arrested following a car bombing in Bulawayo that killed six ANC operatives and a civilian Zambian driver.

'According to information given to the [Truth and Reconciliation] Commission by one of those involved in the operation, this was a CCB project. The orders were given by a member of the CCB's inner circle, a senior Special Forces operator who did not applied [*sic*] for amnesty and so cannot be named. The orders were passed on to the Zimbabwean agents via Mr Gray Branfield and Mr Alan Trowsdale.'[1]

The mention of Branfield is incorrect because we know he resigned from Barnacle in early 1986, probably just before it was reorganised as the CCB, handing over to Trowsdale. Woods, Conjwayo, and Smith would all be sentenced to death, but their

sentences were commuted to life five years in, and they were released eighteen years later.

An earlier mission by the CCB to free the men had been bungled. According to Peter Stiff the would-be rescue team included Dennis 'Sammy' Beahan, a former British Army soldier who had traversed the SAS, McGuinness's Special Branch at the Bindura fort, and 6 Recce. After serving in 6 Recce, he returned to Zimbabwe for a short stint in the Zimbabwe National Army, before winding up as the security manager at the Sandton Sun Hotel from whence he was recruited. Other members included 'Big Jim' McGuire, who had a similar career, and John 'Aussie' McLoud who was believed to be ex-Australian Army, with experience in Africa, and two black 5 Recce askaris.[2]

Stiff records 'Brian' (Gray Branfield), who Woods said had been temporarily brought back in to try and oversee the escape attempt of his former double agents,[3] as being distinctly unimpressed with the quality of these pseudo-operators.

Back at Speskop, Colonel Johan Theron was sent on a year-long staff course spanning 1988 and 1989 before being posted to Military Intelligence as SSO Project Security, giving him oversight over all secret SADF projects, including Project Coast.

Meanwhile, South West Africa moved rapidly towards independence. On 7 June 1989, Administrator-General Louis Pienaar decreed a blanket amnesty to all PLAN and MK guerrillas: 'No criminal procedures shall be instituted or continued following the date of this proclamation in any law court against any person . . . in respect of a [politically motivated] crime committed by such person at any time prior to the date mentioned, in the territory or elsewhere.'[4]

This blanket amnesty would later be extended by Pienaar to all SADF, SWATF, SAP, SWAPOL, and other government officials who had operated in South West Africa and beyond. This protective measure was issued on the very eve of Namibian independence on 21 March 1990 and has been narrowly interpreted as meaning

that those responsible for Operation Dual's several hundred disappearances off the coast – whether by the D40/Barnacle/CCB killers themselves, or the Koevoet, SWAPOL, SAP, and Recce suppliers of their victims – are immune from prosecution for the death flights. As with other Namibian innovations, Pienaar's amnesty decree would also set a precedent for the looming transition to democracy in South Africa itself.

In September 1989, Chief of the SADF General Jannie Geldenhuys, apparently unnerved by public revelations of CCB involvement in the assassination, on the 12th of that month, of SWAPO advocate Anton Lubowski, ordered the CCB to shut down. It would take approximately a year, however, to account for its assets – to the extent that this was possible, given its chaotic and cavalier bookkeeping by Theunis Kruger – to wind it up, and properly to privatise its front companies. As the CCB was unbundled, one of the key results was the formation by the CCB's International Manager, Commandant Eeben Barlow, of Executive Outcomes (EO), a private military contracting company that would provide a home for many other former CCB pseudo-operatives, such as Region 5's Major Lafras Luitingh.

Among Executive Outcomes' most sterling recruits was Colonel Bert Sachse, who retired as 5 Recce OC in 1993. He would go on to run EO's successful operation in Sierra Leone against the rebel Revolutionary United Front (RUF) from March 1995 to November 1996 as a de facto 'brigadier' and later served as a private military contractor in Afghanistan.[5]

At least one former CCB operative did not survive the transition: former Swaziland and Mozambique Manager Corrie Meerholz, who had reverted to regular Special Forces in January 1989 as the OC of 5 Recce, was killed in a mysterious car crash on 24 November 1989. The straightness of the road, and the unusually high temperatures at which his car burned out (the fillings in Meerholz's teeth melted and he was only identifiable by his Rolex), leads Peter Stiff to speculate that his car had been rigged with an incen-

diary bomb because he knew too much and was too independently minded. 'In retrospect, now that Operation Dual has finally been brought out into the cold, clear light of day, it becomes a matter of conjecture whether or not Corrie had become "a package that needed to be put into the system".'[6]

39

The CCB shuts down

The existence of the SAP death squad C1 and its base at Vlakplaas became public knowledge when a death-row prisoner, Almond Nofomela, made a last-minute, bombshell confession.

Sentenced to hang for the purely criminal murder of white farmer Johannes Lourens, Nofomela, who was born in 1957, spilled the beans on politically motivated killings he had been involved in as a member of a hitherto-secret Security Branch death squad.

Nofomela named C1 as the unit, Vlakplaas as its primary base, and Captain Dirk Coetzee as his former commander at the farm from the time when Nofomela had joined the unit in 1980. He had served under Coetzee until 1982, when the latter had been replaced by Captain Jan Coetzee, and then until the end of the 1983–1985 tenure of Lieutenant-Colonel Jack Cronjé.[1]

Nofomela was granted a stay of execution, and Coetzee dramatically confirmed his claims in the independent Afrikaans weekly *Vrye Weekblad*.

Pandora's box had been opened, and other police and military officers – no doubt with a weather eye to warding off potential future prosecutions – also started talking to journalists and to their more honest colleagues about apartheid's dirty war. In the wake of the damaging Nofomela–Coetzee revelations about the police death squad, the military black-ops men, realising that their own actions might be next to be exposed, began to cover their tracks.

Stiff writes that in January 1990, CCB boss Joe Verster was informed by General Jannie Geldenhuys that President FW de

Klerk, South Africa's reform-minded new leader, had assured him that there would be no witch-hunt against the CCB. Nonetheless, in mid-January, Verster and the new GOC Special Forces Major-General Eddie Webb, who had taken over on the first of the month, appear to have arranged for the 'disappearance' of the bulk of the CCB's financial and operational records from storage in a strong room at Speskop.[2] Verster later claimed in a letter to De Klerk that this had been done under pressure from four generals, including Geldenhuys's predecessor, General Kat Liebenberg.

The tide of history began to flow at a rate that proved alarming for apartheid's hit men. On 2 February 1990, De Klerk made his watershed announcement in Parliament that the ANC's Nelson Mandela and all political prisoners would be freed, that a moratorium on judicial executions was in place, and that all the liberation movements – including the ANC, SACP, PAC, and AZAPO – were henceforth unbanned.

On the same day, De Klerk appointed the Judicial Inquiry into Certain Alleged Murders under Judge Louis Harms, to be known as the Harms Commission, to examine Vlakplaas and the CCB. On 21 March, South West Africa gained independence as Namibia under Sam Nujoma's SWAPO. The SADF soon admitted in a public statement that the CCB had been the covert arm of Special Forces. Seeing the writing on the wall, Colonel Johan Theron, the longest-serving operative involved in the Operation Dual death flights, resigned his commission and took early retirement from the SADF.

On 2 March, Joe Verster was arrested, but was shortly released on ministerial orders, allegedly so that he could testify before the Harms Commission. But the Commission proved to be unequal to the task: with Harms, who was openly hostile to allegations against the security establishment, as the sole commissioner, it was easily led astray by Verster.

An SAP/Harms Commission investigations team that seized CCB documents from both Theunis Kruger's smallholding and

the old Renosterspruit D40/Barnacle HQ later simply returned the documents to the CCB without sharing relevant files as promised with fellow policemen investigating the assassinations of Anton Lubowski and another CCB victim, Wits academic Dr David Webster.

Anthony Turton notes: 'The proud record of SADF SF operations is now reduced to comedy as the extent of the criminalisation of the internal component of SF becomes known to the public. This unfairly stigmatises all members of the SADF SF in the future.'[3]

That is an understatement: by this stage, it was patently obvious that the remarkable achievements of Special Forces long-range reconnaissance and other legitimate covert activities conducted by Recce operatives during the Border War had been indelibly besmirched by association with the grotesque war crimes committed by the Speskop-directed pseudo-operatives of the D40/Barnacle/CCB line. Still, commanders like Charl Naudé insisted that the blame for any criminal CCB activities be laid at the feet of its Security Branch component, and that the conduct of its SADF component was unimpeachable.[4]

On 31 July, Geldenhuys announced that the CCB had ceased operations. Former GOC Special Forces Major-General Kat Liebenberg justified the CCB and its pseudo-ops history in a letter to the newspapers, reproduced by Paul Els: 'Special Forces: what countries in the world have had the good fortune to have Special Forces like ours? A land, sea and air, as well as a pseudo capacity with everything under one command, giving us the capability of being extremely flexible in the application of these forces . . . The Civil Cooperation Bureau (CCB) has been denigrated and will probably be denigrated even more in future, but I think that it is time that their excellent contribution to the security of South Africa is recognised. If the media reports are correct that members made mistakes and are now applying for amnesty, it is not for me to comment and perhaps influence the judicial process.'[5]

However, on the Security Branch side, C1 under Colonel Eugene

de Kock had merely been cosmetically renamed C10 in January 1991 and, in April of that year, with the shutting down of the Security Branch, it was transferred to the Crime Intelligence Service under the command of Lieutenant-General Krappies Engelbrecht. But although technically remandated to fight organised crime – and in defiance of the now widespread public knowledge of its true function – C10 continued to sow death and destruction.

C-Section and its operational bases such as Vlakplaas were in fact only shut down in April 1993,[6] while some former CCB and C10 pseudo-operators recombined with some former Military Intelligence spooks to form the so-called Badger Unit, as noted by the Independent Board of Inquiry for December 1992 to January 1993: 'In late January [1993] the *Saturday Star* reported that some of South Africa's most benighted security force members past and present have banded together in a secret well-trained and well-armed unit to protect their own interests. The group has called itself the Badger Unit. Its membership includes former CCB members like Ferdi Barnard, MI operatives, security policemen, and former Rhodesian special forces members. There are at least 17 members, of which 12 are known. At least seven were until recently employed by the DCC [Directorate of Covert Collection].[7]

'Apart from Barnard, other members include – the former commander of the Vlakplaas unit Lt-Colonel [*sic*] Eugene de Kock, former CCB [South Africa] regional manager Staal Burger, former CCB co-ordinator Chappies Maree, MI operatives Leon Flores, Anton Niewoudt, Eugene Reilly and [Zimbabwean CIO and NIS double agent] Geoff Price and Vlakplaas policemen Paul van Dyk, "Snor" Vermeulen,[8] Charlie Chiatt, and Willie Nortje. Various Badger members have been implicated in atrocities ranging from sabotage to murder.'[9]

The purpose of the unit was described in the following blunt terms to the *Saturday Star*: 'Concerned security force operatives have formed a self-defence unit to protect themselves and their fellow members from any form of prosecution and retribution or

revenge. If any government present or future dare to touch us, we will respond. If they take one of us, we will take 10 of them.'

In this period, with the SACP's Operation Vula possibly exposed as a plot to stage a national insurrection,[10] with the ANC and the Zulu nationalist Inkatha locked in a slaughterhouse war in Zululand and in the hostels of the Reef, and with the PAC and ultra-right cells committing blatant terror attacks, the SADF's dirty war actually escalated. It secretly initiated what would soon be described as 'Third Force' violence across the country – shadowy killings that could not be directly attributed to either the state and its allies such as Inkatha, or to the liberation movements.

On 18 December 1993, the Steyn Commission – chaired by SADF Chief of Staff Lieutenant-General Pierre Steyn – reported to De Klerk on its investigation into the maelstrom of allegations of Third Force terrorism and destabilisation activities and other rampant criminality in the SADF. It made very uncomfortable reading for De Klerk.

The TRC's Research Department later summed up the documents used to brief the President: 'These documents suggest that based on a variety of sources . . . it was evident that members, contract workers, and co-workers of the SADF were involved in unlawful, unauthorised action including: assassinations, deeds of terror, destabilisation of neighbouring states, corruption, encouraging factional politics within parties, [and] flagrant disregard for state policy.'

In particular, the Steyn Commission accused Special Forces of, in the researchers' words, 'destabilisation actions in black townships, stockpiling arms and developing operational springboards in neighbouring countries, [and] training military wings of internal as well as external movements, e.g., Inkatha, Renamo', while Brigadier Wouter Basson's 7th Medical Battalion was accused, among other things, of 'involvement in poison murders'.

Although 'concrete evidence was not available, monitoring of conversations, movements and transport suggested that, under

cover of Operation Pastoor, elements of Special Forces were involved in East Rand violence; that Recce Regiments 1 & 5 were active in KwaZulu [Zululand], raising the possibility that they may be involved in activities there.'

Curiously, the TRC Research Department's summary of the Steyn report noted the possible continuity of the old CCB 'elimination' function, several years after the CCB was officially dissolved – and connected it directly to Basson: 'An elimination group, under Dr/Brig Wouter Basson was said to exist comprising ex-members of a group that Charl Naudé (CCB/Special Forces) had previously run. This group was said to be in charge of all SADF elimination actions. It was believed that Genl Kat Liebenberg had been fully aware, and possibly until 1989 personally involved in the planning, of this group's activities. Others said to be connected included Genl Lothar Neethling of the SAP's forensic division, Johan Theron of 4 RR, Johan Truter, financial manager of Roodeplaats Navorsingslaboratorium[11] (connected to the CBW programme), and Col At Nel. There are also references to an ex-CCB group known as the "Binnekring" [Inner Circle] who were monitoring black radicals. (Is this possibly the same group?).'

Thus, after decades in the shadows, Colonel Johan Theron's name finally broke through into the light of presidential, if not public, scrutiny, correctly linking him to the Recces (if incorrectly to 4 Recce Regiment), the chemical and biological warfare programme, and Charl Naudé's old 'elimination group'.

Still, the evidence presented to De Klerk included suggestions that there had been an attempt in about 1992 'to get permission [from the SADF] to get a CCB-type organisation going again. It would appear that after permission was not forthcoming, it was decided to go ahead with a private initiative. Names mentioned include: Glen Gorman (ex-CCB), AO1 Pieta van Zyl, Rocky van Blerk (ex-CCB), Dr Vernon Joynt (linked to one of the CBW front companies).'

Rocky van Blerk is no doubt the ex-Recce sniper Sergeant Rocky

van Blerk, who had become a D40/Barnacle intelligence operative under Major Gray Branfield, one of the few Rhodesian survivors of the initial crew. 'Joe Verster was known to have been on a recruiting drive in the Johannesburg area in July 1992,' the TRC researchers wrote.

'It was said that this was connected to him establishing a security and transport company that would transport goods to the Frontline States. However, he also appeared to have access to vast quantities of money (R800 000 was mentioned in connection with an unknown purpose); he had good contact with a general in the SADF; it was rumoured that Eugene de Kock was leaving SAP and going to join him at the end of September . . . Verster was said by ex-CCB members to have R19 million available; funding from criminal activities. A great deal of socialising/contact was being maintained by ex-CCB members. Favourite hangouts included: La Fragola Restaurant at Sunnyside, Eagle's Nest at Valhalla, Oyster Bar at Lynnwood,' all in Pretoria.

The TRC Research Department's Steyn summary noted that the CCB successor's stay-behind network in Zimbabwe was strangely still operational:[12] 'A Sergeant Mazaruva Tapera Nickedimus of 5 RR was questioned by the ZCIO (Zimbabwe Intelligence) during a visit to Zimbabwe and stated that Robson Mugadza, Josphat Dube, Charles Mutanda, Kenneth Dube, and Jim Reeves (SA), were members of the Zimbabwe CCB, were still operational and targeting activists.'

This suggests a remarkable longevity for a clandestine intelligence, sabotage, and assassination cell, probably of the old ZSOU – several years after its parent CCB had been officially dissolved.

But the tale was still one of smoke and mirrors, of garbled allegations, half-understood intelligence, tangled timelines, harum-scarum tales, and disinformation – no doubt leavened with a good dose of backstabbing as former pseudo-operators attempted to cover their tracks and strike out on their own.

40

Shadow boxing: The Trial of the Generals

While Neil Kriel had been able to put his death flight past behind him – meeting only once with Johan Theron in 1993 or 1994 for a quick cup of coffee[1] and nevermore communicating with his former fellow dirty warriors in Delta 40 such as Trevor Floyd – the former securocrat chiefs who had been in charge of apartheid's Total Strategy were facing the challenge of what to do with the deluge of information spewing out about their past shady activities.

In 1992, Project Coast had been renamed Project Jota and Brigadier Wouter Basson had been replaced as director by Colonel Ben Steyn. The writing was on the wall for the old dirty warriors, and in the same year, on 31 March, Special Forces was downgraded from being an independent arm of service falling directly under the Chief of the Defence Force to yet another military unit, renamed Directorate Reconnaissance Regiments, falling under the Chief of the Army instead.

Its status was further downgraded with its GOC SF being required to be a mere colonel instead of a major-general, and former 4 Recce founder Colonel Malcolm Kinghorn was installed in that post. The new Directorate also lost its well-equipped HQ at Speskop, with the staff relocating to Army HQ in Pretoria.

On 29 January 1993, South Africa announced internationally that it had destroyed its chemical and biological warfare stocks, and on 24 March President FW de Klerk revealed in Parliament that South Africa had once operated, but had now successfully dis-

mantled under International Atomic Energy Agency (IAEA) supervision, its six deliverable nuclear weapons and its viable nuclear weapons programme.

The apartheid state's key Cold War programmes were being shut down: on 31 March 1993, Wouter Basson retired from the SADF, but was immediately re-employed as a civilian for twelve months to tie up the loose ends of Project Jota, particularly regarding its overseas entities.

On the very eve of the first democratic, all-race election on 27 April 1994, which swept Nelson Mandela and the ANC into the Union Buildings at the head of an interim power-sharing Government of National Unity, De Klerk granted amnesty by fiat to some 4 000 military officers; the military was insistent that its perpetrators be protected.

On 13 September 1995, South Africa signed the Chemical Weapons Convention, and in the following year the remnants of both Project Jota and of the second-generation CCB were finally, quietly wound up.[2]

But the former apartheid military chiefs were still at risk of criminal investigation by the new democratic state, and it all came to a head in 1996 with the 'Trial of the Generals' in which former Minister of Defence General Magnus Malan, former GOC Special Forces Major-General Kat Liebenberg and eighteen others faced thirteen counts of murder and one of conspiracy to commit murder.

The charges related to a single massacre on 21 January 1987 in which seven adults and six children under ten were slaughtered by gunmen wielding AK-47s at the home of the Inkatha-supporting father of Bheki Ntuli, a supporter of the ANC-affiliated United Democratic Front, at KwaMakhutha, south of Durban. The trial revealed DST1's covert support for Inkatha via the training by 5 Recce and others of an impi of some 200 Inkatha members in the Caprivi Strip under Operation Marion,[3] and the prosecution was based on a paper trail of documents seized from Military Intelligence headquarters that showed a clear chain of command

between Malan, who reported directly to PW Botha, and the killers on the ground in KwaMakhutha.

Security Branch chief Lieutenant-General Basie Smit – who had oversight of C10 in the 1990s[4] – was implicated in trying to ensure that members of the Caprivi death-squad function never endured prosecution. And yet it all fell apart: on 11 October, Judge Jan Hugo found that, while the state had paid Inkatha vigilantes, he did not accept that the kill order came from Malan, and so acquitted Malan and the other accused.

The trial had provided proof positive that the generals had used Special Forces to train and arm civilians as pseudo-ops death-squad entities, so the judgment sent shockwaves through the international anti-apartheid movement, and there were strong suspicions that the State's case had been sabotaged under higher orders in order to allow the generals and their underlings to walk free.

A critical opportunity had been irrevocably lost. Never again would an apartheid military chief of General Malan's rank face the courts for the crimes of apartheid, and Malan, the most likely importer into the SADF of the secret doctrine of disappearance, would die peacefully in his bed on 18 July 2011 aged 81.

Only nineteen days after the generals were set free, following a marathon trial, former C10 commander Colonel Eugene de Kock, dubbed 'Prime Evil' by the media, was jailed for two life terms for murder, conspiracy to murder, attempted murder, assault, kidnapping, illegal possession of firearms, and fraud, plus 212 years for crimes against humanity. It needs to be stressed that De Kock remains the highest-ranking officer jailed for the crimes of apartheid – and that he was a policeman, not a military officer.

The crimes of C10's military opposite unit, D40, would have to wait several more years to be exposed. Even then, the formidable Truth and Reconciliation Commission was unable to do more than scratch the surface, from its first public hearing on 15 April 1996 until the delivery of its *Final Report* to President Thabo Mbeki on 21 March 2003.[5]

And yet something truly earth-shattering was also under way in late 1996 – the watershed year in which the CCB and Project Jota were shut down, the generals were freed, De Kock was put away for life, and the TRC began its work. A hitherto undisclosed process of secret negotiations began between the SADF military chiefs of the old regime and the top Cabinet ministers of the new dispensation.

Major-General Dirk R Marais, Deputy Chief of the Army, and the Convenor of the SADF Contact Bureau, a co-ordinating body which, during the TRC's working period, acted as a focal point for serving and former military officers, co-ordinating their response to the commission, told this author: 'I was the last convenor of the South African Defence Force. My counterpart on the ANC (government) side was Mr Jürgen Kögl. The deliberations were initiated by the ANC on initiative of Mr [President] Mandela who was represented by [Deputy President] Mr [Thabo] Mbeki and later succeeded by [Deputy President] Mr [Jacob] Zuma.'[6]

Asked to confirm who initiated the talks, Marais stated: 'I think General [Constand] Viljoen said Mandela approached him and then he discussed it with us [the SADF Contact Bureau] and then we said "OK, we can discuss it," then Mandela appointed Deputy President [Thabo] Mbeki . . . he approached Constand Viljoen. General Viljoen then discussed the matter with the other former Chiefs of the Defence Force and I was adopted as Convenor, and then he [Viljoen] replied to the request of the ANC, [of] Mbeki, he said "OK, we are prepared to talk to you".'[7]

The deliberations in question would last seven years and constitute one of the most dramatic hidden processes of the democratic transition – with far-reaching consequences: negotiations towards implementing what in a previous book this author has termed a 'Pact of Forgetting', borrowing from the example of post-Francoist Spain.[8]

There, a political agreement in the mid-1970s between the newly unbanned leftist parties and the former ruling rightist parties,

which still had deep ties to the armed forces, ensured that no prosecutions would take place for gross human rights violations committed during the Spanish Civil War (1936–1939) and the rule of Francisco Franco (1939–1975). In Spain, the Pact of Forgetting was seen by both sides as a way of preventing 'vengeance' against the killers *on both sides*, and so ensuring the stability of the democratic transition. The pact was codified and institutionalised in the Amnesty Law of 1977, which provided wide-ranging immunity from prosecution for perpetrators of war crimes prior to the coming of democracy.

Marais told this author: 'I had no agenda – up till now – on what they [the ANC] wanted to achieve. I think they wanted to keep the former Chiefs of the Defence Force involved in discussions so as to prevent them organising anything they might have – [but] there was no such idea from our side.'

And in fact by this stage, the right-wing militia forces had been rendered a laughing stock by the military defeat of the neo-fascist Afrikaner Weerstandsbeweging (AWB) in Bophuthatswana on 11 March 1994. Meanwhile, a mooted insurrection by Citizen Force reservists and rural Commandos to establish a white separatist state had been nipped in the bud by General Constand Viljoen's formation of the right-wing Freedom Front political party to contest the elections, and the new South African National Defence Force (SANDF) under General Georg Meiring had demonstrated its loyalty to the government of the day. Yet the new ANC government – the National Party having withdrawn from the Government of National Unity on 30 June 1996 – was clearly still insecure about any threat the old generals might pose.

Basing his version on interviews with Viljoen and Kögl in particular, researcher Ole Bubenzer states that the ANC leadership's reason for making the approach to the generals was sixfold. Firstly, there was 'the still very volatile political situation in KwaZulu-Natal, which was due to prolonged political tensions between the ANC and IFP during the 1990s';[9] Jacob Zuma was trying to broker

a peace between the parties and it was feared that prosecutions resulting from the TRC would stir up the hornets' nest in the run-up to the second democratic elections on 2 June 1999.

'The initial intention was, thus, to create an amnesty scheme which would specifically cover the political crimes that happened between the ANC and IFP supporters in KwaZulu-Natal [but the] generals . . . categorically refused to support a regionally confined amnesty process.'

Secondly, 'According to Kögl, one reason for the government's initiative was the SADF's, and therefore the generals', alleged [Third Force] involvement in the KwaZulu-Natal [and Highveld] conflicts between the IFP and ANC', and so government leaders 'were wary that the generals could still possess knowledge of . . . hidden and unknown weapons caches, established during the late 1980s and early 1990s', which could be used to inflame the conflict. Thirdly, the ANC 'also considered that the TRC process suffered from a lack of sufficient findings on SADF activities . . .' largely because the Contact Bureau had ensured a low level of TRC amnesty applications by SADF members, especially regarding CCB/Third Force destabilisation during the negotiations period, and other 'still uncovered secret SADF activities'. Operation Dual was among such unknowns at the time.

Fourthly, there was 'the government's fear that South Africa could be exposed to claims for reparation and damages by countries which had been attacked by the apartheid state'; neighbouring countries had indeed discussed the possibility of such reparations, so the 'government . . . tried not to fuel such discussions by prosecuting SADF members for the atrocities caused in other countries. In this regard, the aim was to make sure that full-scale criminal trials did not go ahead.'

Fifthly, the government was wary that a purge of the new SANDF would undermine its military effectiveness – and possibly create 'legal uncertainty' over some SANDF actions in peacekeeping operations in Africa. Lastly, Bubenzer states: 'The consultations

generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.'

But there was another crucial impetus for the ANC's initiating what became a seven-year secret negotiations process: from the outset, President Mandela's objective, as expressed via his team leaders – Thabo Mbeki in his capacities both as Deputy President of the country and ANC president (from 1997 onwards), and Jürgen Kögl, the ANC's/Government's Convenor – was explicitly a quid pro quo. In Marais' words: 'They don't want us to be charged – and they don't want them to be charged'[10] – or, as Marais later claimed were Mbeki's words: 'I don't want my President to be charged in court.' He explained, however, that Mbeki had not meant this in the specific, as in President Nelson Mandela, but rather in the generic, in that he did not want to see *any* ANC State President facing charges.

It is a curious aspect of the negotiations that Marais' opposite number, businessman Jürgen Kögl, hailed from South West Africa, the territory in which South Africa's armed forces had spilled the most blood, and in which Operation Dual had performed the bulk of its grisly disposal work. When Mbeki returned from exile, he stayed in Kögl's apartment.[11]

A letter written by Marais to then Deputy President Jacob Zuma in early 2004, for the signature of the former Chiefs of the SADF,[12] recalled the initiation of the lengthy series of secret, high-level talks: 'A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T Mbeki when he approached General CL Viljoen in [late 1996?].

General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC. A convenor, Mr J Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg [in early 1997?].

'That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M [Mathews] Phosa,' leader of an ANC lobby arguing that its members be protected from prosecution, 'and by us the former Chiefs of the SADF. There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki expressed, however, the opinion that the process of communication that was mutually agreed to was so important to him that he preferred to remain the prime representative of the ANC in further deliberations.'

Bubenzer claims that the talks were initiated later, in 1998, at the same time as a separate series of negotiations with representatives of the police hierarchy began.[13] He further claims that Constand Viljoen was initially approached not by Mandela but by Jacob Zuma, then a KwaZulu-Natal provincial cabinet minister, though Zuma could only have been authorised at the very highest level, 'with the aim of consulting over questions of criminal accountability in the wake of the TRC. Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the Kontak Buro [the SADF Contact Bureau convened by Marais] who were, thus, already working intensely on amnesty issues and prosecutions. He immedi-

ately referred Zuma to the network of generals around [Jannie] Geldenhuys.'[14]

Bubenzer writes that Geldenhuys and Zuma proceeded to meet, both sides flanked by legal advisors: 'The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms . . . All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.'[15]

This compartmentalisation by the ANC of talks between the SADF and SAP may have been a divide-and-rule strategy for the ANC, but, as the apex predators of the apartheid state, it likewise suited the military to separate its cause from that of their less powerful and looser-lipped police colleagues.

Marais said[16] that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals, such as former Surgeon-General Niël Knobel, or one of the former Chiefs of the Air Force, as required.

Although Marais said that no specific offences were ever discussed, Kat Liebenberg's continuous presence suggests that he was monitoring any potential references to Special Forces' black ops such as Operation Dual – though it was totally unknown by their ANC opposites at the time – while Knobel's intermittent presence suggests he was monitoring the ANC's limited knowledge of the Project Coast chemical and biological warfare programme.

On the ANC/government side, Marais said Mbeki's team at the talks usually consisted of the 'security cluster': this would make it, initially under Mandela's Cabinet, Minister of Defence Joe Modise, Minister of Safety and Security (Police) Sydney Mufamadi, and Minister of Justice Dullah Omar.

'Many deliberations followed and mutual agreements were

reached,' the letter read. Marais said that the discussions towards formulating a 'Pact of Forgetting' (this author's term, not Marais') took place once every few months, 'a few times at Kögl's house, a few times at the Presidency, once in Mbeki's house, and once in Durban with Zuma' – and were 'very social'.

41

Half-truths at the Truth Commission

Despite the intensity and probity of its investigators' tireless work in describing crimes against humanity committed by *all sides* between 1 March 1960 and 26 April 1994, public knowledge of Delta 40 would remain an ephemeral flicker in the peripheral vision of TRC investigators.

It is not necessary to detail the extent to which the TRC assessed the SADF's sweeping guilt in conducting a dirty war against the civilian populations of South Africa and neighbouring countries, other than to note its controversial finding that 'while some acts of regional destabilisation may have been a defence against Communism, the purpose of the war was also to preserve white minority rule in South Africa and was, therefore, a race war'. We will focus on what the TRC revealed about the military's death-squad functions specifically – or rather, how the military managed to obscure the existence and operations of such entities, while allowing the police death-squad elements to bear the brunt of scrutiny.

Along the lines of their secret 'Pact of Forgetting' negotiations with the ANC, the military chiefs attempted in fact more stridently to demand that a blanket amnesty – similar to that applied in South West Africa in 1989 and 1990 – be applied to cover all apartheid-era crimes committed by whatever force.

On 14 July 1998, nineteen years after the first Operation Dual death flight, former Defence Minister General Magnus Malan and former SADF Chiefs General Constand Viljoen and General Jannie Geldenhuys made their suggestion public to the TRC.

They had submitted a similar demand the previous month to Minister of Justice Dullah Omar – who had ironically been targeted by the CCB for assassination. Yet the TRC's Deputy Chairperson, Dr Alex Boraine, responded that it could not make legislative recommendations on a general amnesty. Although they were unable to succeed with the TRC, which completed its work within a few months of their appeal, behind the scenes the secret 'Pact of Forgetting' talks with the ANC Cabinet ministers continued. According to Marais' letter to Zuma: 'When Mr Mbeki could not attend [the talks], he authorised someone, usually a minister, and later on when he became president in 1999, you [Deputy President Jacob Zuma] represented him. In execution of mutual decisions, much effort was put in by the Contact Bureau and some of your ministers to prepare papers and submissions for acceptance by the Deputy president and later on the President.'[1]

Ole Bubenzer names only Zuma, Penuell Maduna, Mathews Phosa, Charles Nqakula, and Sydney Mufamadi as being part of the talks, adding: 'On various occasions Thabo Mbeki was also present, as Vice [sic] President and later in his capacity as the President.'[2] Former Presidents Mbeki and Zuma did not respond to queries by the time of going to press, and neither did Maduna and Nqakula.[3] But Mufamadi responded that although he had indeed participated in talks, they were not with the SADF but the parallel set with the SAP led by Security Branch chief General Johan van der Merwe, and were, he said, aimed at the 'difficult' task of 'convincing them to co-operate with the TRC.'[4] Phosa in turn flatly stated he was 'not part' of such negotiations as claimed by Bubenzer (who had cited Kögl) - but Phosa added that he had passed this author's emails on to Kögl who said 'he refuses to be interviewed about this at all.'[5]

Meanwhile, the TRC investigators prepared to consolidate their immense work. At the heart of the TRC's seven volumes, handed to President Nelson Mandela on 29 October 1998 as the *TRC Interim Report* and updated with the *TRC Final Report* of over 4 500 pages handed to President Thabo Mbeki on 21 March 2003, is the

list of 21 748 victims identified by the Commission in its hearings. And yet, in the entire list there are only two SWAPO victims named: SWAPO lawyer Anton Lubowski, assassinated by the CCB in 1989; and 22-year-old Tshikani Nkuna, who was 'assaulted by members of the SAP at John Vorster Square, Johannesburg, in 1983. Mr Nkuna was interrogated and forced to admit to being a SWAPO member.'[6]

It is obviously untrue that in its bloody 23-year war against SWAPO, the apartheid authorities only accounted for two SWAPO victims. In echo of this blind spot in the record, Marjorie Jobson, co-ordinator of the Khulumani Support Group, a lobby group acting for victims of apartheid, confirmed that, while 'we have 169 cases on our disappearances database', none of them were SWAPO members.[7] The *Final Report* stressed that, while the police had proven a valuable source of information, the Commission 'received notably fewer amnesty applications from members of the former South African Defence Force (SADF), notwithstanding the fact that the SADF was involved in a series of regional conflicts over a period of more than fifteen years. Many of these conflicts transgressed the "laws of war" as laid down in international protocols.'[8]

And in fact, the TRC's *Final Report* admits to what can only be described as a fatal limitation of its scope: 'While few statements were received from deponents and victims outside South Africa, it has been argued that the *majority* of victims of gross violations of human rights were in fact residing outside the country's borders at the time the violations were committed.'

Nevertheless, in the chapter entitled 'The State Outside South Africa (1960–1990)', the TRC noted that evidence had been gathered of 'violations committed by South African security forces or their agents and/or surrogates in nine regional states: Botswana, Lesotho, Swaziland, Angola, Mozambique, Zimbabwe, Zambia, Tanzania, and the Seychelles – and in Western Europe: in the United Kingdom, France, Belgium, the Netherlands, and Scandinavia.'[9]

Although no South West Africans were judicially executed during the occupation, out of fear of an international backlash, the TRC found that detentions for indefinite periods under emergency proclamations were widespread – as was the torture of detainees.

'In 1983, the SADF revealed that it had detained a total of 2 883 people during the 1977–83 period, while the security police disclosed that they had detained 2 624 people during the same period. Mass detentions in the "operational areas" were common. Many detainees were held secretly and without access to lawyers or relatives for long periods, sometimes years. Such conditions provided opportunities for prolonged abuse and torture.'

This period covers the formative phase of Delta 40/Barnacle – and gives an indication of the size of the detainee population that so worried Colonel Johan Theron that he came up with his own 'final solution'. As the report states: 'There is considerable evidence that the process of "turning" was accompanied by torture and that the price of non-compliance was summary execution. Once "turned", these askaris and other Koevoet members are said to have carried out atrocities while disguised as SWAPO fighters in order to discredit the liberation movement, as the Selous Scouts had done during the Rhodesian war . . .'

Finally, D40/Barnacle did make a named, albeit brief, appearance in the Truth Commission's *Final Report*, but its true nature, composition, and mandate was confused by the investigators and commissioners, who wrapped it up within a general description of the Recce Regiments: 'The four Recce regiments were numbered 1, 2, 4, and 5. For a brief period there was also a 3 Recce but that name seems to have given way to Delta 40 or D40. This unit was formed in response to the independence of Zimbabwe and the large numbers of experienced Rhodesian counterinsurgency personnel who were recruited into the South African security network through Operation Winter.'

As will be readily appreciated, here the ex-Selous Scouts unit 3 Recce, a formal if covert military Special Forces commando, was

conflated with Delta 40, a secret 'civilian' pseudo-ops unit, even if they both reported to Speskop.

The Truth Commission's confusion, and slender knowledge of the staffing, functions, and operations of Delta 40 and its immediate successor, Barnacle, is excusable as its investigators and commissioners appear to have been deliberately misled, or at the very least grossly underinformed by the generals, in a TRC special hearing in Cape Town on 8 October 1997 at which former SADF chief General Constand Viljoen testified, as did the former GOC Special Forces, Major-General Joep Joubert, but at which D40 initiator Major-General Fritz Loots was strangely absent.

General Viljoen stated: 'There was an increasing requirement for clandestine and covert operations of a new kind in 1986. A small group known as D40 was originally organised for this purpose. D40 developed into Barnacle which later was transformed in the CCB. The CCB was a covert military organisation managed by a managing director under supervision of a senior officer Special Forces.'[10]

So Viljoen compressed the entire unit history of D40/Barnacle over 1979 to 1986 into two sentences – and naturally completely omitted to mention the Operation Dual death flights, as these were totally unknown to TRC investigators. Also, the way he stated it makes it seem as if D40 was founded in 1986, though by that time – the unit's transformation into the CCB – it had already been an operational unit for almost seven years.

In his amnesty application,[11] former GOC Special Forces Major-General Joep Joubert was a little more frank, yet still concealed more than he displayed: the functions of the CCB were 'a) that ANC leaders and people who substantially contributed to the struggle would be eliminated; b) that ANC facilities and support services would be destroyed; c) activists, sympathisers, fighters, and people who supported them would also be eliminated . . .'[12]

In his testimony in support of his application, he explained: 'Before I took over command, the Special Forces started executing

clandestine operations outside the borders against ANC bases but its operations were for a long time restricted to intelligence-gathering operations overseas. Special Forces consisted of reconnaissance units and a small group known as D40 which eventually became Barnacle and then the CCB. Under my command their task was generally expanded . . . to support the SA Police in its internal covert operations. The members of Barnacle were all in civilian garb . . .'

Again, no D40/Barnacle personnel or specific operations, missions, or actions were identified, and there was not a whisper of Operation Dual's many dolorous death flights – which had continued for at least a year under his command as GOC Special Forces between 1 November 1985 and the last presumed death flight on 12 December 1987. In fact, Joubert's testimony grossly undercounts the death toll of the CCB: asked by TRC Commissioner Ilan Lax to estimate how many persons he was aware of that Special Forces (as a whole, including the CCB) had killed in operations in support of the SAP – that is, in its *internal* application to the South African domestic situation – Joubert replied that 'it must be around 12 persons'.[13]

42

Dual exposed: the Wouter Basson trial

Operation Dual finally became public knowledge with the indictment against former Project Coast director Brigadier Wouter Basson on 23 March 1999.

The full-bearded Basson, who had glided apparently untouchably through his TRC testimony only the previous year, cheekily sporting a colourful African-style embroidered, open-necked shirt, now appeared to have been run to ground. He faced a litany of 24 fraud and theft charges relating to a web of intrigue and secret slush-fund money that spanned the globe, six drugs charges, eleven murder, sixteen conspiracy-to-murder, and two attempted murder charges, plus a handful of lesser counts.

What was most startling to observers was that, at the heart of the murder-related charges which together accounted for roughly 229 deaths, was Charge 31, conspiracy to 'murder a) members of South West African People's Organisation . . . who were in custody and posed a security risk; and b) own powers that had created a security risk, either committing and/or assisting in the commission of the crime and/or effecting it'. The indictment claimed that the conspiracy took place during 'the period from 1979 to Dec 1987 and at or near Special Forces . . . Headquarters, in the district of Pretoria in the jurisdiction of the Transvaal Provincial Division. It allegedly involved the following: Basson himself; former GOC Special Forces Major-General Fritz Loots; Speskop SSO Counter-Intelligence Colonel Johan Theron; Theron's SO2 Counter-Intelligence Major Eric Kennelly; Speskop SO3 Counter-Intelligence

Captain Danie Phaal; a former 5 Recce sergeant-major as well as a former Military Intelligence interrogator at Fort Rev (who both cannot be named as they refused to testify in the Basson trial); Speskop SSO Air Ops Colonel Matie van der Linde and his successor Colonel Hap Potgieter; D40/Barnacle adjutant Sergeant-Major Trevor Floyd; Basson's former staff officer at Speskop Dr Kobus Bothma; D40 founding OC Major Neil Kriel; D40 Urban Intel chief Major Gray Branfield; 'and other persons unknown to the State'.

But on 12 October 1999, just over a week into the trial, presiding Judge Willie Hartzenberg upheld South West African Administrator-General Louis Pienaar's blanket amnesty for crimes committed by security forces in the territory, and further ruled that other crimes alleged to have been committed by Basson and his associates outside of the border of South Africa were beyond his jurisdictional reach. This effectively saw the hundreds of murders related to Operation Dual dropped.

Given prosecutor Advocate Torie Pretorius's very explicit location of the origination of these war crimes and criminal conspiracies at Speskop, south of Pretoria, Hartzenberg was playing fast and loose with the legal truth.

Fortunately, for the purposes of this study, the men responsible for the Operation Dual death flights and those drawn into its web were still required to testify from 2 May to 24 November 2000 regarding Basson's alleged provision of drugs and poisons to them – or knowledge of the death flights, like their unnumbered victims, would have languished in benighted obscurity. It will be readily appreciated that their self-incriminating testimony – and the key confirmatory interviews with this author – form the backbone of this study.

When it all went down to the wire, however, Hartzenberg discounted the results of prosecution investigator Henry Bruwer's seven-year forensic audit of Basson's WPW/Wisdom Group of companies, finding that Bruwer 'failed' to prove that Basson was the beneficial owner of the Group.

Instead, the judge accepted Basson's bald statements that he had merely been following orders in moving tranches of up to tens of millions of rands around the globe. Frustrated prosecutor Anton Ackermann had attempted in February 2000 to have what he perceived as an obviously biased Hartzenberg recuse himself, but failed, and in June 2001 Hartzenberg dismissed another fifteen out of the remaining 61 charges to which Basson pled not guilty.

By the time Basson himself took the stand in June 2002 for nine weeks of showboating testimony, he was bursting with confidence and charm, and had the court eating out of his hand.

On 11 April 2002, Hartzenberg read out his judgment, and, as recorded by observers Marlene Burger and Chandré Gould: 'The court accepted without reservation that the "gruesome" murders described had been committed [under Operation Dual], but found that Basson was not involved in them, and that the meeting with General Fritz Loots at which he allegedly agreed to supply Theron with drugs, never took place. Theron was "a decidedly strange man", said the judge, who had taken a scientific approach to Operation Dual; he said that the idea of placing poisoned beer at taxi ranks in the Eastern Cape at random [evidence of which had been led] was a plan so bizarre that it could "only have been thought up by the same man who devised Operation Dual and singlehandedly executed that plan". According to the judgement, Basson was an "excellent" witness while Trevor Floyd and Danie Phaal were poor witnesses.'[1]

Despite Hartzenberg's careful severance of Basson's ties to Operation Dual, the importance of his official acceptance of the fundamental truth of the Operation Dual crimes against humanity and war crimes is that they can without a shred of doubt be said to have indeed occurred as Neil Kriel, Johan Theron, Trevor Floyd, Matie van der Linde, and their cohorts testified.

The two observers opined: 'There could be no doubt that a conspiracy existed within the SA Defence Force's Special Forces unit to eliminate selected targets, or that poison was one of the

assassination weapons available to ensure that the murders could not be traced back to the SADF . . . considerable care is taken to carry out covert operations in such manner that they can be plausibly denied, and so it was within the Civil Cooperation Bureau and its forerunner, [D40/]Barnacle . . . all operations were carried out on a strictly enforced need-to-know basis. Because of these safeguards, none of the witnesses called by the State had been able to provide the court with a full or complete picture, but the cumulative effect of all the evidence provided all the proof needed.'

Yet, in the biggest reversal since the failure of the Trial of the Generals, Brigadier Wouter Basson was acquitted on all remaining 46 charges – the news sending shockwaves through the country, with much angst wrung out in newspaper opinion pieces. The evidence of 153 state witnesses, buttressed by up to 50 supporting affidavits that had been teased out over some 300 trial days, producing 33 000 pages of court transcript, had astoundingly been found wanting by Hartzenberg.

Burger and Gould reported: 'As the judge pronounced Basson not guilty on all charges, there was applause from a group of about 30 supporters, including five former SADF generals – retired Defence Minister Magnus Malan, erstwhile SADF chief Constand Viljoen, former surgeon-general Niël Knobel, who was the Project Coast manager and Basson's immediate superior, Joep Joubert, former commander of the SADF's Special Forces to whom the head of the CCB reported, and Dirk Marais, co-ordinator of the SADF's largely successful campaign to dissuade soldiers involved in the Angolan and Namibian conflict during the 1980s from applying for amnesty from the Truth and Reconciliation Commission.'[2]

The adulatory response of these men is a powerful indicator that Basson's role was to stand in the breach in lieu of the higher chain-of-command generalship responsible for the war crimes of Operation Dual and other SADF criminality; he would not, how-

ever, be sacrificed as a scapegoat as the SAP had done with Eugene de Kock; the leading apartheid military echelons could at last sleep soundly at night.

On 3 May, as Burger and Gould recount, 'Hartzenberg granted indemnity from prosecution to 24 of the 30 state witnesses who testified':[3] they included Colonel Matie van der Linde and Major Eric Kennelly, but indemnity was *not* granted to Colonel Johan Theron, Major Neil Kriel, Captain Danie Phaal, Sergeant-Major Trevor Floyd, and Dr Kobus Bothma.

Thus, the founding OC of Delta 40, his intimate death flight sidekicks, and at least one of their providers of drugs and poisons were left entirely vulnerable to war crimes prosecutions – an exposure underlined by Hartzenberg's ruling that Operation Dual had indeed been real.

The month before Basson's acquittal, the TRC Amnesty Committee had appeared to offer hope of a better outcome when it finalised its own report – separate to that of the Truth and Reconciliation Commission's report – in which it recommended about 300 prosecutions of apartheid-era perpetrators of gross human rights violations. Then, on 21 March 2003, a year after Basson waltzed free, the *TRC Final Report* was publicly released, recommending a 'bold prosecution policy' in those cases where amnesty had not been applied for so as 'to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law'.

As we have seen, remarkably only two SWAPO dead made it onto the list of victims identified by the Commission, but the *Final Report*'s recommendation of a stern prosecutions approach grounded in international law appeared to strengthen the hand of the National Prosecuting Authority (NPA).

Yet, on 3 June 2003, the Supreme Court of Appeal (SCA) in Bloemfontein, to which the NPA had applied to overturn Judge Hartzenberg's 12 October 1999 quashing of the six extraterritorial charges against Basson – including the conspiracy to murder the

hundreds of victims of Operation Dual[4] – ruled in favour of Basson, thus upholding the dismissal of the Operation Dual conspiracy. So, the State advocates of the NPA appealed to the court of last resort, the democratic state's new highest judicial body, the Constitutional Court in Johannesburg.

43

(Re)disappearing the disappeared

While the Wouter Basson case was wending its way through the courts, progress had been made by the old military chiefs and the ANC leaders in the seven-year negotiations on a legal framework for a post-TRC amnesty process.

Major-General Dirk Marais, the Convenor of the SADF Contact Bureau, recalled: 'Eventually there was an agreement that they would prepare legislation to grant a sort of amnesty-in-general . . . and they had a writer, a law writer in Cape Town and when it was time they invited us to Cape Town at state expense.'[1]

The date was 17 February 2003, and a delegation of generals, led by former Chief of the SADF General Jannie Geldenhuys, met with Minister of Justice and Constitutional Development Penuell Maduna and Minister of Safety and Security Charles Nqakula.

'They were very nice,' Marais said. 'We gathered at seven in the morning because it was [Jacob] Zuma's speech at the Parliament that day . . . they called their writer [a state official in the Department of Justice] and he read to us the proposed legislation.

'When he finished, we said, "But that's got nothing to do with us" . . . because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed] . . . so General Geldenhuys said "No, we don't need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people . . . don't have to do that, so this means nothing to us" . . . The whole thing collapsed there.'

The differences between the sides were now irreconcilable: the

military chiefs wanted a new law granting a blanket amnesty with no disclosure required, but the ministers wanted a new law granting amnesty on a case-by-case basis only after full disclosure.

Marais claimed that it was the ANC and not the SADF that stood to gain the most from a general amnesty – and had the most to fear from any legal requirement that amnesty was dependent upon full disclosure, because they were in power and the stability of their rule would be threatened by prosecutions.

Geldenhuys's delegation then met with Zuma in his office, as Zuma had expressed a desire to meet with them. According to Marais, they merely shared 'a few niceties and then he greeted us and then we asked [Jürgen] Kögl to book us [a flight] directly back . . . That was the last getting together.'

The attempt at establishing a mutually agreed 'Pact of Forgetting' had collapsed. (Ole Bubenzer claims that a few meetings took place until 2004 but 'only as a matter of courtesy').[2] However, it would be secretly and dramatically revived by the ANC government – on its own, very different, terms.

Advocate Howard Varney, who had been consulted by the TRC, wrote: 'In March 2003, the National Prosecuting Authority established the Priority Crimes Litigation Unit (PCLU) to pursue, amongst other cases, matters emanating from the TRC process. Following an audit of the 300 cases [recommended for prosecution by the TRC Amnesty Committee], the PCLU indicated that just over half of these cases could not be prosecuted but that twenty-one cases, with some further investigation, were ripe for immediate prosecution.'

However, the unit, under Advocate Anton Ackermann, 'was rendered impotent' because the government failed to assign it any investigators, Varney said.

'Less than a handful of prosecutions were taken forward between 2002 and 2004. The only significant prosecution, that of three security police officers who were denied amnesty for the murder of three activists, has stalled.'

The three – former Security Branch Colonel (later Major-General) Chris Smith, Captain Gert Otto, and Captain Manie van Staden – had not applied for amnesty at the TRC, but almost the entirety of their involvement in the CCB plot to kill the ANC's Reverend Frank Chikane by poisoning his underwear had emerged during the Wouter Basson trial.

It turns out that this stalling of prosecutions and the under-resourcing of the PCLU was the result of a deliberate – yet not uncontested – process that most probably has its origins in the 1996–2003 secret talks towards formulating a legal 'Pact of Forgetting'. As we have seen, the talks had allegedly been initiated by Nelson Mandela and were pursued further by Thabo Mbeki and Jacob Zuma in consultation with the four apartheid military chiefs who had previously demanded a blanket amnesty: Geldenhuys, Magnus Malan, Constand Viljoen, and Kat Liebenberg.

It appears as if the ANC's continued interest in pursuing some kind of post-TRC amnesty process was driven by their fear of the consequences for certain leading ANC figures following the PCLU's recommendations that 21 cases against perpetrators across the political spectrum be pursued.

On 23 February 2004, Cheryl Gillwald, the Director-General of the Department of Justice and Constitutional Development under Penuell Maduna, convened a forum of her peers, which appointed an Amnesty Task Team. It was chaired by the department's Deon Rudman and consisted of Yvonne Mabule and Vincent Mogotloane of the National Intelligence Agency (NIA), Advocates Gerrie Nel and Lungisa Dyosi of the NPA, Joy Rathebe of the Department of Defence, and Commissioner Ray Lalla of the South African Police Service.

The Task Team's mandate – as detailed in a report marked 'Secret'[3] – was given as: '1. Consideration of the nature of the "arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation" that the NPA and intelligence agencies may come up with in assisting

persons who divulge information relating to offences committed during the conflicts of the past. 2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past. 3. Bearing the above-mentioned in mind, whether legislative enactments are required.'

The secret report notes that the Amnesty Task Team met for the first time on 26 February, then again on 1 March 2004. By its own rather restrained account, these meetings were stormy as the Task Team's considerations proved to be a lightning-rod for contestations that lay at the heart of the TRC's reconciliation process. The report highlighted a series of concerns, including that the story behind 'persons who have disappeared' might not be revealed; here, Operation Dual's victims have a ghostly presence.

The report later mentions that, although the Criminal Procedure Act allows both for the granting of indemnity from prosecution to perpetrators who testify honestly for the state in court, and for crimes older than twenty years not to be prosecuted, the Task Team specifically excluded war crimes from the latter provision.

The report nevertheless concludes that 'The Task Team is of the view that the only way to address [its] concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team.'

This fiery argument was between those who rejected a supplementary amnesty process out of hand, feeling that this amounted to gross disrespect for the victims on all sides, and those who believed a further process could resolve the problem of so few perpetrators' having applied for amnesty via the TRC[4] – as well as reveal what had happened to the disappeared.

The caveat raised by some of those in favour, however, was that (in echo of the generals' position) such a supplementary process *had* to be legislated by Parliament as a statutory follow-on process to the TRC Amnesty Committee's concluded work.

Unfortunately, the minutes do not reveal who among the par-

ticipants adopted what stance in this debate. At about this time, Marais wrote a letter to Zuma complaining about the lack of information about any progress: 'You are requested to inform us of the desirability from your point of view to keep the door open for further co-operation.'[5] But the old military chiefs were now apparently considered irrelevant to the process and Zuma did not respond, slamming that door.

In response to a 31 January 2004 letter from Kögl suggesting that the defunct talks be properly wound up, Marais drafted a letter on behalf of the SADF Contact Bureau,[6] thanking Kögl for his 'diligent efforts' through the years. 'It is however considered inappropriate that the process, initiated by Mr T Mbeki in his former capacity as Deputy President, should stagnate or be concluded without any communication in this regard by the person who initiated it.'

The letter said the generals were separately appealing to President Mbeki in this regard, but asked Kögl 'as the ideally positioned player during the years of deliberations, to compile a review of the entire process which would serve as a trustworthy neutral record . . .'. The appeals went unanswered: the generals were out in the cold.[7]

Meanwhile, the Amnesty Task Team went ahead and established an expanded Departmental Task Team under the Department of Justice to advise Mbeki on the granting of pardons under section 84(1)(k) of the Constitution and to advise the Commissioner of Correctional Services regarding the possible parole or correctional supervision of perpetrators who were already jailed. Ultimate responsibility for decisions about prosecutions, however, rested with the NPA, which 'is an independent constitutional institution'.

The new Task Team consisted of the NPA, the Department of Justice, the intelligence agencies – the internal NIA, the external South African Security Service, Defence Intelligence, and Crime Intelligence – plus the Defence Force, Police Service, Correctional

Services, and the Office of the President. The Task Team suggested a 'Draft Indemnity Bill' that could be submitted to Parliament to authorise its processes.

In reality, the independence of the NPA was not respected – in fact, it was allegedly interfered with by Justice Minister Brigitte Mabandla, several of her Cabinet colleagues, and Police Commissioner Jackie Selebi. No Indemnity Bill was submitted to Parliament, nor was reconciliation incorporated into the process, which proceeded secretly to absolve perpetrators, without the envisaged input from victims.

On 1 December 2005, the NPA effected an amendment to its prosecution policy, which, in Varney's words, 'allowed for the granting of an effective immunity from prosecution even in cases where there was sufficient evidence to obtain a conviction; the crime in question is serious; the victim was in favor of a prosecution; and the applicant did not apply for or was not granted amnesty at the TRC. Moreover, the amended policy did not allow victims to see the "truth" disclosed by perpetrators as the whole process was to occur behind closed doors.'

In the interim, in February 2005, Advocate Wim Trengove, SC, had taken the NPA's appeal against the SCA ruling upholding the quashing of the extraterritorial charges against Basson to the highest court in the land, the Constitutional Court (ConCourt) in Johannesburg.

Trengove argued that the blanket amnesty granted in 1990 by Louis Pienaar to all security forces that had operated in South West Africa did not in fact apply to Basson and his accused co-conspirators at Speskop, the EMLC, 5 Recce, and D40/Barnacle/CCB because the 'amnesty merely indemnified those guilty of crimes committed in the course of the performance of their duties and functions in Namibia from prosecution in that country. It meant that if the conspiracies to which the accused is alleged to have been a party were implemented in Namibia, those responsible for its implementation were rendered immune from prosecution in Namibia.

'The accused is charged in this case with the crime of conspiracy committed in Pretoria and not the crime of murder committed in Namibia. It is immaterial for purposes of the charges against the accused whether the target offences at which the conspiracies were directed were ever committed at all. If they were committed [and Judge Hartzenberg had ruled that Operation Dual had truly been carried out], the fact that those responsible might subsequently have received immunity from prosecution in Namibia cannot in any way affect the accused's criminal liability in South Africa.'[8]

Trengove additionally argued that the common law crime of murder in South Africa had applied to South West Africa since 1919, while the Riotous Assemblies Act of 1976, which outlawed conspiracy to murder within the territory of South Africa, was also extended to South West Africa from 1981 to 1989.

Trengove noted that the SADF Military Discipline Code also had extraterritorial reach beyond South Africa's borders and covered all crimes that would normally be prosecutable as such by the civilian courts.

Finally, the crimes of Operation Dual also fell under international criminal law. Trengove, referring to the 1998 arrest of former Chilean dictator General Augusto Pinochet in Britain and his indictment *in absentia* in Spain in 2000, said that every state had 'universal jurisdiction' over international crimes committed beyond its borders and, in such prosecutions, acts as the agent of the international community. 'The murders that the accused [Basson] and his co-conspirators [Fritz Loots, Johan Theron, Neil Kriel, Trevor Floyd, Matie van der Linde, and the rest] conspired to commit were crimes under customary international law. They constituted crimes against humanity, war crimes, and the crime of apartheid.'

He argued further: 'There is . . . abundant proof that the status of the crime was already established in the period between 1979 to 1989 – the period during which the accused conspired to commit the crimes that constituted crimes against humanity.'

Trengove said that Operation Dual and five other transnational conspiracies to murder fulfilled all the requirements for a crime against humanity: widespread, systematic attacks committed against civilians with state approval or as part of an 'organisational policy', regardless of whether they occurred in wartime or peacetime.

In turn, war crimes were identified as relevant as they included the cruel mistreatment and extrajudicial execution of POWs and of civilians detained by an occupying power. With regards to the 'crime of apartheid', Trengove argued that Basson and his co-accused fulfilled the requirements of conspiring to murder 'members of a racial group' either because they were opposed to apartheid or viewed as enemies of the racist regime.

On 19 April, during the ConCourt's deliberations, the universal jurisdiction principle was ably demonstrated when former Argentine ESMA pilot Corvette Captain Adolfo Scilingo was sentenced in Spain to 640 years' imprisonment for, among other crimes, the death flight disappearances of 30 people during Argentina's Dirty War.

Some of Trengove's arguments proved compelling, and on 9 September 2005, the ConCourt judges overturned the quashing of the conspiracy-to-murder charge against Basson for the Operation Dual murders, as well as five other transnational conspiracy-to-murder charges. These included a plot to assassinate two ANC leaders in exile, Pallo Jordan and Ronnie Kasrils, in London in 1988. The planned murder weapon was a poison-tipped umbrella, which had been handed to Trevor Floyd. The assassinations – to be executed by 'a Portuguese team' – were eventually abandoned, so Floyd tossed the umbrella in the River Thames.[9]

The ConCourt, 'having regard to certain provisions of the Riotous Assemblies Act and the Defence Act – to which Dr Basson as a member of the then South African Defence Force was subject' – found that there was a 'real and substantial connection' between South Africa and the crimes to be committed in Namibia and elsewhere.[10]

'As such, the conspiracies were triable in South Africa, and the trial court [Judge Hartzenberg] was wrong to conclude that the charges disclosed no offence.'

Consequently, the order of the High Court quashing the six charges was set aside. 'This means that it would be open to the prosecution, if it chose, to proceed with the charges relating to conspiracy to commit murder in Namibia, Swaziland, Mozambique, and the United Kingdom.'

And yet, despite the ConCourt's watershed ruling, which not only opened the way for the NPA to reopen the Operation Dual case against Basson and his alleged death flight co-conspirators, but which arguably also set a supreme legal precedent affecting all the prosecutions recommended by the TRC Amnesty Committee and endorsed by the PCLU, the NPA was prevented from pursuing any such cases.

This became apparent when former apartheid Law and Order Minister Adriaan Vlok and former Security Branch Chief General Johan van der Merwe approached the NPA, admitted to having ordered the murder of the Reverend Frank Chikane and applied for amnesty alongside Major-General Smith, Captain Otto, and Captain van Staden under the secret amnesty process.

Even though Advocate Vusi Pikoli, the National Director of Public Prosecutions, had decided that Vlok and Van der Merwe's confessions were incomplete and that they did not qualify for amnesty under the 2005 prosecution policy, he claims he was forced – by the interference in his decision-making autonomy by Mabandla and several Cabinet colleagues[11] – to accept that the leaders would not be tried. Instead, they were offered a plea bargain under which they received ten years in prison suspended for five years, while the three Security Branch men received five-year prison sentences, suspended for five years.

On 24 September 2007, Pikoli was suspended by Mbeki, who cited an 'irretrievable' breakdown in the relationship between Pikoli and the Minister of Justice – but widely believed to be for refusing

to obey an order not to prosecute Selebi.[12] The TRC cases were removed from Ackermann – on the apparently mistaken assumption that he intended prosecuting ANC leaders – and transferred to Selebi's prosecutions-hostile South African Police Service.

In a later court affidavit regarding Vlok and Van der Merwe, Pikoli stated: 'They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the modus operandi of the other hits or the identities of the other masterminds and perpetrators.'[13]

Pikoli is here referring to the CCB death list of apartheid opponents drawn up in secret by elements of the securocrat elite.

Pikoli continued: 'A full prosecution in the Chikane case would have produced greater truth and accountability. However, there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover, I could not rely on the police to investigate this case, and the other political cases, thoroughly.'

Other than Selebi and Mbeki, Pikoli implicated Nqakula, Minister of Defence Mosiuoa Lekota, Minister of National Intelligence Services Ronnie Kasrils – ironically, once also a CCB target[14] – Minister of Social Development Zola Skweyiya, Acting Minister of Justice and Constitutional Development Thoko Didiza, Director-General of Justice Menzi Simelane, Director-General of National Intelligence Manala Manzini, as well as the chief of The Presidency and the CCB's one-time target himself, Frank Chikane, in questioning his attempt at pursuing prosecutions arising from the TRC. Over the following decade, the secret moratorium on prosecuting apartheid-era perpetrators of all sides held tight.

South Africa's 'Pact of Forgetting' only started to unravel with

the inquest ruling on 12 October 2017 that anti-apartheid activist Ahmed Timol had been murdered in Security Branch custody on 27 October 1971. The ruling has sparked public demand for apartheid-era political crimes to be prosecuted. On 5 February 2019, former TRC Chairman Archbishop Desmond Tutu, former TRC Amnesty Committee Chairman Dumisa Ntsebeza, and nine other 'deeply outraged' former TRC commissioners demanded that President Cyril Ramaphosa institute a commission of inquiry into the suppression of TRC prosecutions.

Finally, on 26 April 2019, the tide appeared to turn when Minister of Justice and Correctional Services Michael Masutha announced that apartheid's political crimes would be prosecuted: 'Our democratic government has been magnanimous enough to give the perpetrators an opportunity to tell the truth and receive amnesty for the crimes that they have committed in the name of the evil apartheid regime. They chose to sit back and not say anything. Perhaps they hoped that their crimes would be forgotten. We, as government, owe it to the families of activists . . . to get to the bottom of the circumstances under which they died as well as to ensure that their killers have their day in court.'

It needs to be stressed that this statement exclusively targets apartheid regime perpetrators – and *not* perpetrators associated with their opponents. In favour of the possibility of pursuing criminal charges against even those perpetrators is that Advocate Shamila Batohi, South Africa's prosecutions boss at the time of writing, has recently returned from serving as senior legal advisor of the International Criminal Court.

But perhaps the final judgement on the actions of those involved in the eight and a half years of disappearances under Operation Dual – the cumulative implications, impact, and aftermath of those dark deeds – should come from the unit's founding Officer Commanding, Major Neil Kriel.

44

Quietus: The founding chief's exit

Neil Kriel's movements over the four and a half years following his resignation from Barnacle in August 1982 are unknown. He resurfaced, a true civilian at last, in May 1987 as the marketing director and a shareholder of the firm Unilec Industries (Pty) Ltd, which marketed electrical products to Eskom.

He worked there for four years and nine months before starting his own company in February 1992, Microfence SA (Pty) Ltd, which, according to his LinkedIn profile, manufactured a 'lethal electrified fence system for export to the USA'.[1]

In February 2008, he became a manager of Panda Bamboo in Honeydew, west of Johannesburg, then in March 2014 he became the co-owner, alongside Joe Texeira, a Mozambican, of MOA Bamboo (Pty) Ltd. His choice of name indicates he had never quite left his halcyon days in the military behind, as MOA stands for Military Operational Area.

Still imposingly tall, but shrunken from his prime, white-bearded with some dark-grey still shot through his hair, his cheeks lightly liver-spotted, and with a gentle 'English' demeanour, a love for rugby and Bouvier dogs, Kriel would post rare Facebook entries expressing conservative, even right-wing concerns – for example, circulating a petition for Australia to accept white South African 'refugees', or to impeach US President Barack Obama.

He had a reputation for being 'eloquent, charming, funny, smart, and fastidious as a workman' – though with a hot temper, well reined in.[2]

Although he eschewed the company of retired Recce Colonel Johan Theron, who in retirement had become a Christian pastor with a Master of Ministry degree from a United States institution, and Sergeant-Major Trevor Floyd, who had kept his hand in as an Old Bull, the chairman of a MOTH Shellhole,[3] he remained friends with ex-Selous Scout Sergeant-Major Andy Balaam[4]. He was part of an informal Rhodesian email network with a few of his old D40/Barnacle comrades, notably Intelligence Officer Major Pete Stanton (recently deceased) and Operation Departure chief Major Winston Hart,[5] who still works as an irregular warfare instructor, as well as former ZSOU pseudo-operative Captain Darrell Watt, plus a handful of more prominent old Rhodesians such as former Selous Scouts OC Lieutenant-Colonel Pat Armstrong, former Rhodesian SAS OC Major Brian Robinson,[6] and Kriel's fellow Selous Scouts cofounder Major Jerry Strong.[7]

Thus, in most respects, Kriel appeared to be very proud of his military past. And yet there was something in his later-life activities that indicated a man grappling with his conscience, as he appeared to do back in 1982 in deciding to leave his black-ops past behind.

The Johannesburg Holocaust & Genocide Centre is an austerely yet appropriately beautiful building on Jan Smuts Avenue on the northern rain-shadow foothills of the city's Parktown Ridge, designed by architect Lewis Levin in consultation with survivors of the Rwandan Genocide and the Nazi Holocaust, drawing on a motif that echoes trees in the Rwandan forest and Auschwitz railway tracks in the snow.

Inside its airy atrium, the physical railway tracks set in the outside wall of grey-stone rubble disappear, leaving upward-piercing shafts of golden light in their place. Introduced to the Centre's planners by Levin, Neil Kriel and Joe Texeira's MOA Bamboo offered to provide its facilities with cabinetry, which they did at a discount, according to Centre Director Tali Nates.[8]

It is tempting to speculate that Kriel did this discounted work

as a way, secretly in his own heart at least, to try to make amends for his direct involvement in the early death flights of Operation Dual. But, if so, such attempts at atonement would prove insufficient to assuage his sense of guilt.

It had been a mildly chilly Highveld winter's night, but an ill wind blew over the western suburbs of Johannesburg, tugging rags of cloud over a skull-like full moon. In the early hours of Monday 30 July 2018, Major Neil Kriel, retired dirty warrior, drew his still-large bulk into his car and, running the engine, gassed himself to death.[9]

What went through his mind as he did so will never be known. Was he tormented by the death of his first wife, Joan, some six years previously, by the financial difficulties he had found himself in as a pensioner still having to work for a living, or by the creeping decrepitude of his 70 years? Did he view his post-military career as 'a failure' because he was a better soldier than businessman, as suggested by Colonel Charl Naudé,[10] or was he feeling ostracised by being 'bad-mouthed' by others who did not understand his unique Special Forces career, as suggested by his second wife, Colleen Carter?[11]

Finally, was he tormented by the nagging spectres of the many helpless people he had helped to cast into oblivion in the endless night of the ocean depths? Fully 39 years and 18 days after the first death flight off Meob Bay on 12 July 1979, Operation Dual had claimed perhaps its final victim.

Acknowledgements

I owe a debt of gratitude to all those who encouraged me to pursue the mystery behind the so-called disappearance of several hundred people in the unforgiving depths of the Atlantic and Indian Oceans, a grim process that was not revealed by the remarkable Truth and Reconciliation Commission, despite the probity of its immense work in describing the gross human rights violations committed by both sides in the apartheid era.

In particular, I owe a debt to researcher Chandré Gould, whose 2002 book *Project Coast: Apartheid's Chemical and Biological Warfare Programme*, cowritten with Peter Folb, was the first to sketch the outline of Operation Dual, and to Gould's collaborator in compiling succinct daily reports of the Wouter Basson trial, the late journalist Marlene Burger, who was always willing to assist a greener colleague.

My profound thanks to Recce icon, Delta 40 cofounder and the unit's longest-serving member, Warrant Officer 1st Class Trevor Floyd, who trusted me sufficiently to confirm and clarify the personnel and evolution of this most secret of SADF Special Forces units.

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behind the high walls of Chikurubi Prison, for detailing the structure and functions of D40/Barnacle sister organisation, the Zimbabwe Special Operations Unit, and to Colonel Frans Fourie, 4 Reconnaissance Regiment's second-in-command and later Officer Commanding 1 Reconnaissance Regiment, for laying out the rationale behind, and methodology of, 4 Recce's pseudo-operations.

Their old-world hospitality towards me underlines the sincerity with which they fought their Cold War states' black-ops war against communist-backed insurgency.

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Endnotes

PROLOGUE

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2 Author correspondence with Jean Fremigacci, 2019. Lt Hervéou's first name is not recorded.
3 André Beaufre, *Introduction à la Stratégie*, Librairie Armand Colin, Paris, 1963. Published in English as *Introduction to Strategy*, Frederick A Praeger, New York, 1966.
4 The junta's death toll remains contested, but in July 1978, Intelligence Battalion 601 – the leading unit tasked with death-squad killings – boasted in an internal cable that 'the tally of those killed and disappeared from 1975 up to date is 22 000'.

PART I

1: A youth in the shadow of an insurgent war

1 Telephonic author interview with Mark Seftel, a fellow son of Klaasvoogds and later business associate of Neil Kriel, 19 December 2019.
2 *A History of Umtali Girls' and Boys' High Schools 1896–1968*, *The Borderer*, Jubilee Edition, 2010, online at http://umtaliborderers.blogspot.com/2010/09/borderer-jubilee-edition.html.
3 Lawrence E Cline, *Pseudo Operations and Counter-Insurgency: Lessons from Other Countries*, Strategic Studies Institute, US Army War College, Carlisle, Pennsylvania, 2005.
4 Jim Parker, *Assignment Selous Scouts: Inside Story of a Rhodesian Special Branch Officer*, Galago Books, Alberton, 2015.
5 Winston Hart, 'Early Days', in Jonathan Pittaway, *Selous Scouts: The Men Speak*, Dandy Agencies, Durban, 2017.
6 See also David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire*, Weidenfeld & Nicholson, London, 2005; and Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya*, Jonathan Cape, London, 2005.
7 Paul Matthysen, Matthew Kalkwarf and Mike Huxtable, *'Recce': A Collector's*

Guide to the History of the South African Special Forces, South Publishers, Johannesburg, South Africa, 2010.
8 Peter Stiff, *The Silent War: South African Recce Operations 1969–1994*, Galago, Alberton, 1999.
9 Winston Hart in Jonathan Pittaway (2017).
10 A floor plan of the Selous Scouts' fort at Buffalo Range is available in Jim Parker (2015), while a floor plan of the Mount Darwin fort is available in Glenn Cross, *Dirty War: Rhodesia and Chemical Biological Warfare 1975–1980*, Helion, Solihull, 2017.
11 Wings Wilson, 'Mapai', in Jonathan Pittaway (2017).
12 Noel Robey, 'Selous Scouts XV vs Army XV', in Jonathan Pittaway (2017).

2: From Pretoria bar to Rhodesian bush

1 His first name is sometimes given as Christopher and his nickname as Chris.
2 Dave Scales, 'Recce Group', in Jonathan Pittaway (2017).
3 Jonathan Pittaway (2017).
4 Jonathan Pittaway (2017).
5 Jonathan Pittaway (2017).
6 Jonathan Pittaway (2017).
7 Jonathan Pittaway (2017).
8 André Diedericks, *Journey Without Boundaries: The Operational Life and Experiences of a SA Special Forces Small Teams Operator*, Just Done Publications, Durban, 2007.

3: Behold a pale horse: Rhodesia's chemical warfare

1 One of the Four Horsemen of the biblical Apocalypse rides a pale horse, which in most interpretations represents Death.
2 Chandré Gould and Peter Folb, *Project Coast: Apartheid's Chemical and Biological Warfare Programme*, United Nations Institute for Disarmament Research, Geneva, and Centre for Conflict Resolution, Cape Town, 2002.
3 Electronic, Mechanical, Agriculturalist and Chemical engineering skills in English.
4 Paul Mattysen, Matthew Kalkwarf and Michael Huxtable (2010), who state that Armscor's DSA was run from its foundation in 1976 by a Mr TG Schaeffer.
5 Peter Stiff, *See You in November*, Galago, Alberton, 1985.
6 Glenn Cross (2017).
7 Peter Stiff (1985).
8 This could refer to either Military Intelligence (MI) or to the civilian National Intelligence Service (NIS).
9 US$460 at the 1977 free rate after the Rhodesian dollar was devalued against the US dollar. A similar death bonus system would later be employed by the South African Police's counterinsurgency unit Koevoet.
10 Barbecues, or open-fire grills.

11 See 'Mass graves discovered in Zimbabwe', Independent Online, 7 July 2004, online at https://www.iol.co.za/news/africa/mass-graves-discovered-in-zimbabwe-216620.

4: Horrors and honours

1 According to Paul l Moorcraft and Peter McLaughlin, *The Rhodesian War: A Military History*, Pen and Sword Books, Barnsley, 1982.
2 Jonathan Pittaway (2017).
3 Jonathan Pittaway (2017).
4 Jonathan Pittaway (2017).
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6 Jonathan Pittaway (2017).
7 Jonathan Pittaway (2017).
8 Jonathan Pittaway (2017). 'Boet' is Afrikaans for 'brother'.
9 Paul Matthysen, Matthew Kalkwarf and Michael Huxtable (2010).
10 'Dirty Dozen' veteran WO1 Koos Moorcroft, 'SADF Recces and the Scouts', in Jonathan Pittaway (2017).
11 André Diedericks (2007).

5. Neo-Nazis and mercenaries enter the fray

1 Ironically, Lamprecht's 22-year-old son, Vincent, fled to South Africa to avoid conscription.
2 Stuart Christie, *Stefano delle Chiaie: Portrait of a Black Terrorist*, Refract, London, 1984.
3 Peter Baxter, Hugh Bomford, and Gerry van Tonder, *Rhodesia Regiment, 1899–1981*, 30° South Publishers, Johannesburg, 2014.
4 Jon Lee Anderson, *Inside the League*, Dodd Mead, New York, 1986.
5 Jim Hoagl, 'US Policy on Rhodesia on the Line', *The Washington Post*, 21 December 1978, online at https://www.washingtonpost.com/archive/politics/1978/12/21/us-policy-on-rhodesia-on-the-line/ffdc0b45-fcd4-45b8-88a8-258e0465814d/?utm_term=.8a6584dad0c1.
6 Gerald Horne, *From the Barrel of a Gun: the United States and the War Against Zimbabwe, 1965–1980*, University of North Carolina Press, Chapel Hill, 2015.

6. 'The doctored bodies are in the back'

1 Based on a new review of a taped interview I conducted with Pessarra in October 1999, this appears to be the most accurate date.
2 Historical weather information used throughout this text is derived from the excellent Wolfram Alpha online search tool: https://www.wolframalpha.com/.
3 Pessarra did not recall the civilian pilot's name and did not at that time have access to his logbooks, which he had stored in a safety-deposit box in

Arizona. The pilot lived in Salisbury opposite Moore's unofficial 'US Consulate'. Carlos da Silveira is named four times in Preller Geldenhuys, *Rhodesian Air Force Operations*, PeySoft Publishing, Durban, 2016, as being on air crews for airstrikes during Operation Hurricane in 1977. He later flew for the South African Air Force. I have been unable to trace Da Silveira, however.

4 Kevin Mulligan, *Dakota Tales*, *Rhodesian Services Association Incorporated Newsletter*, Tauranga, May 2008, online at http://www.rhodesianservices.org/user/image/publication05-2008.pdf.
5 Telephonic author interview with Bert Sachse (2020).
6 See 'Wouter Basson: from Eminent Scientist to Murder Accused', Sapa-AFP, 6 October 1999, online at http://www.justice.gov.za/trc/media/1999/9910/p991006c.htm: 'The son of a police colonel, Basson joined the military in 1975 …' The Truth and Reconciliation Commission transcript is online at http://www.justice.gov.za/trc/special/cbw/cbw21.htm.
7 Chandré Gould and Peter Folb (2002).
8 Glenn Cross (2017).
9 Neil Kriel evidence, Wouter Basson trial transcript (2000).
10 Requests for comment on the Buffalo Range incident sent to Basson's counsel in October 1999 for the *Sunday Times*, and again in preparation for this book emailed directly to Basson twice in March 2020, went unanswered.
11 Up until this point, the South African Medical Corps (SAMC) had been part of the South African Army; this changed in July 1979, when the South African Medical Service (SAMS) was established as a service arm of the SADF in its own right, alongside the Army, Air Force, and Navy.
12 'Mr C' evidence, Wouter Basson trial transcript (2000).
13 Telephonic author interview with Bert Sachse (2020).
14 The Douglas C-47 Dakota military transport normally has a cruising speed of 333 km/h, which would suggest that a flight from Buffalo Range to Mapai and back (360 km as the crow flies) would have taken just over an hour at cruising speed, excluding any circling the aircraft might have done over the drop zone.
15 The operation was of course most likely planned at the Selous Scouts' HQ.

PART II: A SECRET KILLING MACHING TAKES SHAPE

7. Black-ops boon for South Africa

1 I will hereafter refer to this contingent as the Rhodesians, despite the transformation of their old country into Zimbabwe in April 1980, in order to emphasise their loyalty to and nostalgia for their homeland, their opposition to the very notion of Zimbabwe, and their differentiation from post-independence Zimbabweans.
2 Telephonic author interview with Bert Sachse (2020).
3 Pat Armstrong, 'The Last Throw of the Dice', in Jonathan Pittaway (2017).
4 Jonathan Pittaway (2017).
5 Jim Parker (2015).

6 Neil Kriel evidence, *State v Wouter Basson*, 1999 (Transvaal Provincial Division case number CC32/99).
7 According to a table in Glenn Cross (2017).
8 Judge Willie Hartzenberg's judgment, Wouter Basson trial transcript (2002).
9 The wait-and-see attitude of most Scouts contrasts strongly with that of the Rhodesian SAS, which had been renamed 1 (Rhodesia) Special Air Service Regt, with a strength of about 250 paratroopers in June 1978, most of whom left Zimbabwe-Rhodesia, a significant group attesting at 1 Recce.
10 Cmdt Bert Sachse became an Elder of the United Church of the Conqueror, according to Paul Els (2000).
11 Pat Armstrong, 'The Last Throw of the Dice', in Jonathan Pittaway (2017).
12 Charlie Bland, 'Selous Scouts, Plan B, 1980', in Jonathan Pittaway (2017).
13 Ian Scott, 'The Move South', in Jonathan Pittaway (2017).
14 Described as a mountain of a man, Cecil J van den Bergh had joined the Scouts as a lance-corporal, but by this time had got his wings and risen to junior sergeant-major: Warrant Officer 2nd Class (WO2).
15 Peter Stiff (1999).
16 *TRC Final Report*, Volume 2 (2003).
17 Commandant was an SADF rank equivalent to Barrett's SAS rank of lieutenant-colonel.
18 Barbara Cole, *The Elite: The Story of the Rhodesian Special Air Service*, Three Knights, Durban, 1984.
19 Peter Stiff (1999) gives the very first 6 Recce OC as Commandant Jake Swart. This appears to have been a temporary appointment covering the unit's construction, as Swart was soon replaced by Barrett.
20 Paul Els, *We Fear Naught But God: The Story of the South African Special Forces, 'The Recces'*, Covos-Day Books, Roodepoort, 2000.
21 Peter Stiff (1999).
22 This is likely a misunderstanding by the interview transcriber: Schofield probably meant the rank of colour sergeant – rather than a racial designation (the Scouts, after all, had both black and white colour sergeants).
23 Peter Schofield interviewed by Mike Cadman, *Reconnaissance Regiment, Project Missing Voices*, 2007, online at: http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/A3079/A3079-D1-001-jpeg.pdf.

8. Recruiting a few hard men

1 Neil Kriel testimony, Wouter Basson trial transcript (2000).
2 *TRC Final Report*, Volume 2, Chapter 1, *National Overview* (2003).
3 Author interview with Johan Theron, location undisclosed, 19 November 2019.
4 Chandré Gould and Peter Folb (2002).
5 Paul Els (2000).
6 Neil Kriel evidence, Wouter Basson trial transcript (2000).
7 Author interview with Trevor Floyd, Bergvliet, 20 October 2019.

8 Peter Stiff, *Warfare by Other Means,* Galago, Alberton, 2001.
9 Paul Matthysen, Matthew Kalkwarf and Michael Huxtable (2010).
10 Author interview with Trevor Floyd (2019).
11 Peter Stiff (1999).
12 Lieutenant Edward Piringondo was killed in action in Rhodesia in February 1980.
13 Jonathan Pittaway (2017).
14 Author interviews with Trevor Floyd (2019) and Johan Theron (2019).
15 Trevor Floyd evidence, Wouter Basson trial transcript (2000).
16 Exhibit 31B, Annexure A [AR 11955], 'Organisational Structure', in *State v Wouter Basson* (1999).
17 Author interview with Johan Theron (2019).
18 The 'Organisational Structure' diagram (Exhibit 31B) shows six white operators and eight black operators, while 'Organisation Inquiry into Project Barnacle' (Exhibit 31C) lists six and ten respectively. The difference means that, on paper, D40 either totalled 29 or 31 men by December 1980.
19 Jan Breytenbach, *The Buffalo Soldiers: The Story of South Africa's 32 Battalion 1975-1993*, Galago, Alberton, 1999.
20 Telephonic author interview with Johan Theron, location undisclosed, 19 January 2020.
21 32 Battalion Recce Wing interviews, Historical Papers. Wits University, Recce Group A3079/B.13, online at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/A3079/A3079-B1-13-001-jpeg.pdf. According to this source, Kelly later joined Executive Outcomes as a sergeant-major.
22 Born Warriors Blog at http://theywerebornwarriors.blogspot.com/search/label/Flechas.
23 Author interview with Trevor Floyd (2019).
24 Author interviews with Trevor Floyd (2019) and Johan Theron (2019).
25 Rautenbach's name is given by Major-General Fritz Loots in his 9 January 1981 top secret instructions to Major Neil Kriel as 'LJ Rautenbach', so Ben is probably a nickname.
26 Chandré Gould and Marlene Burger, *Daily Reports About the Trial of Dr Wouter Basson: 4 October 1999–11 April 2002*, Centre for Conflict Resolution, online on the old Institute for Security Studies site at: https://oldsite.issafrica.org/uploads/Wouter_Basson_Trail_Summary.pdf.
27 Senior Staff Officer (SSO) was commensurate with the rank of colonel, while Staff Officer 1 (SO1) came with the rank of commandant, Staff Officer 2 (SO2) with the rank of major, and Staff Officer 3 (SO3) a captain or a lieutenant.
28 Author interview with Johan Theron (2019).

9. Rhodesia's revenge

1 Peter Stiff (2001).
2 Peter Stiff (2001).

3 *Outpost*, BSAP Regimental Association, UK Branch, Issue 57, Summer 2004.
4 Jeffrey M Bale, *The Darkest Side of Politics II: State Terrorism, 'Weapons of Mass Destruction', Religious Extremism and Organized Crime*, Routledge, London, 2017.
5 Rocky van Blerk was not available to testify in the Basson trial. The details of his Zambian recce are given in André Diedericks (2007).
6 Peter Stiff (2001).
7 *TRC Final Report*, Volume 2 (2003).
8 Peter Stiff (2001).
9 Author interview with Kevin Woods, Durban, 16 November 2019.
10 Author interview with Kevin Woods (2019).
11 Peter Stiff (1999).
12 Preller Geldenhuys (2016).
13 Peter Stiff (2001).
14 Askari is a Swahili word meaning simply 'soldier', and was applied by various colonial governments to local tribesmen recruited or drafted into military service. However, in South Africa the term was applied solely to turned guerrillas; the Rhodesians in contrast used the term 'TTs', for Turned Terrorists.
15 *TRC Final Report*, Volume 2 (2003).
16 Jacques Pauw, *In the Heart of the Whore*: *The Story of Apartheid's Death Squads*, Jonathan Ball, Cape Town, 1991.
17 His surname is spelled 'Wishart' – a more common spelling – on the Selous Scouts' Nominal Roll in Jonathan Pittaway (2017).
18 Major Winston Hart did not respond to an emailed request for an interview.
19 Parker is here naming the former SB detectives by their militarised ranks upon joining the SADF.
20 Butch was former BSAP troop commander Garth 'Butch' von Horsten, who later went into the SAP. Other than denying that Winston Hart had commanded Project Departure, Von Horsten declined an interview request during a telephonic conversation with the author on 20 January 2020.
21 Peter Stiff (2001).
22 Author interview with Trevor Floyd (2019).
23 Author interview with Kevin Woods (2019).
24 Peter Stiff (2001).
25 Author interview with Trevor Floyd (2019).
26 Author correspondence with Anthony Turton, 25 November 2019.
27 He is referring to the ANC-allied South African Communist Party (SACP), and the Pan Africanist Congress (PAC), which had split from the ANC in 1959.
28 My diagram of the chain of command for Delta 40 is reproduced in this book's photo section, drawing on information gleaned primarily from Peter Stiff (1999, 2001), Chandré Gould and Peter Folb (2002), Anthony Turton (2012), Jim Parker (2015), and Exhibit 31B [AR 11 955], 'Organisational Structure', in *State v Wouter Basson* (1999) – confirmed by Trevor Floyd (2019) and Johan Theron (2019).

10. Mobilising against the 'Total Onslaught'

1 Author interview with Johan Theron (2019).
2 According to Peter Stiff (2001), Möller was a fellow Special Forces operator, but he left D40 within a few months.
3 Company registration number 79/02263/07.
4 Memorandum, GOC SF to C SADF, 'Purchase of Fixed Property', 20 January 1979, Exhibit 31B, *State v Wouter Basson* (1999).
5 Peter Stiff (2001).
6 Author interview with Johan Theron (2019).
7 Neil Kriel testimony, Wouter Basson trial transcript (2000).
8 That is, four metres high and half a metre thick.
9 Johan Theron (2019) said the wall was set back from the perimeter and could not be seen from the gate of the fenced property on the Lanseria–Broederstroom road. The farmhouses were situated outside the wall.
10 Preller Geldenhuys (2016).
11 Major-General JJ Viktor retired in 1989 as the SAP Divisional Commissioner for Soweto.
12 Sam Sole, 'The Hammer Unit and the Goniwe Murders', in Anthony Minnaar, Ian Liebenberg and Charl Schutte (eds), *The Hidden Hand: Covert Operations in South Africa,* Human Sciences Research Council, Pretoria, 1994, archived at: http://www.oocities.org/odjobman/hammer.htm.
13 Rautenbach's front company had no other ties to D40; in a telephonic interview, even Theron said he had never met him.

11. The 'hunter-killers' of Koevoet

1 'Sterk' is the Afrikaans word for strong.
2 Glenn Cross (2017).
3 Jim Hooper, *Beneath the Visiting Moon: Images of Combat in Southern Africa*, Lexington Books, Lexington, 1990.
4 'Bushman' is the term mostly used by the community to describe themselves, so it is the one I will use here.
5 *TRC Final Report*, Volume 2, Chapter 2 (2003). A Casspir is a mine-resistant armoured personnel carrier, mostly used by the police.
6 Its doctrinal influences and evolution from intel unit to counterinsurgency battalion are sketched in an interview with Major-General Hans Dreyer, *Koevoet Documentary*, online at: https://www.youtube.com/watch?v=GEArr4RhWX8.
7 Johan Theron said in a telephonic interview with the author (2020) that the fort commander tended to be the most senior officer running ops from there at any given time, so they changed fairly frequently.
8 Koos Stadler, *Recce: Small Team Missions Behind Enemy Lines*, Tafelberg, Cape Town, 2015.
9 Peter Stiff (2001).
10 Author interview with Charl Naudé, Pretoria, 14 January 2020.

12. South Africa's small-team recce pioneer

1 Anthony Turton (2012).
2 Paul Els (2000).
3 André Diedericks (2007).
4 Paul Els (2000).
5 Neil Kriel's logbook.
6 Author interview with Trevor Floyd (2019).
7 Neil Kriel's logbook for 1980 does not mention Fort Rev as a destination, nor André Diedericks and Neves Matias as passengers, so Kriel likely flew another aircraft for Operation Interrupt, which would make sense, given that two units needed to be transported with all of their bulky gear, clearly too large a load for the Seneca II.
8 André Diedericks (2007) has a rare photograph of the two D40 Primary Ops teams of Diedericks and Matias, and Callow and Dobe, at Marienfluss after Operation Interrupt, grubby and wild-haired, standing next to a Puma helicopter.
9 Paul Els (2000).
10 Walter Volker, *Signal Units of the South African Corps of Signals and Related Signal Services*, Veritas Books, Pretoria, 2010.

13. 'Ex-Rhodesians became cannon fodder'

1 Septinus Serfontein statement, *State v Wouter Basson* (1999).
2 Author interview with Johan Theron (2019).
3 Peter Schofield, in Mike Cadman (2007).
4 Eeben Barlow, comment on this text, 8 April 2020.
5 Exhibit 31C, 'Organisasie-Ondersoek na Projek Barnacle', in *State v Wouter Basson* (1999).
6 Neil Kriel testimony, Wouter Basson trial transcript (2000).

14. Delta 40 embraces the 'Dark Side'

1 Author interview with Johan Theron (2019).
2 Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations*, University of Pennsylvania Press, Philadelphia, 1990. Chamorro retired in Pretoria after the junta fell in 1983, but died in a naval hospital in Buenos Aires in 1986 awaiting trial for his oversight of ESMA and the death flights.
3 Koos Stadler (2015).
4 Author interview with Johan Theron (2019).
5 Author inspection of Piper Seneca II ZS-KFG aeroplane, Springs Airfield, 4 November 2019.
6 With the independence of South West Africa to become Namibia in 1990, all of its airport codes changed.
7 There appears not to have been an airstrip at Oshivelo at the time, so they would have landed on a roadway.

8 Floyd's wife and daughters only joined him at his house in Verwoerdburg (now Centurion) in February 1980.

15. The first death flight

1 Jan Coetzee evidence, Wouter Basson trial transcript (2000).
2 Exhibit 47A, *State v Wouter Basson* (1999).
3 This section, Sperrgebiet 2, is now part of the Namib-Naukluft National Park. Only the southern Sperrgebiet 1 remains a restricted area. Meob Bay was no doubt initially chosen precisely because it was in the forbidden zone where the likelihood of being observed was near zero, but the flight there from Kamanjab must have taken almost an hour, so in future the D40 killers tended to choose final stops on the Skeleton Coast further north and closer to the detention facilities of Koevoet, 5 Recce, and the SAP.
4 Theron testified that they would later tie the door in the rear of the aircraft, as they sometimes did not return to the same coastal airstrip from which they had departed. It is most likely, based on my inspection of KS-KFG (Springs Airfield, 4 November 2019), that it was the main cabin door and not the rear storage door that was removed, because the rear doorway is too small through which to easily manhandle a corpse.
5 Author interview with Johan Theron (2019) and Theron's testimony in the Wouter Basson trial.
6 Kriel, in his own testimony, was confused about the date of the first D40 death flight, giving it as 13 July 1979, but his logbook confirms 12 July 1979 as the correct date.

16. 'I never counted the bodies'

1 Author interview with Johan Theron (2019).
2 Johan Theron said, 'I'm the expert and he's the operator and the two of us worked very nice together' in his interview for this book.
3 If this average rate was maintained over the entire 443-week duration of Operation Dual, that would give a statistically possible total of 74 death flights. If they averaged two to four victims per flight, which is more likely than one per flight for cost-saving purposes, the total number of disappearances might range between 148 – more than the 120 killed by death flights in Chile under Pinochet – and 296, the latter of which accords well with Theron's 'hundreds' estimate. This rate was not necessarily maintained after Kriel resigned from the unit in August 1982; it may have increased, decreased, or, far more likely, fluctuated as the situation demanded.
4 Kriel's estimated rate of 'disposals' would put the number of *potential* death flights during his own tenure alone at about 30 (with Theron also a qualified pilot, Kriel need not have participated in all of them), but I do not have the logbooks to support this.
5 *TRC Final Report*, Volume 2 (2003).

6 Author interview with Johan Theron (2019): 'He was actually a good pilot; he was better than me.'
7 Trevor Floyd, email to this author, 7 November 2019. Chris Schulenberg did not respond to an emailed request for an interview.

17. A death flight victim fights back

1 The emotional impact on the killers themselves of an intimate, bloody method of mass-killing detainees was noted by the Nazi Einsatzgruppen, who were required to shoot Jews in Eastern Europe. Protecting the killers' sensitivities was a key rationale behind the Nazis' shift from shootings to gassings, a supposedly more 'humane and clean' method of extermination that allowed the killers to maintain a clinical emotional detachment.
2 Author interview with Johan Theron (2019).

18. An old Recce gets blooded

1 Johan Theron evidence, Wouter Basson trial transcript (2000).
2 André Diedericks (2007).
3 Floyd's handwriting initially slants aggressively forwards, but is chaotic, mixing cursive and printed letters. It degenerates as the statement progresses, switching erratically from a forward to a backward slant, often in the space of a single word. This may signal the stress he experienced in writing the statement.
4 Terrace Bay is just a short distance north of Torra Bay, so both Floyd and the logbook may be correct, in that the destination may have been somewhere between the two bays.
5 Author interview with Trevor Floyd (2019).
6 Koos Stadler (2015).

PART III: THE SHACKLES COME OFF FROM DELTA 40 TO BARNACLE

19. A mandate to kill

1 'Verdere Implementering van Barnacle' (Further Implementation of Barnacle), [AR 11 967] in the Wouter Basson trial transcript (2000).
2 The front company's directors were Major Neil Kriel as CEO and Colonel Ben Rautenbach as CFO.
3 Preller Geldenhuys (2016). Operation Gericke was the Barnacle bombing of the Inkomo Barracks by Captain Peter Gericke.
4 Peter Stiff (2001).
5 Anthony Turton (2012).
6 Peter Stiff (1999). Again, Stiff blurs the line between Branfield's ZSOU network and the Barnacle unit; in his accounts, 'Barnacle' refers to both units working in concert.
7 The Sasol 2 attack was part of a series of sabotage attacks on 2 June 1980 against the state's strategic oil-from-coal plants and refineries. It caused damage estimated to be as high as R70 million.

20. A war crime at Lanseria

1 5 Recce was in the process of being restructured from a commando to a regiment with the integration of the former 3 Recce.
2 Eric Kennelly evidence, Wouter Basson trial transcript (2000).
3 Either the airfield at the Uis Mine on the plain near the foothills of the Brandberg, or the Brandberg West Mine closer to Toscanini.

21. Two hammers: Barnacle kills its own

1 Author interview with Johan Theron (2019).

22. The founding chief's last flights

1 Peter Stiff (2001).
2 Afrikaans for HQ Special Forces.
3 André Diedericks (2007).

23. Barnacle in its prime

1 Peter Stiff (1999), *TRC Final Report*, Volume 2 Chapter 1 (2003), and Howard Barrell, 'Conscripts to their Age: African National Congress Operational Strategy 1976–1986', DPhil thesis, Oxford University, 1993, online at https://www.sahistory.org.za/sites/default/files/field/archiveimages/howard_barrell_2.png.
2 Preller Geldenhuys (2016).
3 Stephen Ellis, *External Mission: The ANC in Exile 1960–1990*, Oxford University Press, Oxford, 2013.
4 Jacques Pauw (1991).
5 Author interview with Johan Theron (2019).
6 Geldenhuys had deep experience of the South West African/Angolan field of operations, having previously been the General Officer Commanding SWATF.
7 *TRC Final Report*, Volume 2, Chapter 2 (2003).
8 Jacques Pauw (1991).
9 Preller Geldenhuys (2016).

24. 'Like a James Bond movie'

1 Author interview with Kevin Woods (2019).
2 Author interview with Johan Theron (2019).
3 Author interview with Kevin Woods (2019). Strangely, their brand-new AK-47s were all clandestinely purchased from Soviet-bloc Romania, according to Johan Theron (interview, 19 November 2019).
4 Peter Stiff (2001).
5 Author interview with Kevin Woods (2019).
6 Preller Geldenhuys (2016). Operation Gericke was the Barnacle bombing of the Inkomo Barracks by Captain Peter Gericke.
7 Jacques Pauw (1991).

25. A changing of the guard

1 Author interview with Trevor Floyd (2019).
2 Author interview with Charl Naudé (2020). Naudé said Kriel thought nothing of swearing at senior officers, while Johan Theron (2019) said: 'He used to swear a helluva lot; whoah, the F-word was his vocabulary.'
3 Telephonic author interview with Colleen Carter, Johannesburg, 7 January 2020.
4 Jean-Michel Desblé joined the police in the Transkei. In 1987, he was expelled from South Africa after participating in a Transkei raid against the Ciskei. He is reported to have died in Maputo in Mozambique in November 2001 (http://www.orbspatrianostra.com/in-memoriam.html).
5 Tim Bax, 'The Final Deployment', in Jonathan Pittaway (2017).
6 André Diedericks (2007).
7 Anthony Turton (2012).
8 Peter Stiff (2001).
9 Author interview with Charl Naudé (2020).
10 André Diedericks (2007).
11 Author interview with Charl Naudé (2020).

26. Barnacle's role in the Maseru raid

1 Peter Stiff (1999).
2 Author correspondence with Trevor Floyd, 14 November 2019.
3 Author interview with Charl Naudé (2020).
4 Author interview with Charl Naudé (2020).
5 'BG' is the Afrikaans initials for 'Bevelvoerende Generaal' (Commanding General).
6 Anthony Turton (2012).

27. Small-teams success

1 Chandré Gould and Peter Folb (2002).
2 Author interview with Johan Theron (2019).
3 Johan Theron evidence, Wouter Basson trial transcript (2000). Johan Theron said in a telephonic interview (2020) that the Fort Rev commander rotated depending on which Recce op was being run out of there, while the police commander was in fact a Koevoet colonel.
4 Johan Theron evidence, Wouter Basson trial transcript (2000).
5 Author interview with Johan Theron (2019).
6 SWAPOL had been given operational independence from the SAP in 1981.
7 Author interview with Security Branch policeman, Namibia, 23 January 2020.
8 Paul Els (2000).

28. Trained, betrayed, murdered

1 Danie Phaal evidence, Wouter Basson trial transcript (2000). Phaal is deceased, according to Trevor Floyd.

2 Danie Phaal evidence, Wouter Basson trial transcript (2000).
3 Author interview with Charl Naudé (2020).
4 Telephonic author interview with Johan Theron, 22 January 2020.
5 Danie Phaal evidence, Wouter Basson trial transcript (2000). Phaal's use of the term 'soldier', rather than 'terrorist' or 'guerrilla', is telling.
6 The Afrikaans for 'pick-up truck', or 'utility vehicle'.
7 Tupperware, a brand of resealable plastic food containers.
8 Johan Theron evidence, Wouter Basson trial transcript (2000).
9 Matie van der Linde evidence, Wouter Basson trial transcript (2000).

29. The Wonder Air death flight

1 *TRC Final Report*, Volume 2 (2003).
2 Cor van Niekerk evidence, Wouter Basson trial transcript (2000).
3 Officially, the SAP 'investigated' the murder, but closed the docket as unsolved in an attempt to distance the regime publicly from RENAMO, while secretly a proper MI investigation got under way.
4 Charge 36, Indictment, in *State v Wouter Basson* (1999).
5 Liebenberg replaced Loots as GOC Special Forces in April 1982.
6 Charge 36, Indictment, in *State v Wouter Basson* (1999).
7 Fred Frayne affidavit, 37G, read into the record, Wouter Basson trial transcript (2000).
8 'Mr S' affidavit, 36F2, read into the record, Wouter Basson trial transcript (2000).

30. A death flight over the Indian Ocean

1 Kobus Bothma evidence, Wouter Basson trial transcript (2000).
2 Peter Godwin, 'Whose Kith and Kin Now?', *Sunday Times Magazine*, Johannesburg, 25 March 1984.

31. Barnacle's final small-teams mission

1 André Diedericks (2007).
2 Neve Matias did not respond to several SMS requests for an interview.
3 Koos Stadler (2015).
4 Peter Stiff (1999).
5 Operation Plexi is sometimes rendered as Operation Plecksy.
6 Anthony Turton (2012).
7 Author correspondence with Trevor Floyd, 14 November 2019.
8 Author interview with Charl Naudé (2020). Tim Callow did not respond to an emailed request for an interview.
9 Peter Stiff (2001).
10 Noted in This Day in History, SA History Online, at https://www.sahistory.org.za/dated-event/citizen-reports-alleged-member-sadf-isaiah-moyo-was-convicted-lusaka-zambia-three-counts.
11 See Rev Peter Hammond, 'Serving the Persecuted', Frontline Fellowship,

Cape Town, 2017: https://www.frontlinemissionsa.org/news/serving-the-persecuted. Peter Stiff (2001) notes that Hammond had met Moyo while himself being detained for 'subversive' missionary activities.
12 *TRC Final Report,* Volume 2, Chapter 2 (2003).
13 Peter Stiff (2001).
14 *TRC Final Report,* Volume 2, Chapter 2 (2003)

PART IV: DRAMATIC EXPANSION UNDER THE CCB

32. 'The Organisation' takes shape

1 Major-General Jac Büchner was succeeded as the chairman of TREWITS in 1987 by Major-General Bob Beukes, and thereafter by Brigadier CJA Viktor.
2 According to Peter Stiff (2001), the front company's budget for the financial year 1988/1989 was R22 093 000 and for 1989/1990 it was R28 717 000.
3 When Meerholz left to head 5 Recce Regt in 1988, serving as OC until killed in a suspicious 'car accident' on 24 November 1989, Regions 1 and 4 (Botswana, Angola, Zambia, and Tanzania) were combined under Dawid Fourie (who also managed Region 3, Lesotho), while Captain Pieter Botes took over Region 2 (Mozambique and Swaziland), and a Region 6 (South Africa) was established under Col Staal Burger (his nickname, 'Staal', means steel in Afrikaans).
4 Author interview with Kevin Woods (2019).
5 Peter Stiff (2001).
6 The CCB acquired at least one ship for covert use, the fishing vessel *Margit Rye*, purchased under Operation Crawler from Denmark for R2,5 million in February 1988 by a front company .
7 Author interview with Charl Naudé (2020).
8 Eeben Barlow comment on this text, 8 April 2020.
9 *TRC Final Report*, Volume 2, Chapter 2 (2003). Major Pete Stanton died in 2018: author interview with Trevor Floyd (2019).
10 *TRC Final Report*, Volume 2, Chapter 2 (2003).
11 Peter Stiff (2001).
12 *TRC Final Report*, Volume 2, Chapter 2 (2003).

33. Parallel pseudo-ops teams

1 Author interview with Frans Fourie, Bela Bela, South Africa, 8 January 2020.
2 After Staff Sergeant Blue Kelly's transfer to D40, its methods were refined by former SAS paratrooper Captain Willem Rätte, according to Jan Breytenbach (1999).
3 Author interview with Charl Naudé (2020).

34. The CCB's Inner Circle

1 Danie Phaal testimony, Wouter Basson trial transcript (2000).
2 Johan Theron testimony, Wouter Basson trial transcript (2000).

3 The bent teaspoon was handed in as evidence in the Basson trial.
4 Antony Turton (2012).
5 PSO stands for Personal Staff Officer, in other words the CSADF's aide-de-camp.
6 Peter Stiff (2001).
7 Turton writes that Lesia was released on 26 July 1990 and notes: 'This entire operation is not a legitimate act of war and amounts to criminal activities masquerading as military action. Acts like this serve to stigmatise members of the Security Forces who operate with integrity for decades to come.' Peter Stiff (2001) notes that Lesia was a shady art dealer with a long string of petty criminal convictions.

35. The Cessna Caravan death flight

1 Author interview with Johan Theron (2019).
2 Matie van der Linde testimony, Wouter Basson trial transcript (2000).
3 Van der Linde mentioned the following death flight penultimate destinations in his testimony: Zeerust, Windhoek, Oshivelo, and Brandberg West.
4 Hap Potgieter testified to only two aircraft on his Speskop Air Ops books, the Piper Seneca and the Écureuil helicopter, suggesting the Cessna Caravan was rather operated by the CCB proper. Peter Stiff (2001) is probably incorrect in claiming that the Caravan replaced the Seneca. Johan Theron said the Caravan had been purchased in about 1986: author interview with Johan Theron (2019).
5 He was nicknamed by his initials, 'Hap' meaning 'bite' in Afrikaans.

36. Resistance by Speskop's new Air Ops chief

1 Hap Potgieter testimony, Wouter Basson trial transcript (2000).
2 However, with the expansion of the CCB, its pseudo-operators acquired other aircraft and pilots and so it is possible that Operation Dual, whether under that name or another, in fact continued, despite Potgieter's refusal and without his knowledge, until the CCB was wound up over September 1989 to July 1990. Mitigating against this possibility is Theron's assertion that the last death flight was indeed on 12 December 1987.

37. The end of Operation Dual

1 Author interview with Johan Theron (2019).
2 Author interview with Johan Theron (2019).

PART V: AFTERMATH: OUR PACT OF FORGETTING

38. The end of the Border War

1 *TRC Final Report*, Volume 2, Chapter 2 (2003).
2 Peter Stiff (2001).

3 Author interview with Kevin Woods (2019).
4 *Official Gazette* No. 5725 of 7 June 1989, cited in Chandré Gould and Marlene Burger (2002).
5 Telephonic author interview with Bert Sachse (2020). Eeben Barlow tells his version of the organisation's activities in *Executive Outcomes: Against All Odds*, 30 Degrees South, Pinetown, 2018.
6 Peter Stiff (2001).

39. The CCB shuts down

1 Lieutenant-Colonel (later Brigadier) Jack Cronjé was in turn succeeded by the unit's longest-serving commander, former Koevoet policeman Lieutenant-Colonel Eugene de Kock, who ran the shadowy enterprise from 1985 to 1993.
2 In the D40/Barnacle era, the unit's documents – including any on Operation Dual – were kept by Colonel Johan Theron in his personal safe at Speskop.
3 Anthony Turton (2012).
4 Author interview with Charl Naudé (2020).
5 Paul Els (2000).
6 After taking early retirement, Colonel Eugene de Kock engaged in private Third Force activities, selling arms to Inkatha.
7 The DCC was the SADF's covert intelligence-gathering directorate, reporting directly to the Chief of Staff Intelligence, and had set up several 'civilian' front companies, including Longreach.
8 His nickname, Snor, means 'moustache' in Afrikaans.
9 *Report of the Independent Board of Inquiry for the period December 1992 to January 1993*, Johannesburg, South Africa, 1993, online at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG2543/AG2543-2-2-31-01-jpeg.pdf.
10 I detail secret revelations by the US Embassy in Pretoria regarding Operation Vula in *Drinking with Ghosts* (2014).
11 Project Coast's Roodeplaat Research Laboratories in Afrikaans.
12 It was unaware at this stage, that this was the likely remnant of the ZSOU network established by Major Gray Branfield in support of D40, headquartered at Daisy farm next to Vlakplaas, in 1979–1980.

40. Shadow boxing: The Trial of the Generals

1 Kriel testified: 'Mr Theron I saw in about 1994, 1993–1994 and that is the only time that I see him, and I went in, we had a cup of coffee and walked out. That was basically it. I never saw him again' (Wouter Basson trial transcript, 2000).
2 After completing his shutdown of Project Jota, Brigadier Wouter Basson was rehired as a cardiac surgeon at 1 Military Hospital.
3 Even though Inkatha's area of operations lay in the east of the country, their impi's training in Caprivi put them under DST1 and not DST2 tutelage.
4 As a result, Basie Smit gained a fearsome reputation as the 'Third Force General'.
5 Held in Pretoria's C-Max maximum-security prison, De Kock proved

himself very useful, sharing his knowledge with TRC investigators, prosecutors, and investigative journalists exploring apartheid depredations. After serving nineteen years, he was released on parole in January 2015, a broken man, embittered by his experience as the scapegoat, the sole mid-level officer to do time for apartheid crimes.

6 Major-General Dirk Marais email to this author, 10 November 2019.
7 Author interview with Dirk Marais, Hartebeespoort, 21 December 2019.
8 Michael Schmidt, *Drinking with Ghosts* (2014).
9 Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process*, Martinus Nijhoff Publishers, Leiden, 2009.
10 Author interview with Dirk Marais (2019).
11 Jürgen Kögl did not respond to a telephonic message request by this author for an interview and could not be traced in person. Thabo Mbeki did not respond to questions on these negotiations emailed to him via a close associate.
12 Letter sent by Dirk Marais to Jacob Zuma, undated, early 2004, copy in the author's possession.
13 Ole Bubenzer (2009) bases his assertion of separate strictly confidential talks between the ANC/Government and the Security Branch in particular on his interview with former Security Branch chief General Johan van der Merwe.
14 Ole Bubenzer (2009).
15 Ole Bubenzer (2009) claims that the Security Branch and other state employees were championed in negotiations by former President FW de Klerk – who 'often consulted directly with President Mbeki or with other high-ranking members of the government' – and a lobby group, the Foundation for Equality Before the Law.
16 Author interview with Dirk Marais (2019).

41. Half-truths at the Truth Commission

1 Draft letter sent by Dirk Marais to Jacob Zuma (2004).
2 Ole Bubenzer (2009).
3 Author emails addressed to Mbeki's and Zuma's spokespeople, to the Ministry of Defence for Nqakula, and to Maduna personally, May-June 2020.
4 Sydney Mufamadi, telephonic call to the author, 31 May 2020.
5 Mathews Phosa, telephonic call to the author, 1 June 2020.
6 Victims' List, *TRC Final Report* (2003).
7 Author SMS communication with Marjorie Jobson, 17 January 2020.
8 *TRC Final Report*, Volume 2, Chapter 1 (2003).
9 *TRC Final Report*, Volume 2, Chapter 2 (2003).
10 Constand Viljoen, TRC testimony, Cape Town, 8 October 1997.
11 A key – and very controversial – formulation of the TRC was the offer of amnesty to perpetrators in exchange for a full and truthful confession; these confessions were heard by a separate TRC arm, the Amnesty Committee.

12 Joep Joubert TRC amnesty application AM3799/96.
13 Joep Joubert TRC testimony, Cape Town, 8 October 1997.

42. Dual exposed: the Wouter Basson trial

1 Chandré Gould and Marlene Burger (2002).
2 Chandré Gould and Marlene Burger (2002).
3 Chandré Gould and Marlene Burger (2002).
4 The State had also applied to the SCA for a ruling against Judge Hartzenberg's refusal on 15 November 1999 to allow the record of Basson's bail hearing into the record before the accused had even been asked to plead, and against Hartzenberg's having refused, on 16 February 2000, to recuse himself on the grounds of bias; the SCA ruled against the State in these instances too.

43. (Re)disappearing the disappeared

1 Author interview with Dirk Marais (2019).
2 Ole Bubenzer (2009).
3 The 'Report: Amnesty Task Team' was disclosed during the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others (*Transvaal Provincial Division case number 32709/07).
4 A total of 7 111 amnesty applications were received, of which 5 392 were refused and 849 granted. The TRC noted with regret that there was little overlap between amnesty applications and victims seeking restitution.
5 Letter sent by Dirk Marais to Jacob Zuma, undated, early 2004, copy in the author's possession.
6 Letter sent by Dirk Marais to Jürgen Kögl, undated, early 2004, copy in the author's possession.
7 At about the same time, ANC/Government negotiations with the former Security Branch chiefs also came to an end, according to Ole Bubenzer (2009).
8 *State v Wouter Basson*, Constitutional Court Case CCT30/03.
9 Trevor Floyd, sworn statement, *State v Wouter Basson* (1999).
10 *State v Wouter Basson*, Media Summary, 9 September 2005, online at http://www.saflii.org/za/cases/ZACC/2005/10media.pdf.
11 Vusi Pikoli affidavit in *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (2007).
12 Jackie Selebi, who at one stage held the post of President of Interpol, was later convicted and sentenced to fifteen years for corruption for his relationship to drug lord Glenn Agliotti. See: 'The Desperate Bid to Shield Selebi', *Mail & Guardian*, 5 October 2007.
13 Vusi Pikoli affidavit in *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (2007).
14 Ronnie Kasrils said (email to the author, 6 May 2020) that he was merely 'present in a meeting' – and indeed it was Selebi who held the floor at the 23 August 2007 meeting at which, Pikoli states, Selebi said 'he was "declaring war" on me'.

44. Quietus: The founding chief's exit

1 Telephonic author interview with former Kriel business associate Mark Seftel, Johannesburg, 19 December 2019. Kriel apparently installed several of these lethal fences in US prisons, according to Seftel.
2 Telephonic author interview with Mark Seftel (2019).
3 The Memorable Order of Tin Hats (MOTH) is a military veterans' charity founded in South Africa in 1927 that is organised around branches called Shellholes.
4 Telephonic author interview with Joe Texeira, Johannesburg, 19 December 2019.
5 Winston Hart did not respond to an emailed request for an interview on the influence of Rhodesian pseudo-ops doctrine on South African Special Forces.
6 Email correspondence by Pete Stanton to Neil Kriel, the men named, and several others, 16 March 2018.
7 Email correspondence by Neil Kriel to Jerry Strong, the men named, and several others, 17 March 2018.
8 Author interview with Tali Nates, Johannesburg Holocaust & Genocide Centre, 11 October 2019.
9 Telephonic author interview with Joe Texeira (2019).
10 Author interview with Charl Naudé (2020).
11 Telephonic author interview with Colleen Carter (2020).

Index

1 Reconnaissance Commando 21, 43–44, 64, 72–73, 75, 97, 147, 183, 257
1 Reconnaissance Regiment 147
3 Reconnaissance Commando 70–71, 72, 85–86, 98, 147, 272
4 Reconnaissance Commando 97, 164, 186, 228–229
5 Reconnaissance Commando 23, 28, 43–45, 76, 97–101, 114, 147
5 Reconnaissance Regiment 98, 106, 147, 151, 154, 164, 183, 209–211, 227, 241, 257, 260
6 Reconnaissance Commando 70, 72, 86, 147, 150–151
7 Medical Battalion 54, 256
7 Reconnaissance Commando 70–71
32 Battalion 21, 44, 97, 98, 100, 227–228

Ackermann, Anton 277, 282, 290
African National Congress (ANC) 74, 77, 130, 166–167, 174, 183–186, 210–213, 219, 225–226, 228–229, 248, 253, 256, 262–270, 281–283
aircraft 23, 26, 50–51, 91, 118–120, 131, 163, 170, 235–237
Algeria 10–11, 113–114
Allum, Peter Kevin 32
Alpha Operational Test Group 21
'ambush' vs 'elimination' 128–129
amnesty 249–250, 260, 264, 269–270, 276, 279, 286–287
Amnesty Task Team 283–286
Anderson, Fernando 'Mack' 242–243
André Rabie Barracks 22, 169–170
Angola 34, 97, 182, 247–248
anthrax 30–31, 36–37
Argentina 10, 12, 114, 124, 167, 288
Armscor 30, 92, 94
Armstrong, Pat 64–65, 67–69, 293
askaris *see* 'turned' guerrillas
assassinations *see* 'eliminations'
Atkinson, Geoff 69, 71
Auditor-General 232
Aussaresses, Paul 11
Azanian People's Organisation (AZAPO) 130, 253

Badenhorst, Rudolph 'Witkop' 137–138
Badger Unit 255–256
Balaam, Andy 293
Barlow, Eeben 109, 222, 223, 250
Barnacle 10, 88–89, 108–109, 148–150, 152, 158, 162–163, 166, 170, 177–181, 186, 188, 192–193, 208–209, 220
Barnard, Ferdi 226, 255
Barrett, Garth 17, 70, 71, 72, 150
Basson, Wouter 31–32, 53–56, 67, 126, 137, 154, 184, 188–189, 193, 225, 256–257, 259–260, 275–280, 286–289
Basson, Wouter Jacobus 221, 224
Basson trial 110, 113, 122, 126, 137, 153–154, 158, 193, 205, 275–280, 283
Batohi, Shamila 291
Battle of Ebo 107
Bawden, Barry 83–84, 248
Bawden, Christopher "Kit" 83–84, 248
Bawden, Guy T 83, 248
Bax, Tim 20, 71, 77, 180
Beahan, Dennis 'Sammy' 249
Beaufre, André 11–12, 90
Berry, Jack 18
Bindura fort 22, 34–35, 66
Birch, Johnny de Gray 67, 87, 139, 162
Blaauw, Hennie M 147
black pseudo-operators 77–79, 92
Bomba, Boaventura 199–203
Booysen, Joop 224
Boraine, Alex 270
Border War, South African 19, 63, 147, 247–251
Botha, Pik 167, 173
Botha, PW 68, 88, 90, 149–150, 168–169, 174, 219, 221, 260
Bothma, Kobus 205–207, 276, 279
Botswana 16, 43, 209–211
Bradley, JE 117
Brandberg Mountains 159–160
Branfield, Gray
  background of 82–83

Basson trial 126, 276
D40/Barnacle 77, 82–86, 88–89, 107, 140, 148–149, 158–159, 161, 167–168, 171, 173–175, 181, 183, 210–212
death of 158–159
resignation of 214–215, 248–249
Breytenbach, Jan 21, 44
Brickhill, Jeremy 234
Britain 18, 49, 65
British South Africa Police (BSAP) 17, 18, 69, 71, 169
Bruni, Roger 47
Bruwer, Henry 276
Bubenzer, Ole 263–267, 270, 282
Büchner, Jac 220
Buffalo Range Forward Airfield 23, 50–60
Bureau of State Security (BOSS) 129
Burger, Marlene 80, 277, 278–279
Burger, Staal 223, 255

C1 87, 92–95, 227, 252, 253, 255
C10 255
Callow, Timothy J 25–27, 77, 102–103, 105–106, 179, 181, 189–190, 211
Calloway, Matthew 'Matt' 86
Carter, Colleen 179, 294
casualties 37, 66, 126–128, 132, 238, 248, 274
cell structure 171–173, 224
Central Intelligence Agency (CIA) 35, 48–49, 52
Central Intelligence Organisation (CIO) 18, 32, 34–35, 65, 70, 198
chain of command *see* lines of reporting
Chamorro, Rubén 114
Charles, Commandant 184
chemical and biological agents 29–38, 57, 59–60, 111, 122–123, 131, 135–137, 141, 154–156, 187, 189, 194–196, 203–206, 231, 235–236, 277–278, 283, 288
chemical and biological warfare (CBW) programme 31–38, 57, 60, 66, 225, 259–260, 267
Chief of Staff Intelligence (CSI) 86–87, 89, 167, 232
Chikane, Frank 226, 283, 289–290
Chikondo, Martin 26–27, 41–42
Chikurubi prison 29
Chilisi, Tsitsi 234
cholera 30, 36
Christie, Stuart 46
Christopher (Barnacle member) 194–197
Church, John 105, 184–185
Cilliers, Jaap 54–55
Citizen, The 213
Civil Cooperation Bureau (CCB) 10, 93, 220–226, 230–234, 240, 243, 248–250, 253–254, 257, 260, 278
civilian covers 11–12, 79, 87, 110, 152, 224
civilians 30, 37, 66, 185, 186, 211, 234
Cline, Lawrence 16, 18–19, 22, 40
Coetzee, Dirk 93, 252
Coetzee, Jan 30, 31, 122–123, 252
Coetzee, Johann 185–186, 200
communications 104, 223
communism 18, 64, 86, 90
compartmentalisation 111–112, 171, 194, 222, 224, 227–229
Conjwayo, Phillip 248–249
Constitutional Court (ConCourt) 286–289
Contact Bureau (SADF) 262, 264, 266, 285
Co-ordinating Intelligence Committee (CIC or KIK) 167, 220
Counter-Revolutionary Information Task Team (TREWITS) 220
crematorium 29
Criminal Procedure Act 284
Cristina, Orlando 198–204
Cronjé, Jack 252
Cross, Glenn 30–38, 54, 66, 95
Cuba 34, 63, 247–248
cultural dissonance 71–72, 109
Curtin, Mike 69, 107

Da Costa, Almerindo Mourão 78–79, 132
Daisy farm (base) 83, 85–86, 158, 161
Da Silveira, Carlos 50–52
'death bonuses' 35, 37
'death squad', origin of term 11
De Beer, Dewald L 103
De Fonseca, Victor M 230–231
De Fontanges, Guillaume 9, 10–11
De Klerk, FW 6, 253, 256, 259–260
De Kock, Eugene 95–96, 255, 258, 261, 279
De l'Assomption, Roland 47
Delta 40 (D40) 10, 60, 77–81, 88–89, 91–92, 94, 108–112, 118–120, 127–129, 148, 181, 272–280
Delta Operational Test Group 21
Denard, Bob 46–48
Desblé, Jean-Michel 47–48, 51–52, 56–58, 71, 180
detainees 22–23, 29, 37, 98, 113–120, 126, 188, 272
Dhlakama, Afonso 199, 201
Diedericks, André 'Diedies' 28, 44–45, 83, 102–107, 140, 149, 164–165, 179–182, 189–190, 208–209
Directorate of Military Intelligence *see* Military Intelligence
Directorate of Special Tasks (DST) 88, 171–172, 203, 220–221, 260
disguises 116
Dobe, Paul 'Americo' 102, 105–106, 181, 189–190, 209

Drew, Dave 116, 141–142, 194, 241–243
Dreyer, Johannes G 'Sterk Hans' 95–96
Dube, John (aka 'Boy' Mvemve) 128–129

elections 67, 82
Elektroniese, Meganiese, Landboukundige en Chemiese Ingenieursvaardighede (EMLC) 30–31, 34, 79, 94, 111, 122–123, 136, 169, 172, 175, 224
'eliminations' 109–111, 128–129, 148, 152–157, 166, 187–189, 193–197, 200, 220, 225, 229, 232–233
Ellert, Henrik 35
Ellis, Stephen 168
Els, Paul 71, 102, 103, 106, 190, 254
Emily Hobhouse, SAS 77
Engelbrecht, Krappies 255
Evans, Colin 86, 168
executions 29
Executive Outcomes (EO) 250

Federal Bureau of Investigation (FBI) 35
Flechas (Arrows) 96–97
Flower, Ken 32, 35
Floyd, Trevor
  background of 74–75
  Basson trial 126, 276–277, 279, 288
  D40/Barnacle 79–80, 84, 87–89, 92, 104, 119–120, 133, 139–143, 148, 154–156, 158–161, 178–179, 193, 195–197, 211, 221
  later career 293
  SPO 72, 74–77
Folb, Peter 29–32, 53, 74–75, 91, 108–109, 187, 220, 224–225
Fort Foot 182
Fort Namutoni 119
Fort Rev 98–101, 104, 114–115, 121, 188–189
forward airfields (FAF) 23
Fourie, Frans 227–229
France 9–12, 113–114
Frayne, Fred 201–203
front companies 74, 91, 152, 201, 221–225, 228, 250
funds 34–36, 91, 118

Gartner, M John 143
Geldenhuys, Jannie 169–170, 221, 232–234, 250, 253, 254, 267, 269–270, 281–282
Geldenhuys, Preller 85, 92, 167, 174–175
Geneva Conventions 113, 130
Gericke, Patrick 170
German Soldiers' Combat League 46
Gillwald, Cheryl 283
Godwin, Peter 207
Gould, Chandré 29–32, 53, 74–75, 80, 91, 108–109, 187, 220, 224–225, 277–279
Gqabi, Joe Nzingo 166–168, 174
Groenewald, Tienie 192
Guma, Mduduzi 151
Hall, Piet 93
Hammer Unit 93, 227
Hani, Chris 185
Harms Commission 253–254
Hart, Winston 19–22, 24, 27, 87–89, 149, 181, 293
Hartlebury, Philip 86, 168
Hartzenberg, Willie 56, 67, 276–279
Henderson, Ian 20
Hickman, John 20, 32
Hills, James 209
Horne, Gerald 49
Hugo, Jan 261
Hunter, Roland 204

Indian Ocean, death flights over 205–207, 237
Inkatha Freedom Party (IFP) 256, 260–261, 263–264
Irregular Warfare Branch (IWB) 21

Jobson, Marjorie 271
Johannesburg Holocaust & Genocide Centre 293–294
Joint Management Centres (JMCs) 233–234
Jordan, Pallo 226, 288
Joubert, Joep 106, 211–212, 221, 232–233, 241, 273–274, 278
Joynt, Vernon 257

Kalafong Hospital 107
Kalimbwe, Timothy 214
Kapembe (tracker) 103
Kasrils, Ronnie 226, 270, 288, 290
Kelly, Kenneth John 'Blue' 78, 140, 227
Kennelly, Eric Ingles 154–155, 275, 279
Ketalar 139, 195, 206, 243
Khulumani Support Group 271
Kinghorn, Malcolm 44, 97, 259
Knobel, Niël 267, 278
Koevoet 95–98, 114–115, 136, 188
Kögl, Jürgen 262, 263–266, 285
Kriel, Joan 92, 178, 179
Kriel, Neil (Cornelius Ignatius Johannes)
  background of 15–18
  Basson trial 54–55, 276–277, 279
  D40/Barnacle 9–10, 85, 88–89, 91–92, 94, 103–105, 108, 110–113, 115–116, 118–137, 139–143, 148–149, 152–159, 161–163, 166, 193, 220, 291
  death of 294
  later career 292–294
  resignation of 177–179, 259, 292–293
  Selous Scouts 20, 23–24, 27–28, 42–43, 66
  SPO 73–77

Kruger, Theunis Erasmus 221, 224, 226, 250
Lamprecht, Nicholas 46
Lancaster House Agreement 65
Latin America 114
Lekota, Mosiuoa 270, 290
Lesia, Leslie 234
Lesotho 161, 183–186, 208–209
Lewis, Joe 24
Liebenberg, Kat 84–85, 173, 177, 179–181, 185, 190–191, 194, 200, 209, 211, 221, 253–254, 257, 260, 267
lines of reporting 32, 88, 111–112, 129, 222–223
Loots, Fritz
  Basson trial 126, 275, 277
  D40/Barnacle 9–10, 80, 84–85, 91, 94, 103, 108–109, 111–113, 121, 127, 137, 148–150, 152–153, 158, 169–170
  retirement of 178
  Selous Scouts 21, 68
  SPO 73–74, 76
  TRC 273
Louw, Willem 21
Lubowski, Anton 250, 254, 271
Luitingh, Lafras 221, 224, 250
Lusaka Accords 212

Mabandla, Brigitte 270, 286, 289
Madagascar 9
Maduna, Penuell 270, 281
Makakola, John 199–203
Makoanyane military base 208–209
Malan, Magnus 12, 35, 73–74, 90–91, 112, 114, 167, 169, 221, 260–261, 267, 269–270, 278
Mambo Press 132
Mandela, Nelson 12, 262, 265
Manzini, Manala 290
Marais, Dirk R 262–263, 265, 267–268, 270, 278, 281–282, 285
Maseru raid 183–186
Masire, Quett 209–210
Masutha, Michael 291
Mathyssen, Paul 76
Matias, Neves Thomas 'Balthazar' 44–45, 97, 103–107, 164, 179, 181, 189–190, 208–209
Matola raid 150–151
Mau Mau uprising 20
Mavengere, Stanlake 19
Mbeki, Thabo 166, 229, 262, 265–268, 270, 289–290
McGuinness, Michael 'Mac' 18, 21, 27, 31–35, 60, 86, 89, 95
McLoud, John 'Aussie' 249
medals 40–45, 102–103, 106, 132, 150
medical care 22–23, 91
Meerholz, Corrie 151, 221, 224–225, 232, 250–251
mercenaries 46–49, 159
Meyer, Roelf 233
militarisation of society 18, 90, 220
Military Intelligence (MI) 64, 88, 198–201, 220–221
MOA Bamboo (Pty) Ltd 292, 293
Modise, Joe 166, 168, 267
Mokgabudi, Motso 'Obadi' 150
Mooiplaas farm (base) 93
Moore, Charles Robert 48–49
Morgan, Nigel 70
Morgan, Phil 28, 30, 79, 94, 104, 111, 175, 179, 224
Morogoro base 229
Moto 132
Mount Darwin fort 22, 37, 66
Moyo, Isaiah 173–174, 212–214
Mozambican National Resistance (RENAMO) 80, 164–165, 198–200, 203–204
Mozambique 16, 23–24, 36–37, 39–40, 43, 97, 150, 164–165
Mozambique Liberation Front (FRELIMO) 39, 40, 43, 57, 198
Mpofu, Stephen 26–27, 40–41
'Mr S' 201–203
'Mr Z' 82–83
Mufamadi, Sydney 267, 270
Mugabe, Robert 65–67, 84, 86, 168–169
Mulligan, Kevin 50–51
Murray, Hamish 18
Mushala, Adamson 214
Muzorewa, Abel 63, 65, 67

Namibia *see* South West Africa
Nates, Tali 293
National Front for the Liberation of Angola (FNLA) 44–45, 96, 97
National Intelligence Service (NIS) 88–89, 129, 220, 227
National Prosecuting Authority (NPA) 279, 282–283, 285–286, 289–290
National Security Management System (NSMS) 90–91
National Union for the Total Independence of Angola (UNITA) 44, 100, 181–182, 189, 241, 247
Naudé, Charl 88, 97–101, 177–186, 193–194, 211, 221, 223–225, 229, 254, 294
Neethling, Lothar 31, 257
Nel, Christoffel 224–225
neo-Nazis 46–49
Nickedimus, Mazaruva Tapera 258
Niemoller, Johan 222
NKJM Eiendomme 91, 118, 152
NKTF Security Consultants 152
Nkuna, Tshikani 271
Noble, Vic 33, 34, 38

Nofomela, Almond 252
Nqakula, Charles 270, 281, 290
Ntsebeza, Dumisa 291
Ntuli, Bheki 260
nuclear weapons 260
Nujoma, Sam 105
Nyadzonya, training base at 39–40
Nyati, Moses Morrison 39, 69

Oberholzer, Andrew 15–16
Ocean Tech 221–225
Olckers, Ewald 147
Omar, Dullah 226, 267, 270
Operational Experimental Team 21
Operation Askari 212
Operation Barrage 189–191
Operation Beanbag 150–151
Operation Concept 67
Operation Drama 201
Operation Dual 115–116, 126–128, 150, 152, 163, 243, 250, 264, 275–280, 287–289
Operation Eland 39–40
Operation Force 164–165
Operation Gericke 149, 174
Operation Hurricane 19
Operation Interrupt 103–105, 189
Operation Kropduif 179
Operation Lebanta 183–186
Operation Marion 260
Operation Mincemeat 59
Operation Mixer 167–168
Operation Moduler 247
Operation Pastoor 257
Operation Plexi 210–211
Operation Quartz 66–67
Operation Reindeer 113, 185
Operation Savannah 44, 102
Operation Splinter 43
Operation Vodka 65
Operation Vula 256
Operation Winter 69, 107, 272
Opperman, Vic 20, 87, 134
organogram of D40 78–81, 89, 108, 148
organophosphates 30, 36
Otto, Gert 283, 289

'Pact of Forgetting' 262–270, 281–286, 290–291
Palmeira Import & Export 228
Pan Africanist Congress (PAC) 110, 130, 253, 256
parachute training 43, 71, 101, 107, 193
Parker, Jim 65–67, 82, 84, 86–88
Parks, Ian 150–151
Pauw, Jacques 86, 168, 170, 174–175
People's Armed Forces of Liberation of Angola (FAPLA) 63, 97, 113, 247
People's Forces of Liberation of Mozambique (FPLM) 39, 58
Peoples' Liberation Army of Namibia (PLAN) 63, 96, 98–101, 103, 116–117, 122, 129, 249
People's Movement for the Liberation of Angola (MPLA) 44, 78–79, 99–101
perfidy, war crime of 11
Perkins, David 34
Pessarra, Chris 48–49, 50–58, 60
Phaal, Danie 192–197, 230–231, 235–236, 276, 277, 279
Phosa, Mathews 266, 270
Pienaar, Louis 249
Pikoli, Vusi 289–290
Pinochet, Augusto 287
Pittaway, Jonathan 96
poisons *see* chemical and biological agents
Potgieter, Hendrik Andreas Petrus 'Hap' 237–243, 276
President Security Consultants 152
Pretorius, Torie 276
Price, Geoffrey Burton 86, 88, 175, 255
Priority Crimes Litigation Unit (PCLU) 282–283
prisoners *see* detainees
Project Coast 53–54, 187, 259, 267
Project Departure 87–89, 181
Project Jota 259–260
pseudo-gangs, use of 11, 18–21, 76, 229

racism 78, 182
radios 30, 33
railway lines, sabotage of 41, 189–191
Rautenbach, Ben 80, 94, 152
Recce Group 77
Recce Troop 25–28, 42, 77, 104
Reconnaissance Commandos 35, 66, 82, 93, 108
referendum of 1983 206–207
Reid-Daly, Ron 19–20, 22, 24–25, 27, 31–33, 40, 180
Renosterspruit farm 91–92
Resister 187
Rhodesia 17, 36
Rhodesia Herald, The 49
Rhodesian African Rifles (RAR) 20, 68, 71, 95
Rhodesian Bush War 15–18, 65
Rhodesian Light Infantry (RLI) 18, 23, 65, 66
Rhodesians' relocation to and from SA 66–72, 109, 147, 179–180, 224
right-wing forces 263
Riotous Assemblies Act 287, 288
Robey, Noel 24, 71, 99
Robinson, Brian 25, 293
rugby 15–18, 24
Rusiki, Corporal 182
Russia *see* Soviet Union

Sachse, Bert 17–18, 42, 48, 52, 56, 58–60, 64, 250
salaries 84, 92, 225
Saturday Star 255–256
Saudi Arabia 35
Scales, Dave 25–27, 79, 104, 140, 164, 179, 182, 190, 209
Schiettocht base 68
Schofield, Peter 71–72, 109, 137–138
Schulenburg, Chris 'Schulie' 25–28, 40–41, 77–78, 88–89, 102, 131–133, 179, 228
Scilingo, Adolfo 288
Scoline 139, 189, 206, 236, 243
Scott, Ian 68–71
secret negotiations between SADF chiefs and ANC ministers 262–270, 281–286, 290–291
Section of Pseudo-Operations (SPO) 73–77, 82
Security Services Transkei (Pty) Ltd 180
Selebi, Jackie 286, 289–290
Selous Scouts 10, 19–27, 30–31, 34–35, 39–45, 48, 51–52, 56–60, 64–71, 93, 96, 98–99
September, Dulcie 226
Serfontein, Chris 228
Serfontein, Septinus 108–109
shooting of death flight victims 135
Slatter, Hugh 176
Slovo, Joe 151, 166
Smit, Basie 261
Smith, Chris 283, 289
Smith, Ian 32, 35, 63, 68
Smith, Michael 83–84, 248–249
Soames, Lord Christopher 65
Sole, Sam 93
South African Air Force (SAAF) 67, 105, 118, 134–135, 185–186, 192, 199
South African Communist Party (SACP) 225–226, 253, 256
South African Council of Churches 220
South African Defence Force (SADF) 36, 43–44, 90–91, 109, 225, 233, 249, 253, 256, 262–272, 281–286
'South African Intelligence' 34–36
South African National Defence Force (SANDF) 263, 264
South African Police (SAP) 17, 34, 90, 122, 130, 167, 188, 249–250
South West Africa 29, 63, 95, 121, 247–249, 253
South West African People's Organisation (SWAPO) 10, 63, 74, 97–98, 113–117, 122, 126, 129, 141–142, 154, 241, 270–271, 279
South West African Police (SWAPOL) 188, 249–250
South West Africa Territorial Force (SWATF) 70, 98, 247, 249
Soviet Union 16, 63, 247–248
Spain 262–263
Special Air Service (SAS) 17–18, 23, 25, 30–31, 43–45, 64–68, 70–72, 95, 97
Special Branch (SB) (BSAP) 18, 20–21, 23, 30–31, 33, 35, 67, 69, 85–88, 169
'special courts' 29
Special Forces (SF) 67–69, 94, 106, 108–109, 111, 118, 129, 147–149, 162–163, 167, 256–257, 259
Speskop 53, 80–81, 94, 98, 102, 114, 129, 130, 142, 152, 154, 162, 163, 175, 177–179, 185, 192, 193, 198, 204–209, 240, 243, 249, 253, 254, 259, 272, 275, 276, 288, 296
Stadler, Koos 98, 116, 142, 209
Stannard, Richard 150, 184–185
Stanton, Pete 'Stroppy' 20, 79–80, 87, 89, 104, 111, 134, 161, 179, 181, 183, 224, 293
State Security Council (SSC) 6, 74, 91, 173
Steyn, Ben 259
Steyn, Danie 79, 89, 92, 104, 179, 181
Steyn Commission 256–258
Stiff, Peter
  CCB 222, 225, 232–233, 249–253
  chemical and biological agents 30–31, 33, 38
  D40/Barnacle 83–85, 87–88, 92, 98, 149–150, 152, 161, 166, 173–174, 180–181, 183–186, 209–213
  Selous Scouts 68–69, 71–72
  SPO 75–76
strangulation 136–137, 139
Strong, Jerry 20, 293
Sunday Times 55
Suttill, Jim 150
Swart, Jakes 102
Swart, Mattheus J 'Boet' 43, 64, 69, 71, 98, 180–182, 190, 209
Symington, Robert 31–35, 38

Tambo, Oliver 166, 226
'Tambuti Lodge' pub 25, 27
Teen-Rewolusionêre Inligtingstaakspan (TREWITS) 220
thallium 31, 36, 231
Theron, Johan
  Basson trial 275, 277, 279
  CCB 221, 231, 235–243, 249, 257
  D40/Barnacle 10, 77–81, 84, 91–92, 94, 108, 113–120, 122–139, 141–143, 148, 154–158, 161–162, 168–169, 179, 184, 187–189, 193–196, 203–207, 272
  retirement of 293
  SPO 74
'Third Force' 225, 256, 264
Timol, Ahmed 6, 291
Tippet, Dave 164, 234
Tiro, Abraham Onkgopotse 129
torture 11–12, 96–97, 99, 116, 212–215, 272

'total strategy' 11–12, 90–91, 234, 259
training 21–22, 43, 71, 93–94, 107, 260
Transkei 132–133, 180
Trengove, Wim 286–288
'Trial of the Generals' 260–261
Trowsdale, Alan 'Trousers' 86, 168, 214, 222, 224, 248
Truter, Johan 257
Truth and Reconciliation Commission (TRC) 53–54, 69–70, 83, 86, 96, 128, 170, 175–176, 198–199, 213–214, 225, 256–258, 261, 264, 269–275, 278–279, 282
Tubarine 139, 189, 206, 236, 243
'turned' guerrillas 21–24, 29, 40, 85–86, 96–101, 142, 272
Turton, Anthony 88–89, 102, 107, 153, 169, 175, 181, 183, 186, 210–211, 226, 231–232, 234, 254
Tutu, Desmond 291
two-man teams 25–26, 28, 74, 78, 102

uMkhonto we Sizwe (MK) 17, 85, 150, 166–167, 183–186, 209–211, 225–226, 249
United African National Council (UANC) 63, 65, 67
United Democratic Front (UDF) 219, 220
United Nations (UN) 40, 247–248
United States (US) 18, 48–49, 247–248

Van Blerk, Rocky 83, 257–258
Van den Bergh, Cecil 'Vise Grips' 69, 79, 147
Van der Byl, PK 32
Van der Linde, Martin 'Matie' 162–164, 178, 184–185, 193–194, 196, 206–207, 221, 236–239, 276–277, 279
Van der Merwe, Johan 94, 289–290
Van der Riet, Piet 71, 180
Van der Riet, Willie 93
Van der Spuy, Sybie 117, 224
Van der Westhuizen, Joffel 93
Van Heerden, Roelf 224
Van Niekerk, Cor 198–202, 204
Van Staden, Manie 283, 289
Van Tonder, Neels 'Smiley' 202
Varkevisser, Fred 170
Varney, Howard 282, 286
Verster, Joe 97, 221, 232–233, 252–253, 258
Videla, Jorge Rafael 12
Viktor, JJ 92–93, 95
Viljoen, Constand 112, 169, 185, 211, 262–263, 265–267, 269–270, 273, 278
Vlakplaas base 93, 252, 253
Vlok, Adriaan 289–290
Von Horsten, Butch 161
Vrye Weekblad 252

Walls, Peter 32, 65
Warfarin 36, 194
Warraker, Robert 26, 27, 39–40
Washington Post, The 49
Watt, Darrell 293
weaponry 20, 27–28, 48, 69, 75–76, 94, 104, 110–111, 117, 132, 147, 169–170, 172, 182
Webb, Eddie 253
West, Alec 86, 87, 88, 168
Wilson, Rob 'Wings' 23–24
witnesses 123, 130–131, 196
Wolhuter, Henry 34, 37–38, 86
women and children 137–138, 185, 186, 211
Wonder Air 198–204
Woods, Kevin 84, 88, 171–174, 215, 222, 248–249
World War II 59

Younghusband, Peter 183

Zambia 17, 18, 65, 174, 213–215
Zimbabwe African National Liberation Army (ZANLA) 16, 57–58, 64–66, 69, 161
Zimbabwe African People's Union (ZAPU) 16, 18, 43, 63, 65–67
Zimbabwean African National Union (ZANU) 16, 40, 63, 65–67, 69, 82, 174–175
Zimbabwean Air Force 175–176
Zimbabwean Central Intelligence Organisation (ZCIO) 234, 258
Zimbabwe People's Revolutionary Army (ZIPRA) 16–17, 64–66, 85, 161, 174
Zimbabwe-Rhodesia 63–65
Zimbabwe Special Operations Unit (ZSOU) 83–86, 88–89, 128, 149–151, 158, 161, 168, 171–176, 181, 212, 248–249
Zuma, Jacob 262, 263–268, 270, 282, 285

About the author



MICHAEL SCHMIDT is a bestselling non-fiction author and investigative journalist with more than three decades' experience in the field, having worked in 47 countries across six continents. An ordinary conscripted SADF soldier during the Border War in the mid-1980s, he went on to operate as a defence correspondent in a variety of conflict and post-conflict societies, including South Africa during its transition to democracy, Guatemala during the Civil War, Lebanon during the Summer War, Chiapas, Darfur, the Democratic Republic of Congo, Rwanda, Lesotho, and Sri Lanka. His experiences led him to found The Ulu Club for Southern African Conflict Journalists, and enabled him to conduct courses on conflict in transitional societies in Mexico, the United States, South Africa, Egypt, and Tunisia in the wake of the Arab Spring, and Bangladesh during the Rohingya refugee crisis. He covered parts of the Truth and Reconciliation Commission in South Africa, consulted briefly to the Commission Dialogue, Vérité et Reconciliation of Côte d'Ivoire, and trained journalists and commissioners of the Truth and Reconciliation Commission in the Solomon Islands. This book arose from his abiding interest in insurgency and counterinsurgency doctrines. He lives in Johannesburg.

IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

AFFIDAVIT OF MICHAEL SCHMIDT

I, the undersigned,

MICHAEL SCHMIDT

do hereby make oath and state:

1. I am an adult male investigative journalist and author based in Johannesburg.

2. I authored the book *Death Flight: Apartheid's Secret Doctrine of Disappearance,* published by Tafelberg in 2020 ("**Death Flight**").

3. Save where appears from the context, the facts contained in this affidavit are within my personal knowledge and are to the best of my knowledge and belief both true and correct.

4. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of its terms of reference.

5. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

6. A certified copy of my original confirmatory affidavit dated 22 November 2024 filed in the abovenamed matter was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 8 at paginated pages 1915 to 1917, together with extracts from Death Flight at paginated pages 1918 to 2017.

7. Further, I refer to the statement of Dr. Nakedi Mathews Phosa ("**Phosa**") dated 18 October 2025 as submitted to the Commission. Phosa denies ever having received a phone call from me in 2020, or even knowing who I am. I refute Phosa's denials.

8. I attach, as "**MS1**", a WhatsApp exchange I had with Phosa's personal secretary, Debbie Burnett ("**Burnett**"), on 31 May 2020. At 15h13 that afternoon, I informed Burnett that I was trying to get hold of Dr Phosa for comment on my book.

9. In the second message I sent to her at 15h48, I confirmed that Phosa had just called me, and that I would email my questions to him through Burnett. At 17h41 on 31 May 2020 I sent a list of questions to Burnett for Phosa's response. The email delivery receipt is attached as "**MS2**". The questions included an allegation of his involvement in an ANC lobby negotiating protection from prosecution of crimes committed during apartheid.

10. On page 270 of Death Flight (at footnote 5), I recorded that Phosa called me on 1 June 2020 flatly stating that he was not part of the alleged negotiations. He added that he had passed my email on to Jurgen Kögl, the mediator and facilitator of the negotiations, who in turn said that he refused to be interviewed.

11. I stand by the information that is recorded in Death Flight.

_____

MICHAEL SCHMIDT

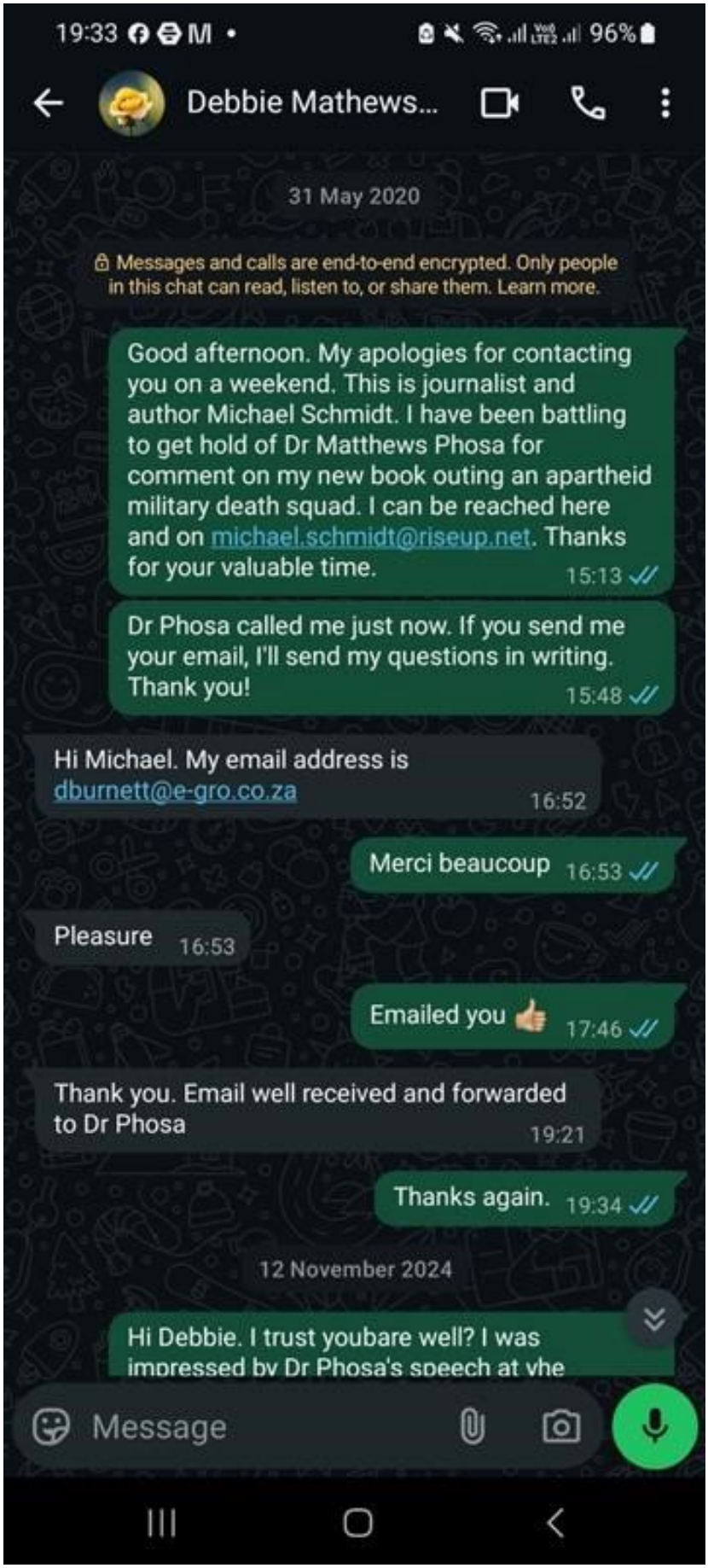
Signed and sworn to before me at _____ on this the ____ day of **_____ 2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

"MS1"


19:33
96%
Debbie Mathews...
31 May 2020
Messages and calls are end-to-end encrypted. Only people in this chat can read, listen to, or share them. Learn more.
Good afternoon. My apologies for contacting you on a weekend. This is journalist and author Michael Schmidt. I have been battling to get hold of Dr Matthews Phosa for comment on my new book outing an apartheid military death squad. I can be reached here and on michael.schmidt@riseup.net. Thanks for your valuable time. 15:13
Dr Phosa called me just now. If you send me your email, I'll send my questions in writing. Thank you! 15:48
Hi Michael. My email address is dburnett@e-gro.co.za 16:52
Merci beaucoup 16:53
Pleasure 16:53
Emailed you 17:46
Thank you. Email well received and forwarded to Dr Phosa 19:21
Thanks again. 19:34
12 November 2024
Hi Debbie. I trust youbare well? I was impressed by Dr Phosa's speech at vhe
Message

"MS2"

From: Mail Delivery System <MAILER-DAEMON@mx1.riseup.net>
To: dburnett@e-gro.co.za
Sent: 31 May 2020 17:41
Subject: Relayed: Death Flight

This is the mail system at host https://url.za.m.mimecastprotect.com/s/5KfTCy8AO5IE7nVxiZf6uxh-10?domain=mx1.riseup.net.

Your message was successfully delivered to the destination(s)
listed below. If the message was delivered to mailbox you will
receive no further notifications. Otherwise you may still receive
notifications of mail delivery errors from other systems.

The mail system

<dburnett@e-gro.co.za>: delivery via
corpmx.worldonline.co.za[196.35.198.130]:25: 250 OK id=1jfQ5P-000k70-BB

Divider 9

Supporting Affidavits

Calata and Others // Government of the Republic of South Africa and Others

Gauteng Division of the High Court, Pretoria, Case No: 2025/5245

INDEX TO SUPPORTING AFFIDAVITS

NO	DESCRIPTION OF SUPPORTING AFFIDAVIT	PAGES
1.	ALEGRIA KUTSAKA NYOKA - 2ND APPLICANT	937-949
2.	BONAKELE JACOBS – 3RD APPLICANT	950-956
3.	FATIEMA HARON-MASOET - 4TH APPLICANT	957-965
4.	TRYPHINA NOMANDLOVU MOKGATLE - 5TH APPLICANT	966-973
5.	KARL ANDREW WEBER - 6TH APPLICANT	974-981
6.	KIM TURNER - 7TH APPLICANT	982-994
7.	LYNDENE PAGE - 8TH APPLICANT	995-1000
8.	MBUSO KHOZA - 9TH APPLICANT	1001-1022
9.	NEVILLE BELING - 10TH APPLICANT	1023-1030
10.	NOMBUYISELO MHLAULI - 11TH APPLICANT	1031-1040
11.	SARAH BIBI LALL - 12TH APPLICANT	1041-1053
12.	SIZAKELE ERNESTINA SIMELANE - 13TH APPLICANT	1054-1059
13.	SINDISWA ELIZABETH MKONTO - 14TH APPLICANT	1060-1064
14.	STEPHANS MBUTI MABELANE - 15TH APPLICANT	1065-1074
15.	THULI KUBHEKA - 16TH APPLICANT	1075-1081
16.	HLEKANI EDITH RIKHOTSO - 17TH APPLICANT	1082-1095
17.	TSHIDISO MOTASI - 18TH APPLICANT	1096-1103
18.	NOMALI RITA GALELA - 19TH APPLICANT	1104-1115
19.	PHUMEZA MANDISA HASHE - 20TH APPLICANT	1116-1121
20.	MKHONTOWESIZWE GODOLOZI - 21ST APPLICANT	1122-1127
21.	MOGAPI SOLOMON TLHAPI - 22ND APPLICANT	1128-1144
22.	DR ZAHEED KIMMIE – FOUNDATION FOR HUMAN RIGHTS	1145-1166
23.	ODETTE HELENA GELDENHUYS – WEBBER WENTZEL	1167-1174

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
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SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

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CERTIFIED A TRUE COPY OF THE ORIGINAL
18/01/2025.

AKV ASM

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

AKN ASM

SUPPORTING AFFIDAVIT – ALEGRIA KUTSAKA NYOKA

I, the undersigned,

ALEGRIA KUTSAKA NYOKA

do hereby make oath and state as follows:

Introduction

1. I am an adult female pensioner resident in Springs, Gauteng. I am the eldest sister of the late Caiphus Nyoka ("Caiphus").

2. I am the second Applicant in this application.

3. I am duly authorised to make this statement on behalf of the Nyoka family.

4. The facts contained in this affidavit are both true and correct.

Caiphus

5. Caiphus was born to Saroma and Moses Nyoka on 9 February 1964 in Daveyton, Benoni. He was the fourth born of my parents' seven children.

6. Caiphus was a talented, courageous, and altruistic son, brother, and patriot in the community of Daveyton. He was a likeable individual and well-respected by those who encountered him. Caiphus stood for equality for all and gave up his life for the cause of the struggle for freedom and justice for a democratic, non-racial, and non-sexist society in South Africa.

AKN ASM

7. During the 1980s, Caiphus was a student leader in the East Rand and the then Transvaal Province. He was a member of the Congress of South African Students ("COSAS"), the South African Youth Congress ("SAYCO"), Organiser of the Transvaal Students Congress ("TRASCO") in the East Rand, and President of the Student Representative Council ("SRC") at Mabuya High School in Daveyton, Benoni. COSAS and SAYCO were affiliates of the United Democratic Front ("UDF").

8. He opposed the apartheid government and mobilised masses of people and communities to protest against the apartheid regime and its discriminatory policies. Caiphus was not a violent person. He used his voice to express his socio-economic views.

9. Caiphus' opposition to the apartheid regime made our family home a target of the notorious Special Branch of the then South African Police ("the SAP"). Caiphus was arrested and detained on several occasions for offences that he did not commit. He was acquitted, at every turn whenever he was arrested, on every charge that was ever brought against him. Our home was frequently raided by the police at all hours of day and night.

Caiphus' murder

10. During the early hours of Monday 24 August 1987, Caiphus and three young men (Exodus Gugulethu Nyakane, Excellent Mthembu, and Elson Mnyakeni) were asleep in his room which was situated at the back of our family home. Caiphus and the three young men attended the funeral of one of our neighbours the previous day and socialised into the late hours of the night before they returned

AKN ASM

11. At or about 02:30 am, the police raided our family home. A large contingent of uniformed and casually dressed police officers entered our property; some took position in front of the main house and others made their way to Caiphus' room. Three police officers, Sergeants Marais, Stander and Engelbrecht, barged down the door to the room with their guns drawn. Engelbrecht removed the three young men from the room, except Caiphus who remained behind seated in his bed, in the presence of Marais and Stander. At no stage did Caiphus refuse or resist to cooperate with the police officers that were in his room.

12. Nine gunshots were fired by Marais and Stander moments after Engelbrecht, and the three young men left the room. Caiphus died at the scene. The fatal shot, presumably the one through Caiphus' forehead, was fired by Marais. The police whisked Caiphus' body from his room, without informing my father about the death of his son and the circumstances under which he was murdered. They detained and tortured the three young men and released them days later without bringing any criminal charges against them.

13. At daybreak, my father instructed me to go to the Daveyton Police Station to enquire about what had happened to Caiphus. I was referred to Major van Den Berg who was stationed at the Police Station at Harpur Square, Benoni ("Harpur Square").

14. Two days later, on 26 August 1987, my father was summoned to Harpur Square where Van Den Berg informed him that Caiphus was killed during an operation that was executed by a police unit that dealt with terrorists. Our father was only allowed to view Caiphus' body on 3 September 1987, some 10 days after his murder.

FKN' AGM

15. We later found out that the three young men, who were with Caiphus just before he was murdered, were taken to the Daveyton Police Station where a police officer had inscribed the following chilling message on a chalk board: ***999 LEMBA STREET, CAIPHUS NYOKA EXECUTED, SIX SHOTS, HANDS OF DEATH.***

The botched inquest

16. Between 1988 and 1989, an inquest was held before the Benoni Magistrates' Court to determine the cause and identify of those responsible for Caiphus' death.

17. Marais, Stander and Engelbrecht testified that the police planned and executed an operation to arrest Caiphus because he had allegedly supplied hand grenades and limpet mines to two fellow activists, Daniel Ntsoseng ("Daniel") and Moses Mahlangu ("Moses"), who were arrested and detained hours before Caiphus was killed. Upon their arrest, Daniel and Moses informed the police that the explosives were supplied by Caiphus.

18. Marais and Stander testified that Caiphus allegedly reached for a knife moments after Engelbrecht removed the three young men from the room, and this caused them to fire nine rounds at him in self-defence. Marais fired four shots and Stander five. An autopsy conducted by the family pathologist revealed that there were twelve bullet wounds on Caiphus' body.

19. Our family presented evidence to show that Caiphus was executed by the police; he did not present any danger when he was seated in his bed before the shooting took place; and that the bullet inflicted wounds located at the back of Caiphus' right hand demonstrated that he had endeavoured to shield himself from the

AKN ASM

volley of bullets piercing his body. In all probability, the weapon that was allegedly found in Caiphus' left hand was planted by the police after their calculated, callous, and murderous deed.

20. As was common practice at the time, the inquest Magistrate, Mr JP Myburgh, rejected our family's evidence and sided with the version presented by the police. The Magistrate determined that the police officers justifiably acted in self-defence, and found that no one could be held responsible for Caiphus' death.

The effect of Caiphus' death on our family

21. Caiphus' death and the inquest outcome was a blow to our family. The continued pain and suffering that followed the inquest findings broke our parents, both physically and emotionally.

22. Our father never stopped pursuing the truth and dedicated the remainder of his life to finding out why his son had been brutally killed by the police. He believed that he failed his son because he could not keep him safe in his own home – and this rendered him helpless and distressed.

23. Our parents withdrew from the community and relatives who had turned their backs against them out of fear for their own safety from the brutality and harassment by the apartheid state and their agents. The finding of the inquest court, which we knew was baseless and without merit, did nothing to ease the pain and suffering that our parents endured.

24. Both our parents fell ill as a result of the death of their beloved son. They both developed hypertension and other health conditions. My father experienced severe body pains, and my mother suffered from clot formation complications.

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25. My father developed a lump, and he succumbed to kidney cancer in October 1992. The pursuit of the truth cost my father his life. My mother had her leg amputated after she was diagnosed with gangrene in 2006. She would later die in June 2010, after suffering a cerebral haemorrhage.

26. Caiphus' death caused severe pain and trauma to both our parents who died without any knowledge of the reasons behind the murder of their son by the police.

27. Four of my siblings, my two daughters and I have endured immense trauma and depression given the cruelty of the death of our brother and uncle, respectively. The psychological and emotional scars have been engraved into our beings as we battled in the past 37 years to come to terms with the brutality of Caiphus' death.

28. The fact that the truth behind Caiphus' murder has not been disclosed continues to haunt our family, to this day. We hold onto the hope that one day the truth will come out and that justice will not only be done, but also seen to done.

The Truth and Reconciliation Process

29. In 1995, the Centre for the Study of Violence and Reconciliation ("the Centre") started to mobilise and encourage victims of the apartheid state to speak out against its atrocities. The Centre afforded us a platform to express our pain in a setting with others who shared similar experiences. The Centre introduced me to the Khulumani Support Group, under the leadership of Maggie Friedman, which I joined during 1995. The Support Group played a critical role in assisting victims of the apartheid regime to share their stories.

30. In 1996, and with the support of the Support Group, I submitted a statement to the Truth and Reconciliation Commission ("the TRC") to share Caiphus' story. The TRC invited the Nyoka family to present our story orally before the Human Rights Violation Committee ("the Committee"), which presentation I made, on 5 February 1997, with my mother by my side. None of the police officers involved in Caiphus' killing applied for amnesty.

31. At the conclusion of the TRC process, the Committee recognised Caiphus and I as victims of gross human rights violations. The Committee found that the Minister of Law and Order, the Commissioner of Police and the Apartheid State were responsible for Caiphus' death. This solace was short lived because the reason for Caiphus' death still remained a mystery.

32. As a family we used the statement of the Committee to advocate for accountability for Caiphus' death as we believed that Caiphus' death was a political act and conspiracy that was orchestrated and executed by, among others, Van Den Berg, Engelbrecht, Marais and Stander. We had hoped that the TRC would uncover the truth which the inquest failed to do.

33. We expected the democratic government, to act upon the recommendations of the TRC, to assist the victims of the apartheid state. We had great expectations that truth and justice would triumph over evil, and that the perpetrators of the diabolical apartheid crimes, like Marais, Stander, Engelbrecht, and Van Den Berg, would be held to account for the pain and suffering that their actions caused us and many other families.

34. We believed that the government would do its utmost best to pursue justice for those who lost their lives in South Africa's freedom struggle. We trusted that the

AKN ASM

policing and justice authorities would do what was necessary to ensure that these cases were brought to finality. This turned out not to be the case and for decades there has been no movement on the investigation into Caiphus' murder.

35. We genuinely believed that the policing and justice authorities would take the TRC cases forward. Unfortunately for us, our trust in the government and the policing and justice authorities was misplaced.

36. We never received any feedback from the policing and justice authorities after the TRC concluded its work.

Marais' confession in 2019

37. In October 2019, Marais confessed to a Rapport journalist that he murdered Caiphus on 24 August 1987.

38. Marais admitted that the version that the police presented under oath during the inquest in 1988 and 1989 was a lie. He stated that he was instructed to execute Caiphus, and that he was assured that the scene would be staged to make it look as if there was a struggle in the room that night to ensure that he would be protected from any repercussions.

39. The Foundation for Human Rights ("the Foundation") started investigating Caiphus' murder shortly after Marais made his confession. The Foundation did so on behalf, and at the behest, of the Nyoka family.

40. During March 2020, Colonel Hadebe of the Vaal Branch of the Directorate for Priority Crimes Investigation (DPCI) visited my house in Springs to obtain information. Unfortunately, his investigation did not progress, even though he submitted progress reports to the Director of Public Prosecutions in Pretoria.

AKN ASM

41. Colonel Hadebe was replaced by Lieutenant Colonel Beukman of the DPCI Germiston branch. To my understanding Lieutenant Colonel Beukman started the investigation afresh and he made great progress in locating Marais, Engelbrecht and Van Den Berg. His investigation led to Marais, Engelbrecht and Van Den Berg being indicted in August 2022. Stander was similarly indicted in April 2024. The criminal trial is set to commence in November 2024.

Conclusion

42. Whilst we are pleased that Marais, Stander, Engelbrecht and Van Den Berg will stand trial for Caiphus' murder, we are saddened by the fact that it took more than three decades to issue indictments against the perpetrators. This inordinately lengthy delay has taken its toll on our family, and it has broken our trust in the criminal justice system.

43. At the conclusion of the TRC process, we expected the imminent resolution of TRC related cases which were referred to National Prosecuting Authority ("NPA") for further investigation and prosecution of the crimes against humanity committed by the apartheid state and its agents.

44. Learning, via Nokuthula Simelane's and Ahmed Timol's cases, that officials at the highest level of the democratic government had taken measures to frustrate any investigations and prosecutions for TRC cases referred to the NPA was disheartening and a low point in our lives.

45. The prosecution of officials of the apartheid regime who made an attempt on Reverend Frank Chikane's life (former Director General and Cabinet Secretary in President Thabo Mbeki's administration) was one of the cases that presented

AKN ASM

the government with the horns of dilemma on its policy for the treatment of TRC cases referred to the NPA for investigation and prosecution.

46. Co-incidentally, Reverend Chikane (then General Secretary of the South African Council of Churches) had officiated and delivered a sermon at Caiphus' funeral service, in September 1987, held at the Free Methodist Church, Daveyton, Benoni.

47. Caiphus and many others sacrificed their lives for our democracy. Their sacrifices secured our freedom from bondage, oppression, and subjugation. We have a right to know why the deaths of our loved ones mattered so little to the government. The truth must come out and our constitutional rights must be upheld.

48. We wholeheartedly support the claim for constitutional damages to vindicate our deeply violated rights, to assist us to celebrate the lives of our loved ones and to continue with the struggle for human rights and social justice. We also support the order sought for the appointment of a commission of inquiry to uncover the truth behind the suppression of the TRC matters. We need to know what happened to avoid a recurrence of the same or similar human rights abuses and transgressions in our beloved country.

AKN ASM

ALEGRIA KUTSAKA NYOKA

ASM

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11 day of Oct 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shasir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg
11/10/2024

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
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SINDISWA ELIZABETH MKONTO	14th Applicant

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CERTIFIED A TRUE COPY
OF THE ORIGINAL
18/01/2025.

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STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

ASM

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COURT OF SUPPORTING AFFIDAVIT – BONAKELE JACOBS

I, the undersigned,

BONAKELE JACOBS

do hereby make oath and state as follows:

1. I am an adult male, born on 19 June 1969. In making this affidavit I represent the Jacobs family.

2. I am the third Applicant in this application.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

4 My brother, Mxolisi 'Dicky' Jacobs ("**Dicky**"), was born on 6 August 1966. We were both born in Upington. On 12 June 1986, my brother and I were detained under a state of emergency. After 129 days in detention, my brother was found dead in his prison cell. He was 20 years old when he died, I was only 17 years old at the time.

5. We were brought up by our grandparents. We attended primary school in Upington and high school in Fort Beaufort in the Eastern Cape. Our mother was working in Cape Town and later in Kimberley

6 My brother's activism started in the Eastern Cape in the early 1980s. His activism was sparked by the lack of electricity and basic services in Paballelo Township in Upington where we grew up. We were greatly influenced by the Black

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Consciousness Movement. We all joined drama clubs where we expressed our activism and distain for the political climate.

7. My brother was the founder of the Upington Youth Congress and a leader of the Upington Student Congress. I did not belong to these groups but I supported his activism. My brother was instrumental in the United Democratic Front's One million signatures campaign and the launching of the United Democratic Front. Dicky travelled frequently to Cape Town and brought back banned reading material for us to read. We would listen to Radio Freedom together and learn about the banned African National Congress. Dicky's strength was mobilising people. He would go to church groups and appeal to farm workers to join the movement.

8. On 12 June 1986, members of the Upington Security Branch picked us up at 10pm at our home in Paballelo Township and were taken to the Upington Police Station. We were told that we were the first activists who were detained under the state emergency, which was to be declared at midnight. At midnight we were formally arrested in terms of the state of emergency. Dicky was taken to Groblershoop Police Station and I was taken to Upington Prison.

9. About a month into our detention, Dicky was transferred from Groblershoop to Upington Prison. We were both kept in solitary confinement in two cells next to each other. We could not see each other but we could speak to one another.

10. Dicky died on 22 October 1986 at the Upington Prison while he was in solidarity confinement. I was released on 17 November 1986, after Dicky's funeral which was held on 1 November 1986. I applied to attend the funeral but my application was rejected by the authorities.

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11. After I was released, the Security Branch told me that I must leave Upington because they did not want me in Upington. I relocated to Kimberley where my mother lived.

12 On 23 October 1986, my family was told that Dicky had committed suicide by hanging. My family was only allowed to see his body on the day of his funeral.

13. In May 1987, an inquest was held in the Upington Magistrates' Court to determine the circumstances surrounding Dicky's death. The testimony of the police and correctional services officers who were on duty the night my brother died was extremely inconsistent. They were unable to explain why they could not get into my brother's cell that night after they realised that he was apparently hanging himself. The police claimed that the only person who had the master key to Dicky's cell was not on duty. That same night I was told my brother hanged himself with his navy blue polo neck shirt, but there was no evidence of this in the inquest.

14. I remember vividly that my brother was high spirited the whole day. I cannot believe that he would then commit suicide in the evening. Dicky would have been looking forward to his release at some point in the near future because two of his comrades were released two days before his death.

15 In October 1996, my mother, grandfather and two aunts made statements to the Truth and Reconciliation ("**TRC**"). No one applied for amnesty for Dicky's death. The TRC recognised Dicky as a victim of gross human rights violations and my mother received a meagre R30,000 once-off payment. I never went to the TRC because I did not believe that anything would come from the process.

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16. Our family never stopped pursuing justice for Dicky. My grandfather, who was a veteran of the ANC, wrote several letters over the years to President Zuma and President Mbeki to tell them about Dickey's case. President Mbeki made promises that the authorities would look into the case, regrettably this never realised. During the early to mid 2000s, I approached the Scorpions to request assistance. At that stage I still had faith in the authorities, but this too faded with time as Dicky's case went nowhere.

17. My family has been negatively affected because of the refusal of the post-apartheid state to take up Dicky's case timeously. My grandfather died in 2015 without closure. My mother is presently 74 four years old and sickly. She too might never get closure for the death of her son.

18. When we heard about the political interference in the TRC cases, it opened our eyes as to why there was never any progress in Dicky's case. We are appalled and shocked that the government we supported closed down the investigations into our cases.

19. We want answers not just for us but also for all the other victims of apartheid-era crimes who have been denied closure. We want answers and the state must be forced to answer for their part in closing down the truth.

20. I agree that the State must be required to pay constitutional damages. Our rights to justice and truth, which have been seriously violated, must be vindicated. We must be supported to investigate Dicky's murder ourselves and to commemorate his life. Generations to come should hear the truth.

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21. We support the call for an independent and open commission of inquiry into the suppression of the post-TRC cases. This commission must have the necessary powers to compel testimony and the production of evidence. We want commissioners who are truly independent.

22. The ANC government and the presidency must take responsibility for their inaction. Those who suppressed our cases must be held to account. They trashed the rule of law, and the promise of a new South Africa based on equality and human dignity for all.

BONAKELE JACOBS

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of Oct / 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Sabir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg
11/10/2024

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
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SUPPORTING AFFIDAVIT – FATIEMA HARON-MASOET

I, the undersigned,

FATIEMA HARON-MASOET

do hereby make oath and state as follows:

1. I am an adult female and the youngest daughter of the late Imam Abdullah Haron ("**the Imam**" or "**my father**") and Galiema Haron ("**my mother**").

2. I am the fourth Applicant in this application.

3. The facts contained in this affidavit are within my personal knowledge and are, to the best of my belief, true and correct.

4. I make this affidavit on behalf of my brother, Muhammed Haron, and the extended Haron family. My elder sister, Shamela Shamis, died on ~~10~~ 4 January 2024.

5. My father was born in Claremont, Cape Town, on 8 February 1924. At the time of his death in 1969, he was the Imam (prayer leader) of the Masjid Al-Jaamia in Claremont. He was also the first editor of the Muslim News newspaper and a sales representative for Wilson Rowntree.

6. The Imam was a prominent leader in the Muslim community, committed to social justice and equality during the dark days of apartheid. He was not a political leader, but he associated with the leaders of the African National Congress and

the Pan Africanist Congress in their struggle against the suppression of the black majority.

7. On 28 May 1969, the Imam was arrested by the Security Branch under the Terrorism Act. He was detained without trial and incarcerated initially at the Caledon Square Police Station and later at the Maitland Police Station. In detention he was subjected to severe interrogation and brutal torture by the security police. This endured up to his death on 27 September 1969, 123 days after his arrest. At the time, the Security Branch told us that the Imam died of his injuries arising from an accidental fall down a flight of stairs at the Maitland Police Station.

8. In 1970, an inquest was held in the Cape Town Magistrates' Court. The purpose of the inquest was to establish the circumstances surrounding my father's death. The inquest, like many other apartheid inquests, was a travesty of justice. The investigations that were done were a total farce, and the findings were preposterous. Despite being presented with evidence that my father was severely tortured, the Magistrate failed to critically question how he was killed. He found that my father's death came about as a result of trauma that was caused by an accidental fall down a flight of stairs. He concluded that no one was to blame for my father's death.

9. Our family, especially my mother who lost her husband and support system, was severely affected by my father's death. We were disturbed psychologically and unsettled by his untimely death. Most painful was that we never really knew what transpired whilst my father was detained. We could only imagine what he had to endure from stories of those who interacted with our father during his time in

detention. The bruises, lesions and gashes that were discovered on his body at the ritual cleansing before his burial revealed the extent of the suffering at the hands of the Security Branch.

10. Shortly after my father's death, we were forced to move from our family home in Repulse Street in Crawford to live with my grandmother in her one-bedroom home. I vividly remember my mother telling me that "we lost the house" as we stood outside our home for the very last time, her eyes were filled with tears and sorrow. That moment marked the beginning of a new life for my dear mother and our family.

11. For the remainder of our upbringing, my mother fulfilled a motherly and fatherly role in the lives of each of her three children. It was an extremely difficult journey for her, one that I am still trying to fully appreciate.

12. With the turn of the democracy, which my father contributed significantly to, and the establishment of the Truth and Reconciliation Commission ("**TRC**"), we consciously decided not to participate in the TRC. In any event, none of the perpetrators involved in my father's killing applied for amnesty. The TRC, in considering deaths in police detention in the Western Cape, concluded that my father's death was "undoubtedly a gross violation of human rights, and his death was caused directly or indirectly by his experiences at the hands of the security police". The finding of the TRC came with a promise that the democratic government would pursue truth and justice for apartheid crimes that were not amnestied.

13. We remained hopeful that one day the highly problematic and unquestionably inaccurate findings of the 1970 inquest would be reversed and that the real truth

behind my father's death in detention would be revealed. This hope remained but a dream for the first two decades of democracy.

14. On 4 December 2019, more than fifty years since my father's death and nearly three months after my mother passed away, our family, with the assistance of our pro bono lawyers and the Foundation for Human Rights, made detailed representations and provided new evidence to the National Director of Public Prosecutions ("**NDPP**"). We did so with the intention to reopen the 1970 inquest.

15. Nearly two and a half years after we approached the NDPP, the Minister of Justice, on 31 May 2022, finally requested the Judge President of the Western Cape High Court to designate a Judge to reopen the inquest. The reopened inquest was heard in November 2022 and April 2023. This was the fourth reopened inquest of an apartheid killing in South Africa's democratic dispensation.

16. On 9 October 2023, Judge Thulare of the Western Cape High Court delivered his judgment, overturning the findings of the 1970 inquest. Judge Thulare emphatically found that the Imam's cause of death was attributable to the cumulative effect of the injuries that he suffered under torture. In particular, the death was attributable to a combination of severe systemic physiological stresses, which included crush injury syndrome precipitated by complications of blunt soft tissue injury. The finding that my father died of his injuries following an accidental fall down some stairs, was something of the past.

17. The Judge held the Security Branch responsible for my father's death, and identified the following officers as the primary Security Branch members who were responsible for my father's torture:

17.1 Lieutenant Colonel Carel Johannes Freysen Pienaar, officer in charge of the Cape Town Security Branch since August 1969. Pienaar died on 5 July 1990.

17.2 Major Dirk Kotze Genis, who was in charge of the Imam's investigation. Genis died on 1 February 2003.

17.3 Major Kotze, a member of the Security Branch who interrogated the Imam. Kotze is deceased.

17.4 Captain Ebanis Jogiemus Johannes Geldenhuys. Geldenhuys died on 24 December 2012.

17.5 Sergeant Johannes Petrus Francois 'Spyker' van Wyk, the lead interrogator and investigator. Van Wyk died on 12 November 1990.

17.6 Sergeant Andries van Wyk, who participated in the interrogation. Van Wyk is deceased.

18. Only one of the junior officers, former Constable Johannes Hendrik Hanekom Burger, remains alive. We decided not to seek a prosecution against him.

19. The reopened inquest opened up our eyes to insights that we had no knowledge of and understandings that we lacked. It reignited our trust in truth and justice and finally changed the narrative surrounding the Imam's death.

20. The reopened inquest marked the completion of our family's quest for justice for our father, something that we yearned for decades. Our family inched our way towards some form of closure as a result of this process. Sadly, my late mother

passed away before the reopened inquest commenced but we are certain that she would have been pleased with the outcome.

21. As thankful as we are for the reopened inquest, we are saddened by the decades that it took for the democratic authorities to seek truth and justice. It is heartbreaking to learn that political interference, perpetrated by officials in high office, was the cause of the delay in investigating and prosecuting apartheid atrocities.

22. However, when compared to many other families of victims of apartheid atrocities, we must recognise that our family has been privileged in this truth-seeking process. We think of many other activists who were killed by the apartheid regime, whose families, such as those who are joined in this application, have not found truth, justice or closure in the decades following the deaths of their loved ones. We feel their pain and suffering and we remain hopeful that one day they too will see the wrongs that were done to them put right.

23. I support the relief claimed in this application, and I too call for constitutional damages to be paid and for a commission of inquiry to be established to determine the truth regarding the political suppression of the TRC cases.

F. Haron-Masoet

FATIEMA HARON-MASOET

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at CLAREMONT on this the 21 day of OCTOBER 2024.

SOUTH AFRICAN POLICE SERVICE
PROVINCIAL DETECTIVES
COLD CASE INVESTIGATION UNIT
21 OCT 2024
ORGANISED CRIME INVESTIGATIONS
WESTERN CAPE
INKONZO YAMAPOLISA OMZANTSI AFRIKA

COMMISSIONER OF OATHS

Full Names: 0622737-6
D.D. PETERSEN

Business Address: 69 Imam Haron Street

Designation: Lieutenant Colonel

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SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

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SUPPORTING AFFIDAVIT – COSAS 4 FAMILIES

I, the undersigned,

TRYPHINA NOMANDLOVU MOKGATLE

do hereby make oath and state as follows:

Introduction

1. I am an adult pensioner, resident in Kagiso, Gauteng. I am the eldest sister of the late Zandisile Musi ("**Zandisile**").

2. I am the fifth Applicant in this application.

3. The facts deposed to in this affidavit are within my knowledge, and unless otherwise stated or indicated by the context, are true and correct to the best of my knowledge. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be correct.

4. I depose to this affidavit on behalf of my family, and on behalf of the families of the late Eustace Madikela ("**Bimbo**"), Peter Matabane ("**Ntshingo**") and Fanyana Nhlapo ("**Fanyana**").

5. Zandisile, Bimbo, Ntshingo and Fanyana have come to be known as the COSAS 4, which nomenclature I will also use in this affidavit. Bimbo, Ntshingo and Fanyana were brutally killed by the Security Branch on 15 February 1982. Zandisile survived the attacked but sadly passed away on 28 June 2021.

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The COSAS 4

6. The COSAS 4 were all born and raised in Kagiso. At the time of their killing and maiming, they were teenagers with ambitions of joining the liberation struggle against apartheid

7. The COSAS 4 were members of the Congress of South African Students ("**COSAS**"), which was established in the wake of the 1976 June student uprisings and was intended to represent the interests of Black students.

8. As intimated above, the COSAS 4 intended to join the liberation struggle. To this end, the COSAS 4 became acquainted with one Tlhomedi Ephraim Mfalapitsa ("**Mfalapitsa**"). Mfalapitsa, together with my other brother, Mbulelo Musi, received training in exile from the African National Congress' (the "**ANC**") military wing uMkhonto weSizwe (the "**MK**"), and it is for this reason that the COSAS 4 trusted Mfalapitsa.

9. Unbeknown to the COSAS 4, Mfalapitsa was no longer an ANC member and MK operative. Instead, Mfalapitsa had become a Security Branch informant. At the time, informants were known as askaris. Askaris would feed information to the Security Branch regarding anti-apartheid activities and anti-apartheid activists. Askaris were also deployed to commit heinous crimes against their former comrades.

10. As far as we know, Mfalapitsa agreed to train the COSAS 4, particularly in weaponry. To this end, Mfalapitsa lured the COSAS 4 to a disused pumphouse at a mine near Krugersdorp on 15 February 1982.

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11. When the COSAS 4 got to the pumphouse with Mfalapitsa, he showed them hand grenades and excused himself, supposedly to fetch more grenades. Shortly after Mfalapitsa excused him, there was an explosion in the pumphouse. Eustace, Ntshingo and Fanyana all died from the explosion. Zandisile survived the explosion but was seriously maimed. Zandisile lost his hearing, he had burn wounds to his face and back, and with time he slowly lost his mobility and required assistance with daily tasks. While Zandisile was seemingly unaffected mentally, the explosion greatly affected him emotionally.

The aftermath of the killing

12 After the explosion, Zandisile was located by the police, who took him to Leratong Hospital for treatment. Thereafter, Zandisile was taken to a field and was interrogated and tortured, whereafter he was kept in detention without charge for about six weeks.

13. The police, however, told our families that Zandisile was the one behind the explosion. The police informed the families that Zandisile lured the COSAS 4 to the mine with the intention of killing them. Noting that the COSAS 4 were friends, the fabrications by the police caused deep resentment by the other families towards our family.

14 In the aftermath of the explosion, Zandisile could not speak to anyone about what had happened. It was only in 1996, at the Truth and Reconciliation Commission (the "**TRC**"), that Zandisile first spoke about the incident. It is only at the TRC that the other families actually met Zandisile and learned the truth of what happened to the COSAS 4

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The TRC

15. After Zandisile had told his story in 1996, the police officers involved in the explosion applied for amnesty at the TRC. They included Mfalapitsa, Jan Carel Coetzee, Abraham Grobbelaar, Christiaan Siebert Rorich and Willem Schoon. Rorich was the explosives' expert who rigged the pumphouse.

16. Ultimately, the TRC refused the applications for amnesty. The Amnesty Committee found that the murderous conduct of the amnesty applicants was wholly disproportional to the political objective pursued, especially since there were other means to prevent the COSAS 4 from joining the armed struggle.

Post the TRC

17. It was the promise of the TRC that those who were refused amnesty would be referred for prosecution. As such, it was our hope that the National Prosecuting Authority (the "**NPA**") would undertake this task without delay.

18. Instead of timeously prosecuting Mfalapitsa, Coetzee, Grobbelaar, Rorich and Schoon after the TRC, what followed was deafening silence from the NPA and the state. The killers of the COSAS 4 were allowed to roam free with impunity. Mfalapitsa, who led the COSAS 4 to their deaths, carried on with his life and assumed the role of a pastor

19. Encouraged by the success of the reopened inquests, we approached the Foundation for Human Rights in 2019 who arranged pro bono legal support for the families. In September 2019 our lawyers requested the NPA and the Directorate for Priority Crime Investigation ("**DPCI**") to investigate the case. After a year of perceived inaction, we decided to take matters into our own hands and

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on 2 September 2020 we filed an application with the Krugersdorp Magistrate's Court seeking an order for the disinterment and forensic examination of the bodies. This prompted the NPA and DPCI to take action.

20. As a result of the NPA's inaction over decades, only Mfalapitsa and Rorich are still alive. In August 2021 the NPA belatedly took the decision to prosecute them for the kidnapping and murder of Bimbo, Ntshingo and Fanyana and the attempted murder of Zandisile. Our lawyers urged the NPA to include crimes against humanity charges, including apartheid as a crime against humanity, against the accused. We are very happy that the NPA has taken this important step, which is the very first time that crimes against humanity charges have been pursued in South Africa.

21 It bears mention that Mfalapitsa and Rorich are both elderly and further delays will undermine the interests of justice, as they could pass away at any time.

22 The prosecution has been plagued by delays. Most notable was the South African Police Services' ("**SAPS**") refusal to fund Rorich's legal defence. An application to intervene under High Court case no SS70/2021 was even brought before the above Honourable Court, sitting in Johannesburg, in an attempt to ensure that the SAPS would fund Rorich's defence. The Court ordered the SAPS to pay the legal costs. However, the trial remains pending as the defence legal teams have successfully employed Stalingrad tactics to delay the trial by launching parallel civil applications.

23. The long delay in the NPA and SAPS acting against the killers of the COSAS 4 has been deeply painful for our families. After the TRC we lost all hope that

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justice would ever be served. We became despondent and are deeply angered by the long delay.

24. It has therefore come as a deeply hurtful shock to us all, to learn that the TRC prosecutions have been politically supressed, for reasons unknown to us. It was always Zandisile's hope to live to see those responsible face justice. He was robbed of seeing justice done as he died on 28 July 2021 at the age of fifty-seven.

Conclusion

25. We heartily support the application for constitutional damages and an order compelling the President to establish an independent commission of inquiry into the suppression of the TRC cases.

Mokgatle

TRYPHINA NOMANDLOVU MOKGATLE

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of Oct 2024.

COMMISSIONER OF OATHS

Full Names: A. S. MAYET
Business Address: Commissioner of Oaths
Designation: Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg

Ahmed Shabir Mayet
11/10/2024

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MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

K.A.W.
ASM

SUPPORTING AFFIDAVIT – KARL ANDREW WEBER

I, the undersigned,

KARL ANDREW WEBER

do hereby make oath and state as follows:

1. I am an adult male salesperson living in Gonubie, East London.

2. I am the sixth Applicant in this application.

3. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

4. I was born in Kalk Bay on 19 May 1956 and later my parents moved to Fort Beaufort in the Eastern Cape. My parents, my three sisters and I, had an unremarkable family life.

5. I am a victim and survivor of the Highgate Massacre which took place on 1 May 1993 at the Highgate Hotel in East London. At the time, I was employed by the SPCA in East London as a Senior Inspector.

6. The night of the massacre, I was asked to collect a colleague, Dougie Gates, at the airport in East London. Dougie was in town to do business. Two of my colleagues, Doreen Rousseau and Megan Boucher, accompanied me to collect Dougie and take him to his place of accommodation at the Dolphin Hotel in Nahoon. I was also asked to take Dougie for a social drink. We decided to take him to the bar at the Highgate Hotel.

K.A.W ASM

7. We arrived at the Highgate Hotel at around 21:30 and found a table near the entrance of the ladies bar seating four people. I approached the bar lady to order a round of drinks. As I returned to our table, the lights in the ladies bar went out. A man who was standing in the doorway started shooting randomly at the patrons in the ladies bar. Having knowledge from the military service (I completed compulsory military service in 1979), I immediately fell flat on the floor and turned my head towards the doorway to observe the gunman who was shooting wildly with an AK-47. I noted that the gunman was wearing a ski-balaclava and what looked like blue police issued combat boots. I judged him to be a professional shooter.

8. In those split seconds, I did not realise that I had been shot as my attention was on the shooter in the doorway, not knowing what was to happen next. While still in the same position on the floor, I heard something rolling towards me. I assumed that it might be a hand-grenade but this turned out to be a teargas cannister. At this stage, I closed my eyes and prayed for my life to be spared as I had a young daughter to care for. Little did I know that my life would change forever.

9. I was taken to Frere Hospital in East London where immediate surgery was performed. It was 72 hours after the massacre that I was informed that I had been shot through both arms at the elbows. The bullet penetrated at the right elbow, shattering it to pieces. It was then that I learned the devastating news that my left arm had been amputated above the elbow as it was beyond repair. My right arm was also shattered but thanks to the orthopedic surgeon they managed to save my right arm so that I might have a certain amount of use or

RAG.
ASM

movement going forward. Much painful reconstructive surgery over months had to be performed, which included bone grafts taken from my hip, inserting titanium plates and screws in my elbow. On top of this, I was unable to use my fingers. The tendons on my fingers were later rerouted but this left me unable to use the pinkie and ring finger. This was an extremely dark time in my life. The massacre rendered me invalid and totally dependent on the help of others to assist me with my daily living needs.

10. For years, we had been under the impression that the Azanian People's Liberation Army ("**APLA**") which was the military wing of the Pan Africanist Congress ("**PAC**"), had been behind the attack. This is what the police had told us when the massacre was investigated.

11. In 1996, I testified at the Truth and Reconciliation Commission ("**TRC**") hoping that the truth of what really happened and who was responsible for the massacre would be revealed. At the time, we were told that APLA members had applied for amnesty, but we later learned that their applications were for a different attack on the Highgate Hotel. No one applied for amnesty for the massacre. The TRC concluded that APLA was responsible for the attack but this left us with more questions than answers.

12. I received a once-off payment of R30,000 from the TRC but nothing further. I had thought that the TRC would assist me in getting a bionic arm as there had been several discussions about this kind of assistance. However, after the TRC proceedings, I was not contacted again about this kind of medical assistance.

KAW

ASM

13. To date, there has never been an inquest into our case. We received no further information from the TRC or the National Prosecuting Authority ("**NPA**"). We still believed it was APLA who had conducted the attacks.

14. In 2005, I learned that Neville Beling, a fellow survivor of the Highgate Hotel massacre, attended a mediation with Letlapa Mphahlele, the former APLA commander. Letlapa Mphahlele assisted us to try and make sense of what had happened that night.

15. Neville Beling informed us that Mphahlele told him about all the APLA attacks and their *modus operandi*. He explained that the massacre was not authorised by APLA. He also investigated with some of APLA's renegade groups to determine if the massacre was part of a rogue operation, but APLA did not have any knowledge of the massacre.

16. In 2006, we contacted Mthunzi Mhaga, an official at the NPA. We were told that the investigation into the massacre was reopened. Since then, the case has been passed on to various investigating officers with no results. We have been advised that over the years dockets and documents have gone missing. We have made little progress and have been frustrated with the lack of information that has been provided. We went as far as appointing two private investigators to look into the case because the authorities were not making any progress.

17. We feel that the authorities have blatantly disregarded our case. The NPA has never shown commitment or urgency to find the truth behind the massacre.

R.A-L.

ASM

18. If we had known that no investigations would emerge from the TRC process, we would have approached human rights lawyers immediately after the TRC wound up to assist us in our pursuit for truth and justice.

19. I strongly support the relief sought in this application. We were deeply saddened to hear that the TRC cases had been closed down by political interference following the closure of the TRC. We support the call for a commission of inquiry into the suppression of the post-TRC cases. We want answers as to why our case has suffered such gross neglect.

20. We want to see clear and decisive action being taken. We want an independent, transparent and open investigation with the proper powers to get to the truth. Those who obstructed our cases from going forward must be held to account.

21. We also want to know how it was that institutions meant to uphold the rule of law so easily succumbed to political pressure. This must never be allowed to happen again in South Africa.

22. I also ask that the state be required to provide constitutional damages to vindicate our rights that have been deeply violated by the suppression of our cases. These amounts can be used to further our struggle for justice, truth and closure and it can help us to commemorate the lives of those lost in the Highgate Massacre.

KARL ANDREW WEBBER

ASM

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY
OF THE ORIGINAL

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Commissioner of Oaths
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18/01/2025

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

RAYMOND SMITH
Vice-Consul

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
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NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

SUPPORTING AFFIDAVIT – KIM TURNER

I, the undersigned,

KIM TURNER

do hereby make oath and state as follows:

Introduction

1. I am an adult female, resident in California, United States of America. I am the daughter of the late Dr Richard Albert David 'Rick' Turner, who was murdered at his Durban home in 1978. He was 36 years old.

2. I am the seventh Applicant in this application.

3. The facts deposed to in this affidavit are within my knowledge, unless otherwise stated or indicated by the context, and are true and correct to the best of my knowledge.

4. I depose to this affidavit on behalf of my sister, Jann Turner and my late father's wife, Foszia Turner-Stylianou.

The life of Richard Turner

5. Richard Turner, to whom I will refer to as "my father" or "Rick", was born in Cape Town on 25 September 1941. He was the only child of Jane and Owen Turner. My father was raised by his mother in the Stellenbosch area and attended school at the St George's Grammar School in Cape Town.

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

6. In 1962, my father graduated with a Bachelor of Arts degree from the University of Cape Town. He completed his Honours degree in 1963 and departed for Sorbonne University in Paris to further his studies. In 1966, he obtained a PhD in Philosophy (*tres honorable mentionne*) and returned to South Africa to work temporarily on his mother's farm.

7. My father was a career academic with a passion for philosophy, politics and worker's rights. He lectured Logic and Political Science at the Universities of Cape Town, Stellenbosch and Rhodes between 1967 and 1969 before joining the Department of Political Science at the University of Natal in 1971. He occupied a prominent role in the academic space, with students flocking to his lectures. He is still widely recognised as one of the most significant South African political philosophers and theorists for his teachings on the radical existentialist perspective and bottom-up popular democracy.

8. Shortly after arriving in Durban, my father met Steve Biko, the Black Consciousness leader, who was a medical student at Natal University's Medical School, which at the time was reserved for "Non-Europeans". In 1968, Biko had broken away from the National Union of South African Students ("**NUSAS**") to form the South African Student Organisation ("**SASO**"), the first organisation to espouse Black Consciousness, and which coalesced into the Black Consciousness Movement ("**BCM**"). My father's receptiveness to the BCM enabled him to act as a mediator between SASO's black students and the white students from NUSAS.

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

9. My father's collaboration with Steve Biko triggered the "Durban Moment" which mobilised students and workers, as well as wider resistance against apartheid and the exploitation of working people.

10. My father was a guiding hand in the development of South Africa's trade union movement. He actively mobilised students to get involved in the unionisation of black workers, and this spurred the formation of various workers unions and labour groups such as the NUSAS Wages Commission, the Institute for Industrial Education and the South African Labour Bulletin.

11. Rick's teachings, his pragmatic approach to life, his ability to connect and engage people from different backgrounds and contexts, and his advocacy for a fair and just South Africa was unorthodox during the apartheid era. In 1972 he published his seminal book "*The Eye of the Needle*" which spoke of the 'necessity of utopian thinking' and articulated a vision of an 'ideally possible society.'

12. He had no political affiliation, but he took seriously the task of not only understanding the world but changing it. His knack for gentle persuasion, his profound effect on people, his ideals of a decentralised socialist society, and his vision for an equal South Africa made him a sworn enemy of the apartheid regime.

13. In March 1973, Rick and several other intellectuals and leaders from NUSAS and the BCM were placed under five-year banning orders by the apartheid state. The banning order made it unlawful for him to teach, hold meetings, publish or leave Durban. Despite these limitations and living under constant surveillance by the Bureau of State Security ("**BOSS**") and the Security Branch of the South African Police ("**SB**"), he continued to advocate for an equal and just South Africa for all.

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

Rick Turner's assassination by the apartheid state

14. My sister Jann and I visited our father during the December holiday in 1978. His banning order was still in place. I was 9 years old at the time, and Jann was 13 years old. We were alone with him at his home at 32 Dalton Avenue, Bellair, Durban on the fateful night of 8 January 1978 when he was killed.

15. Jann and I were asleep in our bedroom which was at the front of the house. Just after midnight, Jann was woken by the sound of my father walking in the hallway adjacent to our room. The house was dark. He repeatedly asked at the front door "who is it?". There was no reply.

16. He walked into our room and went over to the bay window that faced out onto the stoep. From there he would have been able to see who was at the front door. This was a long-standing habit of his given the threats and surveillance from the authorities over the years.

17. Jann watched as our father pulled the curtain aside to see who was outside. For a brief moment, surprise registered on his face before a deafening gunshot went off. He was hit. As he fell to the floor, he let out a muffled scream, writhing in pain. He managed to pick himself up and tried to move towards the back door. He lost consciousness and collapsed face down under the archway between the living room and the kitchen. He died in Jann's arms fifteen to twenty minutes after he was shot.

The botched investigations into Rick Turner's killing

18. The Durban Murder and Robbery Unit, which had a good record for solving crime during the 1970s and 1980s, launched an investigation into the murder. The

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

investigation was led by Captain Christiaan Earle ("**Earle**"). The Durban branch of the SB also played a role in the murder investigation.

19. Earle's investigation revealed the extent to which BOSS and the SB monitored and disrupted our father's life. During February 1978, the investigation pointed to the involvement of the state security forces. Earle identified former BOSS operative Martin Dolincheck ("**Dolincheck**") as a suspect. Shortly after Earle identified Dolincheck as a suspect, his commanding officer, Maj Chris Groenewald ("**Groenewald**"), was summoned to Pretoria to attend a meeting with the National Police Commissioner. In November 1978, after the meeting in Pretoria, Groenewald closed the docket as inconclusive.

20. Thereafter an informal inquest into my father's death was held. No hearings were held. Magistrate Delport simply perused the docket and issued a finding dated 23 June 1978, in which he concluded that the cause of death was attributable to a bullet wound to the chest and that my father was killed by a "person unknown". In other words, nobody could be held responsible for the murder.

21. In November 1996, Earle revealed during an inquiry convened under section 29 of the TRC Act that Groenewald was instructed to close the murder docket because a BOSS operative was being investigated. Earle conceded that the interference and premature closure of the docket prevented him from properly investigating the murder. It seems that the investigation was purposely botched because the security forces were involved in the hit on our father.

22. Following the closure of the TRC, the transcripts of the section 29 hearings of Earle, Groenewald, Dolincheck and Captain Jimmy Taylor were concealed by the Department of Justice ("**DOJ**"). The South African History Archives fought an

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

11-year battle with the DOJ for the release of the transcripts, which were eventually released in a court settlement in 2015. Despite this, we knew for years that the Durban Murder and Robbery Unit was deliberately blocked from further investigating the murder of our father. We assume that this was in order to protect the responsible elements within the security forces from scrutiny and exposure.

The Truth and Reconciliation Commission

23. On 24 October 1996 our mother, Barbara Follett (née Hubbard), Foszia Turner-Stylianou, Jann and I appeared before the Truth and Reconciliation Commission's Human Rights Violations Committee to tell our father's story.

24. We hoped that the TRC would launch a proper investigation into his killing, and finally reveal the identities of the killers. We hoped that someone would come forward to tell the truth, even though we were aware that those who disclosed the truth could escape justice through the amnesty process. However, nobody applied to the TRC for amnesty for Rick's killing.

25. As stated above, the TRC subpoenaed former BOSS, SAP and SB members under section 29 of the TRC Act as part of their promise to pursue the truth. Earle, Groenewald, Dolincheck and Taylor gave evidence *in camera* at the section 29 inquiries. The evidence, which we only learned of in 2015, pointed to the killers being members of the security forces. The identity of the killer was not revealed. My father's murder was one of the cases referred by the TRC to the NPA for further investigation at the conclusion of the TRC's work in 2002.

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

26. In addition to the promise of truth, the TRC assured us, and many other victims, that reconciliation and restitution would follow the process. Our father was recognised on the TRC's list of victims of gross human rights violations, but unfortunately, nothing further transpired.

The post-TRC delays

27. Our family's pursuit for the truth never stopped. With the turn of democracy, we hoped and believed that the policing and prosecuting authorities under the democratic dispensation would revive the investigation into Rick's murder. But as far as we know this never happened and no investigation commenced after the TRC concluded.

28. Like many other TRC victims, justice remained out of reach as TRC cases remained cold cases. The failure to investigate and prosecute TRC cases constitutes a terrible injustice to the families.

29. For years there was no movement on the case, until August 2021 when the inquest into the 1977 death at Brighton Police Station of the late anti-apartheid activist Dr Hoosen Haffejee was reopened before the Pietermaritzburg High Court. On 16 September 2021, the Court heard evidence from Mohun Deva Gopal, a former SB officer from the Durban branch ("**Gopal**"). During his evidence, Gopal spoke of his role in the surveillance of our father.

30. The inquest transcripts reveal that Gopal testified that he was instructed to monitor Rick's movements in and around our Bellair home in December 1977, approximately two weeks before the killing. He carried out observations with his immediate superior, Lt VR Naidoo. Others involved in the surveillance included

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

Capt. Van Sittert and Lt Raju. On 7 January 1977, the day before the killing, Gopal was abruptly ordered by Maj Joseph Benjamin ("**Benjamin**") of the Durban SB to break off his surveillance.

31. He learned the following day that the subject of his surveillance had been murdered. Gopal mentioned that his surveillance notes were passed onto Captain James 'Jimmy' Taylor. He suspected that his surveillance records were used to help plan the murder. Gopal enquired from Benjamin what had happened and Benjamin advised him that they operated on a "need to know basis".

32. When probed under cross-examination by counsel for the Haffejee family as to who was behind the killing, Gopal indicated that it was likely done by an "internal killing squad" under Captain Jimmy Taylor. When asked about others who might have been involved, Gopal mentioned the following names: Andy Taylor, an operative by the name of Nel, Captains Louis Botha and Hentie Botha. He also mentioned the names of two Indian members who were involved in the gathering of intelligence, Sergeants Dan Pillay and Archery. As far as I am aware most or all of these persons of interest have passed on.

33. Counsel for the Haffejee family requested the Hawks officials who were present at court to take a statement from Gopal for purposes of a fresh investigation into Rick Turner's death. We learned about Gopal's revelations when it was published by the Mail and Guardian days after his testimony concluded.

34. Following Gopal's testimony in 2021, with the assistance of our legal representatives and the Foundation for Human Rights, we learned that the NPA was going to reopen the investigation into our father's killing. We were extremely

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

happy as it was the first time in nearly 28 years that work was apparently being done by the authorities to investigate the murder.

35. Our initial optimism about the reopened investigation was short lived. Since 2021, the NPA and Hawks have worked at a snail's pace. To this day, after several meetings, it is still not clear to us what the authorities have actually done in this case. It seems that the meetings the NPA held with us were largely for public relations purposes. There appears to be little or no supervision or quality control over their work. Sadly, there seems to be no institutional will or interest to deal with this case properly and to give it the urgency that it requires.

36. The ongoing delays have severely affected our lives. It has been 46 years since our father was killed and we are no closer to truth and closure. We have been denied the opportunity to close this most painful chapter of our lives in peace. The failure by the post-apartheid dispensation to investigate and prosecute apartheid atrocities is a deep injustice that only the families of the victims can comprehend. The institutions that are constitutionally obliged to respect, protect and promote our fundamental rights have treated us with utter contempt.

37. The state's conduct gives the impression that our father's life, and that of many other men and women murdered by the apartheid regime, does not matter. We do not matter. We are mere pawns in their political game, to be tossed about, in the service of unknown agendas.

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

Conclusion

38. We have learned in recent years that our father's case, together with hundreds of others, were suppressed by various political machinations that began as soon as the TRC concluded its work.

39. We support the relief that is sought in this application. We have a right to know who was behind the conspiracy to kill off our cases. Since nobody is taking responsibility, we need an open and independent commission of inquiry to make official findings of responsibility. We have a right to see those who blocked the cases into the murders of our loved ones being held to account. We need to know why the fight for truth and justice was stopped. We will continue to pursue the truth until there is nothing left to pursue. We also endorse the claim for constitutional damages to vindicate the egregious violation of our fundamental rights. These damages will assist us to commemorate the lives of our loved ones and to pursue truth and justice, where this is still possible.

KIM TURNER

RAYHANA SALIE
Vice-Consul

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at SACG, LOS ANGELES on this the 21 day of Oct 20 24.

COMMISSIONER OF OATHS

Full Names:

Business Address:

Designation:

SOUTH AFRICAN CONSULATE GENERAL
21 OCT 2024
LOS ANGELES

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
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OF THE ORIGINAL
18/01/2025

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
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PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – LYNDENE PAGE

I, the undersigned,

LYNDENE PAGE

do hereby make oath and state as follows:

1. I am an adult female, currently employed as a Bookkeeper and living in Amalinda, East London. I was born on 3 November 1967 in East London.

1. I am the eighth Applicant in this application.

2. The facts stated in this affidavit are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. My brother was Deon Harris, who was killed in the Highgate Hotel massacre on 1 May 1993. My brother and I were only 18 months apart and we were very close growing up. We had a normal, happy childhood together. We were not involved in politics when we were growing up.

4. My brother was a keen fisherman, and he also enjoyed camping. At the time of his death, he had just bought our grandparents' house and was completing a management course at the Mercedes Benz factory, where he was working.

5 On the day of the attack at the Highgate Hotel, my brother was 26 years old and in the prime of my life. He had gone to watch a rugby match and had then gone to the hotel for a drink.

6 The Highgate Hotel was a neighbourhood hotel. It had two bars, the men's bar for men only and the ladies bar, at which my brother sat that evening.

7. I learned after the massacre that around 22:00, a man entered the ladies' bar wearing a balaclava over his head and opened fire on the patrons with an AK-47.

8. My brother was shot only once. The fatal bullet entered the right side of his chest and went through both his lungs.

9. At the time of the attack, I was pregnant with my first child and about to give birth. My brother was so excited about becoming an uncle.

10. I never had the opportunity to properly grieve the death of my brother, as I had to focus on giving birth and ensuring the health of my newborn baby. I felt so conflicted as I mourned the death of my brother while celebrating the birth of my baby.

11. The death of my brother severely affected my parents who long searched for answers as to what had happened. They have since both passed away without learning who was responsible for my brother's killing.

12. Over the years I have stayed in regular contact with the survivors of the attack. I wanted to know the truth about what had happened to my brother.

13. For years we believed that the Azanian People's Liberation Army ("**APLA**"), the military wing of the Pan Africanist Congress ("**PAC**"), was responsible for the attack, because this is what the police had told us.

14. Neither I nor anyone from my family went to testify at the Truth and Reconciliation Commission ("**TRC**"). We did not believe that it would bring us any closure and my parents did not believe that the TRC would provide any assistance to our family. Knowing what I know now, I am glad we never went to the TRC, as the truth never came out of that inquiry.

15. We were told that APLA members applied for amnesty for the attack on the Highgate Hotel but we later learned that the amnesty applications were for a different attack on

the Highgate Hotel – a drive-by attack on 24 March 1994. No one came forward to apply for amnesty for the attack that killed my brother, but the TRC still ruled that APLA was behind the attack.

16. To date, there has never been an inquest into the case. During 2023 the NPA agreed to hold an inquest, but we still do not have any dates for the hearing, even though our attorneys proposed hearing dates for early 2025.

17. In relation to efforts to secure justice in the Highgate Hotel Massacre case I refer to the affidavit of Karl Webber, which I have read and endorse.

18. I support the relief claimed in this application. I was deeply upset to hear that the TRC cases, including the Highgate case, had been shut down by political interference following the closure of the TRC. I want a thorough, independent and open commission of inquiry into the suppression of the TRC cases. I also support the call for the state to pay constitutional damages to vindicate our rights that have been seriously violated by the suppression of our cases. These damages will help us to seek truth and justice, and such funds will help us to preserve the memory of those who lost their lives in the Highgate Massacre.

LYNDENE PAGE

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at East London on this the 16th day of October 2024

6

COMMISSIONER OF OATHS

Full Names: **Paige Riddin**

Business Address: Commissioner of Oaths Ex Officio
Practising Attorney RSA
Drake Flemmer & Orsmond (EL) Inc
Quenera Park, Quenera Drive, Beacon Bay
East London

Designation:

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY
OF THE ORIGINAL

TAYLA ILSLEY
BA Law (UP) - LLB (UP)
Commissioner of Oaths
Ex Officio / Practising Attorney R.S.A
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18/01/ 2025

MK
ASM

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

SUPPORTING AFFIDAVIT – MBUSO KHOZA

I, the undersigned

MBUSO KHOZA

do hereby make oath and state as follows:

Introduction

1. I am an adult male Safety Inspector at the Amanzimtoti Fire Station, KwaZulu Natal. I am the son of the late Musawakhe 'Sbho' Phewa (hereinafter referred to as "**Sbho**" or "**my father**").

2. I am the ninth Applicant in this application.

3. The facts stated in this affidavit are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

4. In making this affidavit in support of the first applicant, Lukhanyo Bruce Matthews Calata, I act on behalf of my family, in particular my mother, Faith Mama Mntungwa, grandmother, Pali Getrude Phewa, and uncle, Vusi Samson Gama.

Musawakhe "Sbho" Phewa

5. My father was born on 18 January 1967 in Lamontville, KwaZulu Natal. During the mid-1980s my father was an active member of the United Democratic Front ("**UDF**"), the ANC in Lamontville and an underground uMkhonto we Sizwe ("**MK**") operative. He was closely associated with the likes of Nhlanhla Samuel 'Zimba'

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Gumede, Bheki Cele, and Mvusi Simakade Ngubo who were all youth activists and members of the Masibonisane Lamontville Youth Organisation ("**MALAYO**") in the early 1980s.

6. My father also had ties to Ntombikayise Priscilla Kubheka ("**Ntombi**") who ran the ANC Cell in KwaMashu, KwaZulu Natal. Ntombi was abducted, tortured and murdered by the Port Natal Security Branch shortly after my father disappeared on 19 May 1987.

7. During 1987, three Askaris (former ANC members who were recruited to work for the Security Branch ("**SB**")) Xola Frank "Jimmy" Mbane ("**Mbane**"), Simon Radebe ("**Radebe**"), and Nicholas Dube ("**Dube**"), infiltrated the ANC Cell at the instruction of the notorious officer and head of the Terrorist Section of the Durban SB, Andrew Russel Cavill "Andy" Taylor ("**Taylor**"). The Durban SB worked with the SB's C1 unit that was based at Vlakplaas to identify and arrest trained members of the liberation movements. The Askaris gained Ntombi's trust and in the process, they were introduced to several MK operatives, including my father and Zimba Gumede.

8. On 19 May 1987, my father disappeared. He was apparently abducted by Mbane, Dube and Radebe and handed over to the SB at their base in Winkelspruit. My father was never seen again.

9. Days after my father disappeared, Mbane, Dube and Radebe lured Ntombi into a trap. She was abducted at Battery Beach by several members of the SB in an operation executed by Hendrik Johannes Petrus Botha ("**Botha**"), Salmon Johannes Gerhardus du Preez ("**Du Preez**"), Casper Adriaan van der

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Westhuizen, Roelof Brand Visagie ("**Visagie**"), JHA "Joe" Coetzer ("**Coetzer**"), and "Bossie" Basson ("**Basson**").

10. Ntombi was taken to the Railways and Harbours Police shooting range near Winkelspruit where she was tortured by Taylor, Botha, Lawrence Gerald Wasserman ("**Wasserman**"), Van der Westhuizen, Coetzer and Basson. Following her interrogation and torture, Ntombi was shot and her body was dumped near the Bhambayi informal settlement by Du Preez and Wasserman. Her body was recovered in 1997 when the Truth and Reconciliation Commission ("**the TRC**") launched an investigation into her death.

The Truth and Reconciliation Commission

11. Botha, du Preez, Van der Westhuizen, Wasserman, Visagie, Radebe and senior Vlakplaas officer Adrian David Baker ("**Baker**") applied to the TRC for amnesty for Ntombi's abduction, torture and murder. Radebe was granted amnesty for Ntombi's abduction and Baker received amnesty for defeating the ends of justice in relation to Ntombi's abduction and death as well as the disposal of her body.

12. My father's disappearance, as described above, was mentioned by Mbane in his testimony against the amnesty applicants in Ntombi's case which was presented to the TRC in 2000. The applicants denied having any knowledge about my father's disappearance and Mbane did not apply for amnesty for abducting my father.

13. The TRC investigators reached out to my mother to obtain information relating to my father's disappearance. The investigators informed us that Mbane disclosed the information about my father's disappearance to the TRC.

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14. We were hopeful that the truth behind my father's disappearance would be revealed and that the perpetrators would be held to account. Unfortunately, no one applied for amnesty for my father's disappearance, but we believe that the perpetrators who were responsible for Ntombi's abduction, torture and killing were also involved in his disappearance.

15. The TRC Human Rights Violations Committee recognised my father as a victim of gross human rights violations. I received the reparations that were paid by the TRC. We expected that my father's disappearance would be investigated by the policing and prosecuting authorities under the democratic government.

Post the Truth and Reconciliation Commission

16. In 2002, my aunt, Zama Phewa, submitted an application on my behalf to the Department of Finance so that I could benefit from my father's special pension. My aunt had to submit supporting documents, which included my father's certificate of service, and a biography that was authored by my father's close ally, Bheki Cele.

17. In the biography, Cele stated that he made enquires after my father disappeared and he heard that my father left for exile in Uganda or Nigeria.

18. This depiction never sat well with our family. We knew that my father never had any intention to go into exile. We were highly suspicious of this claim.

19. We suspect that Cele knows more about my father's disappearance, but he is not disclosing this information.

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20. Given the fact that my father was closely involved with comrades who climbed the ranks within the ANC, like Bheki Cele, Mvusi Ngubo and Zimba Gumede, we remained hopeful that the when the ANC government came to power, time and resources would be allocated to find out what happened to my father. This turned out not to be the case.

21. Between 2003 and 2008, our family heard nothing from the SAPS or the NPA regarding my father's disappearance. We waited patiently hoping that justice would prevail for my father.

Our family's attempts to uncover the truth

22. In the late 2000s, my uncle, Vusi Gama, started to make enquiries about the investigation into my father's disappearance. My uncle had a close relationship with my father before his disappearance in 1987, and he always fulfilled a fatherly role during my upbringing.

23. On 13 August 2008, my uncle wrote to Bheki Cele, who was the MEC for Transport in KwaZulu Natal at the time, to request his assistance in establishing the truth about my father's disappearance. A copy of my uncle's email to Cele is attached as "**MHK1**".

24. My uncle was under the impression that Bheki Cele would come to the family's aid because of the close relationship that he had with my father. Cele had political influence and we were hopeful that he would use his high standing in the government and the ANC to help us get to the truth.

25. Cele never responded to my uncle's email, and we took this to mean that he did not have any interest in solving my father's disappearance.

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26. After my uncle's failed attempt to approach Cele, he reached out to a contact who was formerly employed by the Directorate of Special Operations ("**the Scorpions**") before its disbandment in January 2009. The contact referred my uncle to the National Prosecuting Authority's Missing Persons Task's Team (MPTT). The MPTT assists families to trace and recover the remains of loved ones who disappeared during apartheid.

26.1 My uncle had several engagements with the MPTT between February 2009 and June 2014 about their investigation into my father's disappearance. In an email dated 23 February 2009, Madeleine Fullard of the MPTT informed my uncle that my father's disappearance was on the MPTT's "lists of cases of missing persons to address" and assured him that the matter was "a priority case". Pule Zwane, a colleague of Fullard who was assisting her with KwaZulu Natal cases confirmed a meeting with my uncle to provide our family with an update on the progress of the investigation into my father's case. The email exchanges between my uncle and the MPTT on are attached as "**MHK2**".

26.2 The MPTT met with our family on 17 and 18 March 2009 and explained to us the progress that has been made in their investigation. After the meetings with the MPTT my uncle did not hear back from them despite several telephonic follow ups that my uncle tried to make.

26.3 On 8 October 2009, my uncle sent an email to Zwane and Fullard requesting feedback on progress since the meetings in March 2009. Zwane responded to my uncle on 11 and 12 October 2009, indicating that the MPTT experienced difficulties with the investigation, but he ensured that he

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would "communicate the details with [him] in due course". Zwane also indicated that my father's case was previously investigated by the former Gauteng Attorney-General, Dr Oliviera, and that the MPTT was trying to locate that docket. The email exchanges of 8, 11 and 12 October 2009 are attached as "**MHK3**".

26.4 Zwane met with our family again on a couple of occasions between November 2009 and August 2010. He informed us that a former Askari by the name of 'Myeza' was apparently willing to provide more information into my father's disappearance and death in exchange for deal with the prosecution. Zwane stopped communicating with us shortly after he informed us that Myeza wanted a deal with the state in exchange for the truth.

26.5 My uncle continued to communicate with Fullard and up to today, the MPTT has continuously been involved in the search for my father's remains, but results have not been forthcoming. In June 2014, Fullard acknowledged our frustration occasioned by the delays in locating my father's remains. She intimated to my uncle that the 500 other families that the MPTT was assisting also experienced the same frustration.

26.6 In the process of seeking the truth and frustrated by the decades long delay in getting to the bottom of my father's disappearance, my uncle also sought intervention from the offices of the Minister of Justice, Jeff Radebe, in August 2010, President Jacob Zuma in June 2011, and the National Director of Public Prosecutions, Mxolisi Nxasana, in June 2014. The Department of Justice's Deputy Director: Victim Support Services TRC Unit

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referred my uncle's requests for intervention to the Minister and NDPP to Fullard of the MPTT.

26.7 A copy of my uncle' affidavit to confirm the aforesaid is attached as "**MHK4**".

27. Around 2018 or 2019, I attempted to make contact with Mvusi Ngubo to establish whether he had information that could shed light on my father's disappearance. Mvusi, who was a close friend of my father, told me that he did not want to get involved in my father's case.

28. As a family we did not sit on our hands after Mbane made his statement about my father's disappearance to the TRC in 2000. We followed up and engaged with the authorities and those who were closely associated with my father before his disappearance to determine what had happened to my father in 1987. To our dismay, our attempts did not yield the desired results and till today my father's disappearance remains a mystery.

The current investigation

29. The Directorate for Priority Crime Investigation ("**the Hawks**") started to investigate my father's disappearance in 2021.

30. Col Masimetsa Johannes Mothle was appointed as the Investigating Officer, and he took various statements from our family and my father's friends who had information about his disappearance. He also took a statement from Mbane. For reasons unknown to us Col Mothle, who was extremely passionate about my father's case, was removed from the investigation in 2023.

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31. In October 2022, we were informed that the NPA was going to open an inquest into my father's disappearance. We questioned this decision because my father has not been declared dead, and we do not have a death certificate for him.

32. In December 2023, the NPA decided not to proceed with an inquest but to criminally charge former SB members who kidnapped and murdered my father. To date no one has been indicted. We have not been provided with any information on how the NPA reached the decision to launch a prosecution in my father's case. The NPA has failed to communicate effectively with our family regarding the inquest and subsequent criminal prosecution that has apparently been instituted.

The delay and the effect on our family

33. For 36 years our family has been waiting for the truth behind my father's disappearance to be told. My grandmother, Pali Getrude Phewa, turns 80 this year. She has been carrying my father's disappearance with her for the greatest part of her adult life. She does not know whether my father is still alive or if he is in fact deceased. She cries whenever she thinks of her son.

34. I grew up without a father present in my life, and my mother had to raise me as a single parent. This caused a grave disturbance in both our lives, but more so in mine because of my father's absence.

35. The delay on the part of the NPA and the SAPS to uncover the truth behind my father's disappearance and death has led to a situation where we have lost all trust in the criminal justice system.

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36. Learning about the political suppression of the TRC cases, which we always believed was the reason behind the lack in progress in my father's case, confirms that the government has no intention to pursue justice for our fallen comrades who sacrificed their lives for our freedom and democracy.

37. Unfortunately, we do not how or why the cases of our fallen heroes were suppressed. We demand to know the reasons and we demand to hear from those responsible.

38. The suffering that our family, and many other families of TRC victims, had to endure at the hands of the government that deliberately instructed the NPA and the SAPS not to pursue the TRC cases, is beyond reproach. We deserve truth, justice and accountability.

Conclusion

39. I support the relief sought in this application. We need an independent, strong and fully open commission of inquiry to get to the truth behind the suppression of our cases. My family and I also firmly agree that the state must pay constitutional damages to vindicate our rights which have been egregiously violated over so many years.

MBUSO KHOZA

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of Oct 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shabir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg
11/10/2024

"MHK2"

FW: The late Sbho Musa Phewa from Lamontville

Vusi Gama <Vusi.Gama@Kzntransport.gov.za>
12/12/2023 at 10:54:00

From: **Vusi Gama** <Vusi.Gama@Kzntransport.gov.za>
Sent: 12/12/2023 at 10:54:00
To: **jos.venter@webberwentzel.com** , **nkosinathi.thema@webberwentzel.com**
Cc: **nicola.irving@nortonrosefulbright.com** , **mkhozer@gmail.com**

From: Vusi Gama
Sent: 13 August 2008 15:12
To: Bheki Cele <Bheki.Cele@Kzntransport.gov.za>
Cc: Sharon Gaehler <Sharon.Gaehler@Kzntransport.gov.za>
Subject: The late Sbho Musa Phewa from Lamontville

Dear honorable MEC Cele

1. Today I unintentionally went through the Truth & Reconciliation Commission of South Africa Report.
2. The name of Sbho Musa Phewa from Lamontville is written amongst the list of the victims.
3. Sbho is a father to my only nephew Mbuso.
4. When Sbho decided to exile Mbuso was still in his mother's womb.
5. The mysterious circumstances under which Sbho died are a painful story that has turned Mbuso into a victim.
6. Mbuso is a victim because he does not know how & where his father died.
7. Zama, a sister to Sbho & my sister have tried to find closure to the matter but lately they are running out of steam.
8. It is because there seems to be no progress regarding the investigation.
9. I therefore humbly appeal to the MEC for assistance to discover what happened to my brother-in-law.
10. Seemingly time is not on our side.
11. Each time Sbho's son asks for financial assistance from me I always wish his father was here.
12. He is even battling to get funds so that he can further his education at a tertiary level.
13. South Africa is a free country today but some sons & daughters of the people who struggled & sacrificed with their lives are feeling the pain of growing fatherless & suffering from financial muscle. Therefore pain & tears is their story.
14. I am requesting for assistance from the MEC because of your will to assist where you can.
15. May Sbho rest in peace.

Regards,

Vusi Gama

Policy & Planning

033-3558747

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"MHKZ"

From: Madeleine M. Fullard [mailto:mfullard@npa.gov.za]
Sent: 23 February 2009 02:39 PM
To: Vusi Gama
Cc: dqueen@npa.gov.za; Deborah Quin; Tshiamo Moela; pule@phakwe.co.za
Subject: RE: Missing MK soldier-Sbho Phewa

Hi Vusi

Thank you for your email. The case of Sbho Phewa is on our TRC lists of cases of missing persons to address [redacted] a priority case and also a very painful case, as you say.

However, it is also a difficult case because we are probably dependent on getting information from the perpetrators.

We are hoping that Deborah Quin will be able to transfer from the Scorpions to assist the Missing Persons Task Team in our KwaZulu Natal cases in April this year. We have had a lack of capacity in the KZN region as we are just a small Task Team of 3 people in Pretoria at present.

Deborah previously worked for the TRC and is well versed about Sbho's case and cases involving the Security Police in that region.

If you email your contact details and telephone numbers, I will call you to discuss it. Please feel free to call me on 012 – 845 6694 or my cell 082 576 9220 to discuss this. Or you can speak to my colleague Mr Pule Zwane on 084 5020 490. He will also be assisting with KZN cases.

Note that Deborah's surname is actually spelt Quin and so her email is dquin@npa.gov.za

I hope to speak to you soon. Are you part of the Phewa family?

Kind regards

Madeleine Fullard
Missing Persons Task Team NPA
Tel: 012 – 845 6694
Fax: 012 - 845 6337
Cell: 082 576 9220
Email: mfullard@npa.gov.za

From: Vusi Gama [mailto:Vusi.Gama@Kzntransport.gov.za]
Sent: 23 February 2009 01:04 PM
To: Madeleine M. Fullard
Cc: dqueen@npa.gov.za
Subject: Missing MK soldier-Sbho Phewa

Hi Madeline

1. On the 04th February 2009 I spoke to Debra about Sbho Phewa who is a missing MK soldier.
2. On the 23rd of February 2009 I spoke to Debra Queen again regarding the developments about Sbho's case.
3. Queen informed me that her hands are tied down because of the disbandment of the Scorpions.
4. I am concerned about service delivery in this regard.
5. It is more than 20 years since Sbho allegedly died.
6. His story is so painful.
7. Last thing that a citizen like me could expect is an answer from government stating that we can't help you now try us later.
8. I therefore deserve an answer as to why we can't get service delivery in the case of Sbho?

Dissatisfied family member
Vusi Gama

"MHK3"

Jos Venter

From: Vusi Gama <Vusi.Gama@Kzntransport.gov.za>
Sent: 02 September 2024 10:38
To: Jos Venter
Cc: mkhozer@gmail.com
Subject: FW: Missing MK soldier-Sbho Phewa

From: Vusi Gama
Sent: 11 November 2009 09:06
To: Sikhumbuzo Mdlalose <Sikhumbuzo.Mdlalose@Kzntransport.gov.za>; Siyabonga Mshengu <Siyabonga.Mshengu@Kzntransport.gov.za>
Subject: FW: Missing MK soldier-Sbho Phewa

From: Pule Zwane [mailto:pule@phakwe.co.za]
Sent: 10 November 2009 09:06 PM
To: Vusi Gama
Subject: RE: Missing MK soldier-Sbho Phewa

Mr Gama,

Thanks for the information. Clearly, we need to meet next week and discuss the case. The only person who mentioned Sbho Phewa during the TRC was Xolani Frank Mbane (Jimmy). I will confirm the date for our meeting. I need to give you some detailed brief report on the above case.

Regards

From: Vusi Gama [mailto:Vusi.Gama@Kzntransport.gov.za]
Sent: 10 November 2009 09:38 AM
To: pule@phakwe.co.za
Subject: FW: Missing MK soldier-Sbho Phewa

Hi Pule

1. The document herewith attached refers.
2. Your email below dated 12 October 2009 refers
3. I would like to bring this matter to your attention.
    a. There is contradiction between your email and the letter from the Department of Justice and Constitutional Development
        i. The letter dated 20 July 2004 herewith attached, from Department of Justice states that one of the perpetrators applied for amnesty
        ii. Your email below dated 12 October 2009 states that the perpetrators did not apply for amnesty.
4. There are two versions of the story. Which one is the correct side to the story?
5. I must bring it to your attention that:
    a. There was commitment from your side to point out where Sbho remains were scattered or buried
    b. There have been delays regarding the identification of the alleged crime scene
    c. There are different versions to the story
    d. Hearsays and rumours could be flying around.
6. Through evidence the picture is becoming clearer
7. Hope to speak to you soon.

MK
ASM

Vusi

From: Vusi Gama
Sent: 14 October 2009 10:21 AM
To: 'Pule Zwane'
Subject: RE: Missing MK soldier-Sbho Phewa

Hi Pule

Your disappearance left a vacuum that could be filled by serious hearsays. Those hearsays could be true or not. There is something that you need to comprehend. My nephew is now more than 20 years old. We need to also consider sensitivity on his part. His father disappeared when her mother was still 9 months pregnant. Pule lot of people have been hurt here

Sbho has a family that is deeply affected by this situation

Anyway Pule I am not interfering with your job. Talk to you later. You must know that **SBHO's** story really **HURTS.**

Vusi

From: Pule Zwane [mailto:pule@phakwe.co.za]
Sent: 12 October 2009 05:00 PM
To: Vusi Gama
Subject: RE: Missing MK soldier-Sbho Phewa

Vusi,

There is something you need to comprehend. This case is very sensitive. Perpetrators did not apply for amnesty from the TRC. This means that they are exposed to possible criminal prosecutions should we find the remains of Sbho. The former Gauteng Attorney General, Dr Oliviera, investigated this case. I am still trying to locate that docket. The docket will tell us who are the perpetrators, what they did they disclose about the site where Sbho was murdered and buried. The reason why I am not communicating this to you is precisely because of its sensitivity

Please do understand the nature of this case. It is not like other cases where perpetrators approached the TRC and got amnesty.

Regards

From: Vusi Gama [mailto:Vusi.Gama@Kzntransport.gov.za]
Sent: 08 October 2009 03:50 PM
To: Pule Zwane; Madeleine M. Fullard
Cc: Tshiamo Moela
Subject: RE: Missing MK soldier-Sbho Phewa

Hi Pule & Madeleine

1. Pule you have disappointed me and Sbho's family.
2. Pule I cannot reach you on the phone.
3. Madeleine I have been leaving voice messages on your phone and on your colleagues as well but up to now you have not responded.
4. This situation makes mockery to service delivery
5. Were you guys employed to perform disappearing acts?
6. I am now going to refer this matter to the Presidential hotline.

Vusi

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From: Pule Zwane [mailto:pule@phakwe.co.za]
Sent: 24 February 2009 10:16 AM
To: Vusi Gama; 'Madeleine M. Fullard'
Cc: dqueen@npa.gov.za; 'Deborah Quin'; 'Tshiamo Moela'
Subject: RE: Missing MK soldier-Sbho Phewa

Vusi,

This is to confirm our telephonic communication earlier on today. I confirm that I will be travelling to Durban in the next two weeks to meet with yourself and family members and give you some briefing on this particular case. I will also discuss the status of this case with yourself.

I will confirm the exact date and possible venue for the said meeting.

Regards

Pule

From: Vusi Gama [mailto:Vusi.Gama@Kzntransport.gov.za]
Sent: 24 February 2009 09:15 AM
To: Madeleine M. Fullard
Cc: dqueen@npa.gov.za; Deborah Quin; Tshiamo Moela; pule@phakwe.co.za
Subject: RE: Missing MK soldier-Sbho Phewa

Hi Madeleine

1. Thanks for your response
2. I grew up with Sbho in Stanger (currently called Kwa-Dukuza) in the 1980's up to the late 80's when he disappeared.
3. He dated my sister called Mama Khoza whom he subsequently impregnated.
4. When he disappeared in 1987 Mama was due for labour.
5. Mama gave birth to a baby boy called Mbuso in the middle of May 1987.
6. I have learnt from the TRC documents that May 1987 is also the time when Lindiwe Kubheka was murdered who was later buried in a pauper's grave in Groutville. Her grave was dug up in 1997.
7. Therefore Sbho was my brother-in-law
8. Mbuso Khoza, Sbho's son who has never seen his father let alone to know the circumstances of his death & where he died in21 years, (0794473667) is my nephew & Zama Phewa (0836176971) is a sister to Sbho
9. I would like to emphasise how the dragging of this investigation has badly affected my nephew in every formation.
10. His spirit & emotion have indelible scars.
11. Zama has told me that Jimmy Mbane from Cape Town who is alleged to be an Askari, who was also present during the TRC was willing to talk.
12. John who was a TRC investigating officer knows Jimmy Mbane.
13. Have you spoken to Jimmy & what did he said.
14. Give us the names of the perpetrators we will talk to them.
15. After 21 years Sbho disappeared the last thing I could expect from officials is an excuse.
16. Guys Sbho case is so painful beyond imagination while your salaries are guaranteed every month.
17. You are not employed to look for excuses, passing the bark or put people on a run-around.
18. Madeleine your response is insensitive & lacks urgency
19. People are dying & case risk going cold
20. I have tried to make contact with Madeleine on the 24th of February 2009 in vain.
21. If you are under-resourced, please refer me to an official who is senior.

Extremely dissatisfied family member
Vusi Gama
0825515808

MK
ASK

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
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VSG ASM

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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondentt

CONFIRMATORY AFFIDAVIT – VUSI SAMSON GAMA

MK ASM JSG

I, the undersigned,

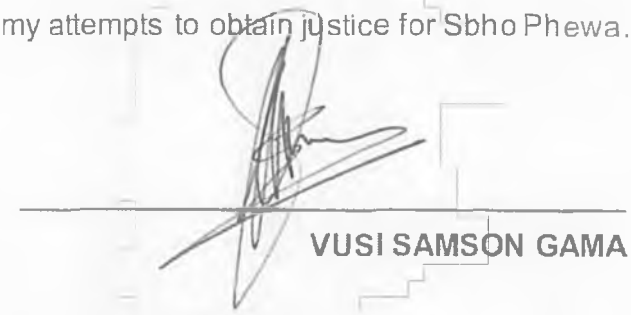
VUSI SAMSON GAMA

do hereby make oath and state that:

1. I am an adult male and the uncle of Mbuso Khoza, the ninth Applicant in this application.

2. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I have read Mbuso's supporting affidavit and confirm that its contents are true insofar as they pertain to me and my attempts to obtain justice for Sbho Phewa.



VUSI SAMSON GAMA

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was sworn to before me and the deponent's signature was placed thereon in my presence at Pietermaritzburg on this the 16 day of October 2024, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

VSG MK ASM

SOUTH AFRICAN POLICE
COMMUNITY SERVICE CENTRE
2024-10-16
ALEXANDRA ROAD
KWAZULU-NATAL

COMMISSIONER OF OATHS

FULL NAMES: BHEKUMUZI MCHUNU
DESIGNATION: CAPT
ADDRESS: 101 ALEXANDRA RD

MK

JSG

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
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SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

CERTIFIED A TRUE COPY OF THE ORIGINAL

TAYLA ILSLEY
BA Law (UP) – LLB (UP)
Commissioner of Oaths
Ex Officio / Practising Attorney R.S.A
THE LEONARDO
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Email: tayla@ianlevitt.co.za

18/01/2023

NJB ASM

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

NJB ASM

SUPPORTING AFFIDAVIT – NEVILLE BELING

I, the undersigned,

NEVILLE BELING

do hereby make oath and state as follows:

1. I am an adult male, currently unemployed and living in East London.

2. I am the 10th Applicant in this application.

3. The facts stated in this affidavit are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

4. I was born on 30 November 1972 in East London. I was close with my sister and had a good childhood.

5. I completed my standard 8 at a practical school, after which I managed to get a job as a forklift operator at Da Gama Textiles and started doing courses, such as beginner safety courses applicable to that line of work, through my employer. After this, I was training to become a clerk in the tape sizing department. My manager wanted me to eventually go into a management position. I upskilled myself with that in mind.

6. On the day of the attack at the Highgate Hotel on 1 May 1993, I was 20 years old and in the prime of my life.

7. At that time, the Highgate Hotel was a neighbourhood hotel, with most of the clientele being working class men and a regular group of police officers. The

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Highgate Hotel had two bars, the men's bar for men only and the ladies bar for women and men, which was a smaller space than the men's bar. I was in the men's bar that evening with my cousin, Roland Parker.

8. After I had been at the bar for approximately ten minutes, a man entered the men's bar wearing a balaclava over his head. He threw a hand grenade and a teargas cannister before opening fire on the inhabitants with an AK-47. I had been hit with bullets multiple times. I could not see anything through the teargas, and I could not move. I thought the gunman was going to return to shoot me in the head, but he quickly departed.

9. The bullets from the AK-47 shattered my bones, and I was in intense pain after being shot and while lying on the floor. It felt like a very long time that I lay there. My eyes were burning from the teargas, and I was struggling to breath. My white shirt was drenched in blood.

10. Two men who had been at a nearby house having braai, Mark Bush and Steven Good, had heard the gunshots, and were the first on the scene. They dragged me out of the bar by my feet. I had serious injuries to my hip and legs and they struggled to drag me out.

11. My youth was robbed from me. I spent the rest of my twenties in and out of hospitals, and that has continued for the rest of my life. I have had close to 50 major surgeries, all related to the severe injuries I sustained during the attack.

12. At one point in my life, I was taking over 600 tablets a month. I have been to so many psychologists and psychiatrists. In the end I had to help myself because I was so dependent on medication.

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13. Since the day of the attack, I have not been able to work again. I have been fortunate enough to stay on my Discovery medical aid, which I had been on while working for Da Gama Textiles. If it had not been for my medical aid, I would never have been able to afford the surgeries and medication I received over the years. Since the attack, I have been living on a disability pension.

14. The attack forever changed my relationship with my family. My mom would work during the day and then come sleep by my bedside at night while I was in the hospital. I had so many drains and tubes attached to me that needed to be constantly monitored and she was concerned that the nurses might forget to change the tubes. She was my caretaker for many years as I still needed further assistance after all the surgeries and hospital stays. I have struggled with mobility issues throughout my life as a result of the attack and I am dependent on walking aids to help me move. At one point, I weighed over 200 kilograms because of the medication that I was on and my restricted mobility. I live in constant pain.

15. The attack emotionally drained my mother which contributed to her death in 2017. My father also took severe strain and suffered multiple strokes, before his death in 2016.

16. I have never married nor had any children. I now live entirely on my own and am struggling to look after myself. I would love to move to Cape Town to be closer to my specialist, but I cannot afford it.

17. For years, we had been under the impression that the Azanian People's Liberation Army ("**APLA**") which was the military wing of the Pan Africanist Congress ("**PAC**"), had been behind the attack. This is what the police had told us after the attack, and we had no further evidence to prove anything else.

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18. In 1997, I presented a statement to the Truth and Reconciliation Commission ("**TRC**") because I expected that we would learn the truth about what really happened and who had attacked us. I thought the men who had attacked us would come forward for amnesty so that we would at least know who they were.

19. We had been told that APLA members had applied for amnesty, and we were eager to learn the truth. However, we later learned that the APLA members had applied for amnesty for a different attack on the Highgate Hotel – a drive-by attack on 24 March 1994, and not for our attack. No one came forward to apply for amnesty for our attack, but the TRC still ruled that APLA had been behind the attack. We left the TRC with more questions than answers.

20. The TRC listed me as a victim of gross human rights violations. I received a once-off payment of R30,000 from the TRC and nothing further.

21. Following the attack, we received no further information from the TRC or the National Prosecuting Authority ("**NPA**"). We took it upon ourselves to investigate the attack on the premise that APLA was responsible.

22. In 2005, I attended a mediation with Letlapa Mphahlele, the former APLA commander. He assisted us to try and make sense of what had happened that night. He told me about the former APLA attacks and their *modus operandi*. Letlapa explained that the attack on the Highgate Hotel was not one that they had authorised. He also enquired with some of APLA's renegade members to see if the attack had been part of a rogue operation, but no one had any knowledge of the attack.

23. In 2006, I contacted Mthunzi Mhaga, an official at the NPA, and the investigation was apparently reopened.

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24. Since 2006, the case has been passed on to various police investigating officers. We have made little progress and have been frustrated with the lack of information that has been gathered. We are most upset to hear from the police that over the years many of our dockets and documents have gone missing. We feel immensely dissatisfied with the level of consideration our case has received from the police and the NPA. Our dissatisfaction with the police and the NPA led us to hire two private investigators to investigate the case on our behalf.

25. We feel that there has been a blatant disregard for our case. The authorities have never demonstrated any commitment to the Highgate Massacre or any urgency to get to the truth.

26. To date, there has never been an inquest into our case. During 2023 the NPA, at our urging, eventually agreed to hold an inquest. We still do not have any dates for the hearing, even though our attorneys proposed hearing dates for early 2025.

27. I was shocked and angry to learn of the political interference that blocked the investigation and prosecution of the TRC Cases, including my case. I want to know who was behind the interference as well as their motivations. Their actions have denied me closure over so many years.

28. I accordingly support the relief sought in this application. The President must be compelled to establish a commission of inquiry. However, the commission must be independent and public and have the powers to investigate decisively.

29. If we had known that the politicians would stop the post-TRC investigations of our cases, we would have approached our lawyers immediately after the TRC to

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take action on our behalf. However, we had faith in the post-apartheid order to do the right thing. This faith was misplaced. We have been horribly betrayed.

30. In the circumstances, I also support the claim for constitutional damages to vindicate our rights to human dignity, equality and the rule of law, which have been deeply violated. An award for constitutional damages will help us to reach the truth behind the Highgate Massacre, since we can no longer rely on the institutions of state. Such damages will also assist us to commemorate those who tragically lost their lives on 1 May 1993 in the Highgate Hotel.

NBeling

NEVILLE BELING

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of OCT 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shabir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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18/01/2025

NM ASM

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SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

NM ASM

SUPPORTING AFFIDAVIT – NOMBUYISELO MHLAULI

I, the undersigned,

NOMBUYISELO MHLAULI

do hereby make oath and state as follows:

1. I am an adult female, currently retired and living in Claremont, Cape Town

2. I am the 11th Applicant in this application.

3. The facts deposed to in this affidavit are within my personal knowledge, unless otherwise stated or indicated by the context, and are true and correct to the best of my knowledge.

4 My husband was Sicelo Mhlauli. He, together with Mathew Goniwe, Sparrow Mkonto and Fort Calata were abducted and murdered by Security Branch of the former South African Police on 27 June 1985 when they were on their way back to Cradock from Port Elizabeth after attending a meeting. They became known as the Cradock Four. Days after they had disappeared, their bodies were found, badly burnt with numerous stab wounds.

5. My deceased husband and I have two children, Nolubabalo and Ntsika. I make this affidavit on behalf of myself and my two children.

6 I met my husband when we were both teachers, and our relationship was always very strong. He later became the headmaster of a secondary school in Oudtshoorn, a community leader and an active member of the United Democratic

NM ASM

Front ("**UDF**"). The students were always very close to my husband, and they had much love for him. He taught many of them about politics. His political activities brought him to the attention of the apartheid government.

7 I was involved in the struggle. I was initially too scared to get involved but I wanted to support my husband and our country. I attended the UDF's launch in Cape Town with my husband and went to meetings of the United Women's Congress.

8. When my husband and I lived in Dimbaza, it was hell. We were constantly harassed by the police, and he would often be picked up by the police to be interrogated. It became so bad that whenever there was a knock on the door, I would tell my husband to put on his coat in case they took him away again. It became part of our daily life.

9 The day my husband died still haunts me. Initially, I did not believe it. I thought he had just been picked up to be questioned and even wanted to take him some warm clothes. I had been in Port Elizabeth attending the Vista winter school programme. My husband was going to collect me, but he never arrived. I was told that they were missing but I assumed they had just been arrested and that I needed to find out which police station he was being held at.

10 My brother-in-law and his friend then came to collect me, and only when I got to Cradock, was I informed about what had happened to him. I immediately fainted when I heard that my husband was dead. When we buried him, his body was so mutilated and we had to bury him without his hand, which had been cut off. His whole face and body were disfigured. My father-in-law went to view the body,

NM ASM

but I decided not to look at it after seeing my father-in-law's reaction. My father-in-law never recovered from seeing his son in that condition.

11 I have been retired now for 8 years. Before I retired, I worked many jobs to ensure my children were looked after. I started as a teacher on a very low salary, and also worked for a few non-profit organisations. There were also periods where I was unemployed, and we struggled to make ends meet.

12. I worked at the Bellville's Teacher's College, Juta & Company, the South African Heritage Resources Agency and Jubilee South Africa. Most of the jobs I had paid low salaries, and I did not receive benefits and a pension from some of them.

13. While I was at the South African Heritage Resources Agency, I worked with victims of human rights violations. I was encouraging communities to make peace with each other and erect monuments to commemorate those who had died. I travelled across South Africa, Zimbabwe, Tanzania and Mozambique meeting with organisations dealing withvictims and their families. I eventually had to leave this work because it was becoming too dangerous and if anything had to happen to me, my children would have lost both their parents.

14. My final job before retirement was with the South African Social Security Agency. I stayed with them until I reached the retirement age of 65, so that I could build up a little pension. It was not much, but it was all I had.

15 My children were very young when my husband died. I struggled financially and emotionally to raise them, and I am still struggling. Our family lost our primary breadwinner, and my children lost the benefit of growing up with their loving father. My husband was a good father, and he always gave the family good

JVM ASM

16. I never remarried after losing my husband. We were supposed to grow old and retire together. Instead, I have been on my own for nearly 40 years. I had to look after myself and my children.

17. After years of struggle and non-responsiveness from the National Prosecuting Authority ("**NPA**"), the reopened inquest in the Cradock Four case was meant to start on 2 September 2024. However, because the NPA did not do its preparatory work on time it has been postponed for another 9 months to June 2025. We have been pushing for truth and closure for decades and we are deeply frustrated at the ongoing delays.

18. There were two previous inquests into the deaths of the Cradock Four, which left us with more questions than answers. The first one was held in 1987 before Magistrate De Beer and the second one was held in 1993 before Judge Zietsman. Neither of the inquests identified the murderers of the deceased.

19. However, Judge Zietsman found that the notorious "permanent removal from society" signal was a recommendation to murder. He also found that it has been established prima facie that the murderers were members of the security forces; and that a case of suspicion has been made out against SAP officers Colonels Harold Snyman and Eric Winter and against SADF members Brigadier Joffel van der Westhuizen, Colonel Lourens du Plessis and Major General Nicolaas Janse van Rensburg. Notwithstanding these findings, no steps were taken against these members.

20. We were all so excited when Nelson Mandela became president because we thought that change was coming, and that justice was imminent.

NM ASM

21. I went to testify at the Truth and Reconciliation Commission ("**TRC**") because I wanted to know what happened to my husband. I wanted justice for his death, but I never received any justice. I received R30,000 from the TRC, which was not enough to support my family or begin to fill the hole left by my husband's absence. I believe it is now time for a new approach.

22. In April 1996, at the TRC proceedings in East London, my daughter Nolubabalo testified and said that we want to forgive, but we do not know who to forgive, we do not know the killers of her father. She said that her father's murder has been a big loss because I had to play two roles, a mother role and a father role. After my daughter testified, Archbishop Desmond Tutu told me that he was proud of my daughter for her testimony.

23. Eight former Security Branch ("**SB**") police officers applied for amnesty before the TRC in the Cradock Four case. They were Harold Snyman, Eric Alexandra Taylor, Gerhardus Johannes Lotz, Nicolaas Janse van Rensburg, Johan van Zyl, Hermanus Barend du Plessis, Eugene de Kock and Jaap van Jaarsveld. Only Eugene de Kock and Jaap van Jaarsveld received amnesty for their role in the Cradock Four case.

24. The six SB officers who did not receive amnesty were never brought to justice for their role in my husband's death. They have all subsequently passed away and will never be held accountable for their crimes.

25. We have been waging a long struggle for justice. When the state sought to provide a backdoor amnesty for apartheid-era perpetrators we fought it. Together with the other widows of the Cradock Four, and Thembi Nkadimeng, the sister of Nokuthula Simelane, the young freedom fighter murdered by the SB

NM KSM

in 1983, I went to court to challenge the NPA's prosecution policy in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07) (the Nkadimeng case). In 2008 the Pretoria High Court struck down the backdoor amnesty provisions that were contained in the policy, declaring it to be absurd and unconstitutional. Sadly, this victory did not open the door to justice.

26. In 2019, we asked the Foundation for Human Rights and Cliffe Dekker Hofmeyr attorneys to take up the Cradock Four case. It soon became apparent that the authorities were not taking our case seriously. Indeed, it appeared that the investigation docket had gone missing from the offices of the NPA in Pretoria and had to be reconstructed. After two years with little progress, our attorneys applied to court to compel the NPA and the Directorate of Priority Crimes Investigation to finalize the missing docket investigation and take a decision on the murder case. This application was launched on 20 July 2021, the 36th anniversary of the burial of the Cradock Four. After an exchange of papers, the application was held in abeyance when the authorities agreed to expedite the investigations. Sadly, the suspects against whom there was a *prima facie* case all died, forcing us in August 2023 to accept a third inquest.

27. We now know why there has been such long delays in advancing our cases. Post the TRC, political interference suppressed the cases and shut the doors of justice in our faces. I see our politicians becoming rich and powerful, but we, who were the victims of apartheid and continue to suffer from the long-standing effects, are ignored and made to feel insignificant.

28. I want the truth to come out and I want it to be heard. The African National Congress and the government must account for their disinterest in our case and

NM ASM

our families. The Cradock Four laid down their lives for our democracy. It feels like their legacies have been discarded.

29. We thought we were going to get monthly stipends from the TRC or educational support for our children. But none of that materalised. Had I known that nothing more would come from the TRC process, I would not have put myself through the trauma of testifying. It feels like it was all wasted energy.

30. The Mhlauli family supports the relief sought in the application. The President must be compelled to appoint an open and transparent commission of inquiry into the suppression of the TRC cases. We want answers as to why there has been such a lack of progress with our case. We want to see clear and decisive action being taken. We have questions for those who decided behind closed doors to obliterate justice in our cases. Only an independent commission of inquiry can get to the bottom of the suppression and publicly hold those responsible to account.

31. We also support the claim for constitutional damages to vindicate our deeply violated rights. This will enable us to properly memorialise our loved ones who sacrificed everything for our freedom. It will also enable us to pursue truth, justice and closure in those cases where this is still possible. Finally, it will help us to monitor the conduct of the responsible departments.

32. Even today we have no faith in the authorities acting in our interests. We must take this struggle forward ourselves.

NOMBUYISELO MHLAULI

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of Oct 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shabir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg
11/10/2024

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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SUPPORTING AFFIDAVIT – SARAH BIBI LALL

I, the undersigned,

SARAH BIBI LALL

do hereby make oath and state as follows:

1. I am an adult female and the sister of the late Dr Hoosen Mia Haffejee (hereafter referred to as "**Hoosen**" or "**my brother**").

2. I am the 12th Applicant in this application.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

4. My brother died at the hands of the Durban Security Branch of the former South African Police on 3 August 1977. He was 26 years old.

5. I make this affidavit on behalf of the surviving members of the extended Haffejee family.

Brief background of Hoosen Haffejee

6. Hoosen was born in Pietermaritzburg on 6 November 1950. He was the youngest of four siblings in a close-knit family. Our parents, Mohammed Essack Haffejee and Fathima Bibi Rahim, were married in Durban and resided in Pietermaritzburg. My two elder brothers were Yusuf and Ismail Haffejee. Ismail and I are the only siblings who are still alive.

7. Hoosen completed his schooling in Pietermaritzburg. My father borrowed money to send him to medical school in Nagpur, India. All our family members contributed financially towards Hoosen's education as we paid the money that my father had borrowed back in instalments. My father's belief was that by educating his youngest son, Hoosen would have paid it back by educating other members our family. We were not financially well off.

8. In 1968, at the age of 17, Hoosen left South Africa to study dentistry in Andheri, India. Because of the quota system that was imposed by the apartheid government, there were limited opportunities for non-white students to study at South African universities.

9. Hoosen remained in India for seven years, and upon his graduation in 1976 he returned to South Africa. He struggled to obtain employment after he returned because the South African government refused to recognise his 'foreign' qualification. After some time, he was employed at the King George V Hospital in Durban. As part of his duties, he also visited Tongaat and surrounding areas. He rented a flat at Antelope place in Overport, Durban which he occupied during the week. He returned to our parental home in Pietermaritzburg every weekend without fail.

10. The Saturday before my brother passed was away, I went to our parental home with my husband and children. Hoosen was happy and in good spirit a usual. Before I left on the Sunday, I prepared his favourite meals that he would take with him when he returned to Durban for the work week on Monday morning. I bade Hoosen goodbye before I left our parental home that Sunday, expecting to see him again the following Friday.

Hoosen's mysterious death

11. I was at work on 3 August 1977 when I was told of Hoosen's death. I became hysterical and started screaming. I was so overcome with grief that at a stage, someone slapped me to bring me out of the hysteria. I remember telling my brother that the person who had told me of Hoosen's death joked badly with me. My brother simply responded by saying that it was not a joke but the truth.

12. My father was not present when my mother was told of Hoosen's death. He was in Transvaal collecting money for the Mosque and to send to the poor in India. My mother was a strong woman and so too was my father a strong man. They managed to stay calm when the news of their son's death broke.

13. We were told that Hoosen committed suicide, but we did not believe it. In our culture, suicide is not permissible. This was known to Hoosen. If one commits suicide, in Islam, it is a sin, and you are not permitted to be buried in the same section of the cemetery. There is a section reserved for those that commit suicide. Hoosen was buried inside the designated area, that is not outside the cemetery, after his body was bathed (Ghusi) as is required in our culture.

14. Hoosen's friend, Amena Motala, who identified his body at the government mortuary in Gale Street, Durban observed that Hoosen's face was severely swollen, he had many bruises on his body and head and burn marks underneath the soles of his feet. At the time we did not know that Hoosen was arrested and tortured by the Security Branch. The injuries to Hoosen's body and the presence of the Security Branch raised questions about the circumstances in which he died.

15. I remember shortly after Hoosen's death, the Security Branch raided our parental home one evening around midnight. They searched my mother's room and Hoosen's room. Yusuf, my eldest brother, refused to let them search his room. According to me, Hoosen was never involved in politics. I could not understand the Security Branch's interest in Hoosen and their involvement in his death.

The 1978 inquest

16. In 1977 and 1978 an inquest was held to ascertain the facts surrounding Hoosen's death ("**the 1978 inquest**"). Our family's lawyers made the case that Hoosen was severely and deliberately tortured. We argued that he died as a result of the torture because we did not believe that he committed suicide.

17. The version of the Security Branch was that Hoosen suffered the terrible injuries to his body because he resisted his arrest. They refuted the claims that he was tortured. They said that Hoosen was found hanging from the door of his cell at the Brighton Beach Police Station and that he had committed suicide.

18. The inquest court agreed with the Security Branch and concluded that Hoosen committed suicide. It found that nobody was responsible for his death. There was no justice for my brother.

The Truth and Reconciliation Commission

19. In 1997 my mother appealed to the Truth and Reconciliation Commission ("**TRC**") to investigate and establish the truth behind Hoosen's death because she did not believe that he committed suicide.

20. None of the Security Branch members who were involved in Hoosen's arrest, detention, torture or death applied for amnesty to the TRC. But in another matter, the killing of Dr Richard Turner, former Security Branch policeman, Mohun Deva Gopal, stated that he was present when Hoosen was interrogated, assaulted and tortured.

21. The TRC concluded that it was likely that Hoosen died in detention as a result of the assaults and torture that he endured. It found that his death was a gross violation of human rights.

22. The TRC legislation held the promise that police officers who committed crimes during apartheid, such as assault, torture and murder, that were not amnestied would be investigated and prosecuted. This should have applied to the Security Branch members who were responsible for Hoosen's death because they did not apply for amnesty for the crimes that they committed.

The impact of Hoosen's death on our family

23. Hoosen's death had a huge impact on our family. our family suffered tremendously.

24. Yusuf's focal point in life became the search for the truth behind Hoosen's death. Yusuf would hang photos of the Security Branch officials, Captain Petrus Lodewikus du Toit (**"Du Toit"**) and Lieutenant James Brough Taylor (**"Taylor"**) outside our shop window with a caption which read "Who killed Hoosen?". Du Toit and Taylor were involved in Hoosen's arrest, and they advanced the false narrative in the 1978 inquest that Hoosen committed suicide in detention.

25. Yusuf sued the Minister of Police on behalf of our family. The amount that was paid out was distributed to all those that assisted the family financially after my brother's death. The Professional Fund refused to pay out because the inquest court found that Hoosen committed suicide.

26. Yusuf changed completely as time passed. He became involved in politics but withdrew from society and his family. He made it his duty to investigate Hoosen's death. He explored every avenue that he could find. Sadly, he passed away in September 2009 without obtaining justice for Hoosen.

27. My father was a fit man before Hoosen's death. Everything changed when he lost his son. He died with a broken heart in May 1986 without knowing why his son was killed.

28. My mother's life changed as well. She became withdrawn and spent a lot of time reading newspapers and searching for articles about Hoosen. She wrote to newspapers editors to tell them about Hoosen. She made her feelings and suspicions about his death known and a series of articles about Hoosen's death was published. My mother passed away in 2011 at the age of 89 years without knowing the truth of how her son died in detention.

The continued pursuit for truth and justice

29. Yusuf led our family's quest to find truth and justice for Hoosen. He pursued this quest tirelessly until his death in 2009. My brother, Ismail, and I had to continue this quest. We owed it to Hoosen, my father, Yusuf and later my mother.

30. Despite the recommendation made by the TRC that apartheid perpetrators who were not amnestied should be held to account, the authorities of the democratic government failed us. Justice has remained out of reach. We attempted for decades to get the authorities to act in Hoosen's case because we knew that the finding of the 1978 inquest was a farce. In 2016 we submitted joint representations with the family of the late Dr Neil Aggett to the National Director of Public Prosecutions to have the inquests into Neil and Hoosen's deaths in detention reopened.

31. In October 2017, the National Prosecuting Authority ("**NPA**"), led by Adv Shubnum Singh, began an investigation into Hoosen's death. Adv Singh located several key witnesses, and with the help of an expert, conducted technical tests in the cell where Hoosen had died to determine if there was sufficient evidence to request the Minister of Justice to reopen the inquest.

32. The reopening of the inquest was approved on 18 September 2018 but the process was delayed and in August 2019, on the eve of the 42nd anniversary of Hoosen's death, the NPA informed our family that the inquest would not be reopened because it was in the process of conducting further investigations. Our lawyers had to threaten the the Minister of Justice NPA with litigation to have the inquest reopened. Families should not have had to take drastic steps like this.

33. On 16 August 2019 the Minister of Justice released a press statement announcing that the inquests into the deaths of Hoosen and Dr Neil Aggett would be reopened. James Taylor, the last surviving lead interrogator and torturer of Hoosen died 3 days later on 19 August 2019.

34. Indeed, none of the leading role players behind the torture and murder of Hoosen lived long enough to appear before the reopened inquest. This was the terrible cost of delay.

35. The re-opened inquest commenced in the Pietermaritzburg High Court on 16 August 2021 and judgment was delivered by Judge ZP Nkosi on 23 September 2023.

36. Judge Nkosi overturned the findings of the 1978 inquest. The Judge found that:

36.1 Hoosen's death could be attributed to two possibilities. The first was that he died from a cardiac incident that occurred while he was tortured by the Security Branch members. The second was that he died from a cardiac incident that was caused by ligature constriction applied by the Security Branch members either while he was less conscious, unconscious or debilitated.

36.2 The police officers primarily responsible for the torture and murder of Hoosen were Du Toit and Taylor (the two members who convinced the 1978 inquest that Hoosen died by suicide).

36.3 The Security Branch members who were involved in the interrogation, torture and cover-up of Hoosen's death were Brigadier Steenkamp, Commander of the Durban Security Branch, Colonel Ignatius Gerhard Coetzee, second in command of the Durban Security Branch; Major Joseph Benjamin; Lieutenant Vic MacPherson; Warrant Officer Shunmugam (Schrewds) Govender; Sergeant Veera Ragalulu Naidoo

(VR Naidoo), and Mohan Deva Gopal (who made the statement to the TRC).

36.4 The members of the South African Police Uniform Branch at Brighton Beach Police Station who turned a blind eye and helped to facilitate the cover-up of Hoosen's death were Constables Johannes Nicolaas Meyer, Derek Hugh Naude and Shadrack Madlala.

37. Du Toit died on 15 April 2008; Benjamin died on 16 December 2010; MacPherson died on 20 April 2017; and Taylor died on 19 August 2019. Except for Naidoo and Gopal all the other Security Branch members have either died or could not be traced.

38. The Judge recommended that Gopal and Naidoo should be prosecuted for their role in Hoosen's murder and that charges of perjury should be proffered against Naude, Meyer and Matheevathinee Benjamin who handed Hoosen over to the Security Branch in 1977.

Conclusion

39. I support the relief that is sought in this application.

40. If the authorities had investigated Hoosen's murder at the conclusion for the TRC or any time shortly thereafter, as they were required to do by law, we could have seen justice done in his case. My mother and brother could have gone to their graves in peace knowing who was responsible for Hoosen's murder. They were all denied this closure.

41. We could also have heard from the perpetrators who could have faced justice in their lifetimes. It is heart breaking to know that our family lived with the pain of Hoosen death engraved in our hearts while those responsible for the murder of a 26-year-old, who had his whole life left to live, spent the remainder of their lives living freely and without the slightest concern about their past crimes

42. We now know that the TRC cases were deliberately suppressed. The political interference by South Africa's post-apartheid government caused grave harm to our family and many other families. It is truly unacceptable that those in high office could deprive us of truth and justice. We demand to know why this abomination of justice happened.

43. We accordingly support the relief sought against the President compelling him to appoint an independent and open independent commission of inquiry, with all the necessary powers, to get to the bottom of the political suppression of the TRC cases.

44. We also support the claim for constitutional damages to vindicate the violations of our rights to human dignity, equality under law and the rule of law. These damages will help us to memorialise our loved ones who died at the hands of the apartheid regime. Constitutional damages will also assist other families to seek justice, truth and closure.

SARAH BIBI LALL

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Pietermaritzburg on this the 15th day of October 2024.

Chetty Lt Col

COMMISSIONER OF OATHS

Lt Colonel

S CHETTY

SOUTH AFRICAN POLICE
MAGISTRATE COURT
2024 -10- 15
PIETERMARITZBURG
KWAZULU-NATAL

Full Names: SURAYA CHETTY

Business Address: Pietermaritzburg Court

Designation: Lt Colonel

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY OF THE ORIGINAL

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Commissioner of Oaths
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18/01/2025

E.J.S

K.C

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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SUPPORTING AFFIDAVIT – SIZAKELE ERNESTINA SIMELANE

I, the undersigned,

SIZAKELE ERNESTINA SIMELANE

do hereby make oath and state as follows:

1. I am an adult female pensioner and the mother of the late Nokuthula Aurelia Simelane.

2. I am the 13th Applicant in this application.

3. Nokuthula was my first child. I gave birth to her when I was 19 years old. I am now 84 years old. Nokuthula's father and my husband, Tiny Matthew Simelane, died in March 2001. He never found out what happened to our daughter. We still don't know what happened to her. We have endured daily agony since her disappearance in 1983.

4. Nokuthula operated as a courier for Umkhonto we Sizwe, the military wing of the African National Congress, between South Africa and Swaziland. In September 1983, she was abducted and brutally tortured by members of the Security Branch of the former South African Police. Nokuthula was never seen again.

5. We have not been able to bury Nokuthula's remains with the dignity and respect that she deserves. I desperately want to do this before I die. Until we can do this, we will have no closure.

6. We know that Nokuthula refused to collaborate with the apartheid security forces. We know they tortured her brutally. They ultimately murdered her and secretly

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disposed of her remains. We know that it was routine practice for the Security Branch to murder their captives if they refused to collaborate. They often concealed their remains in a manner that made discovery unlikely, if not impossible.

7. We feel deeply betrayed. Nokuthula was betrayed by one of her own cadres. The TRC's Amnesty Committee ("**AC**") granted the white officers amnesty for kidnapping even though they found that these same individuals had lied about what they did to her during her captivity, and they made false claims that Nokuthula was cooperating with them. This was an inexplicable betrayal of the full disclosure principle on the part of the AC.

8. We then expected the various post-apartheid governments to pursue justice in Nokuthula's case. They turned their backs on us. Prosecutors even refused to investigate those police officers who did not apply for amnesty for the kidnapping of Nokuthula. This included the Commander of Security Branch C1 Section, former Brigadier Willem Schoon, who authorised the crimes committed against Nokuthula. He has since died.

9. We expected that with liberation a new post-apartheid government would stand with us, and they would hold the perpetrators to account. We were wrong. Rather than standing with the victims, successive post-apartheid governments found ways to shield apartheid-era perpetrators from justice. This betrayal cut the deepest.

10. Our pleas since the mid-1990s for a proper investigation fell on deaf ears. When we gave up on a prosecution of the known suspects and sought an inquest in

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2013 this was refused. The refusal forced us to launch an application to court in 2015 to force the prosecutors to make a decision in Nokuthula's case.

11. Only when we launched this case, did the NPA act which resulted in indictments being issued in early 2016. Since then, two of the four accused have died and another claims he is mentally unfit to stand trial. Eight years later we are still waiting for the trial to begin. We fear that by the time trial starts, there will be nobody alive, or mentally fit, to stand trial.

12. I have suffered emotionally, psychologically and physically as a result of my daughter's disappearance. This suffering has been heightened by the duplicitous conduct of the police and prosecutors who ought to have upheld the rule of law, but, acting at the behest of politicians, deliberately blocked Nokhuthula's case from going forward, as well as other cases from the past.

13. I support the relief claimed in this application. Constitutional damages will help us commemorate Nokuthula and her sacrifices and will help other families reach truth and closure. I also support the relief requiring an independent and public commission of inquiry to be established to determine the truth regarding the political suppression of the TRC cases.

SIZAKELE ERNESTINA SIMELANE

X.C

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Ermelo on this the 23 day of December 2024.

SUID-AFRIKAANSE POLISIEDIENS
GEMEENSKAPDIENSSENTRUM
2024 -12- 23
COMMUNITY SERVICE CENTRE
ERMELO
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS

Full Names: Lubuchi Xaba
Business Address: 24 Jan van Riebeeck
Designation: Sergeant

S.E.S
X.C

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

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ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
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SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

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18/01/2025

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
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MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – SINDISWA ELIZABETH MKONTO

I, the undersigned,

SINDISWA ELIZABETH MKONTO

do hereby make oath and state as follows:

1. I am an adult female pensioner currently residing in Cradock in the Eastern Cape. I was born on 1 September 1955. My husband is the late Sparrow Mkonto (hereinafter referred to as **"Sparrow"** or **"my husband"**).

2. I am the 14th Applicant in this application.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

4. I depose to this affidavit on behalf of myself and my son, Lonwabo Mkonto.

5. On 27 June 1985, Sparrow, Matthew Goniwe, Sicelo Mhlauli and Fort Calata were abducted and murdered by members of the Security Branch of the former South African Police. Days after they had disappeared, their bodies were found, badly burnt with numerous gunshot and stab wounds. Sparrow, Matthew, Sicelo and Fort became known as the Cradock Four.

6. The story of the Cradock Four and our attempts to pursue justice in their case is dealt with extensively in the founding affidavit deposed to by Lukhanyo Calata. founding affidavit. I confirm the contents of his affidavit in so far as they relate to

the Cradock Four, my husband and our decades long pursuit for justice. To avoid repetition, I will not repeat the story of the Cradock Four in this affidavit.

7. On 16 April 1996, I presented a plea for justice to the Human Rights Violations Committee of the Truth and Reconciliation Commission ("**TRC**"). I was supported by the other widows of the Cradock Four and they too presented statements on the same day.

8. In my statement, I told the Committee that my husband was everything to me. He did everything for me and my son. His murder rendered me a widow and left my son without a father. The impact that Sparrow's murder had on our lives is incomprehensible.

9. I requested that a thorough investigation into the Cradock Four case be conducted so that justice could be done. I asked the TRC to assist me with my son's education.

10. The TRC recognised Sparrow as a victim of gross human rights violations, and I received reparations in the meagre amount of R30 000.00. The reparations were wholly inadequate, and it failed dismally to elevate us from our suffering.

11. The pain, suffering and violation that we suffered in 1985 was not relieved with the passage of time. The turn of democracy brought with it the hope that our suffering, pain and violation would be vindicated. We expected that the truth would be pursued by the government, that those who murdered our husbands would be held accountable, and that justice would prevail. Sadly, justice remained out of reach for the Cradock Four in the thirty years of democracy.

12. We support the relief sought in this application. It was heartbreaking to learn that high ranking government officials were responsible for the suppression of TRC cases. We deserve to know why these officials thought that they could deny us justice. We demand to know how this happened. We also support the claim for constitutional damages to vindicate our deeply violated rights.

SE Mkonto

SINDISWA ELIZABETH MKONTO

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at CRADOCK SAPS on this the 22 day of OCT 2024.

SOUTH AFRICAN POLICE SERVICE
VISIBLE POLICING
2024 -10- 22
CRADOCK
EASTERN CAPE

0534806-4
[illegible] 18/0

COMMISSIONER OF OATHS

Full Names: MONCIO SIZWE

Business Address: SIKHULU STR CRADOCK SAP

Designation: WARRANT OFFICER

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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STEPHANS MBUTI MABELANE	15th Applicant

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18/01/2025

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THULI KUBHEKA	16th Applicant
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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT - STEPHANS MBUTI MABELANE

I, the undersigned,

STEPHANS MBUTI MABELANE

do hereby make oath and state as follows:

Introduction

1. I am an adult male born on 5 April 1957. I am the brother of the late Matthews Mabelane ("**Matthews**" or "**my brother**") and the 15th Applicant in this application.

2. Matthews died in detention on 15 February 1977, whilst under interrogation by the notorious Security Branch ("**SB**"), at the John Vorster Square police station ("**JVS**"). He was only 22 years old at the time of his death.

3. The facts deposed to in this affidavit are within my knowledge, unless otherwise stated or indicated by the context, and are true and correct to the best of my knowledge.

4. I depose to this affidavit on behalf of the surviving members of the Mabelane family.

The life of Matthews Mabelane

5. Matthews was born in 1954 in Soweto. He was the third born of six children. In 1958, our family was forcefully removed from our home in Sophiatown under the Natives Resettlement Act of 1954. The apartheid government relocated our family to Zone 1, Meadowlands where Matthews grew up.

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6. Matthews attended Madibane High School in Diepkloof, Soweto and it was during his high school career that he became politically active. Together with other students from Soweto, Matthews vehemently opposed the apartheid regime and the policies that affected the daily living of black people in South Africa.

7. Matthews joined the Soweto Students Representative Council ("**SSRC**"). The SSRC then was led by Mr Tsietsi Mashinini who died many years later in exile under mysterious circumstances. The SSRC comprised of students from different schools in Soweto. At first, it was formed as an Action Committee of the South African Students Movement. The SSRC led the 16 June 1976 mass student demonstration in Soweto to which the apartheid government responded with brutal violence.

8. During the 1976 student uprisings in Soweto, Matthews and several other students from Madibane High School mobilised against the adoption of Afrikaans as compulsory medium of instruction in terms of the Bantu Education Act of 1953. On 13 June 1976, scores of students gathered at the Orlando Donaldson Community Hall in Soweto to discuss the imposition of the Bantu Education system. The students decided to protest peacefully on 16 June 1976. Over the ensuring days, hundreds of protesting students were gunned down by the South African Police ("**SAP**").

9. After the 16 June 1976 demonstrations, the apartheid police apparatus went into full swing in search of student leaders of the SSRC. Out of fear of arrest, Matthews went into hiding.

10. In late 1976, Matthews joined uMkhonto we Sizwe ("**MK**"), the armed wing of the ANC. He left Meadowlands for Botswana in October 1976 to undergo

military training. Matthews intended to join the liberation struggle to fight the apartheid government in a more direct and militant manner.

Matthew's death in detention

11. On 21 January 1977, my brother was apprehended by the police near Zeerust while crossing back into South Africa from Botswana. He was detained in terms of section 6(1) of the Terrorism Act. This was after the Minister of Police, Jimmy Kruger, announced that amnesty would be granted to children who left South Africa to join liberation movements.

12. After a few days which cannot be accounted for, Matthews was booked into JVS on 27 January 1977. No explanation has been provided by the police as to what they did with him between 21 and 27 January 1977. He was never charged with any criminal offence. Given the modus operandi of the SB, it is likely that Matthews was subjected to torture prior to his detention at JVS.

13. Matthews was detained, interrogated, and most likely tortured for 19 days before he fell to his death from the infamous 10th floor of JVS on 15 February 1977. According to statements made by SB members at the subsequent inquest, on 15 February 1977 at approximately 08h40, Matthews arrived at the interrogation room on the 10th floor for questioning. There were three officers in the room at the time, namely Warrant Officers Leana Viljoen and Petrus Daniel Jordaan and Sergeant Jacobus Johannes Cilliers.

14. Shortly after the commencement of the interrogation, the questioning was interrupted as Warrant Officer Jordaan was apparently summoned to the lifts by a telephone call. According to Jordaan's statement, he claimed that he told Matthews that he expected his father to be waiting for him at the lift, and that he "was going to quickly get his father".

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15. Whilst the interrogation was adjourned, the police members alleged that Matthews tried to escape from police custody. They claimed that he dashed for the window, exited the window and began walking along a ledge on the outer wall when he lost his balance and fell. The police allege that the two police officials present in the office were unable to stop him. According to the police, Matthews fell and cleared the roof of the garage and landed on the bonnet of a vehicle in the car park some six meters away from the edge of the building.

16. When our family retrieved Matthews' body from the government mortuary, my father discovered a disturbing message on the lining of his trousers which Matthews had written for our brother, Lasch Mabelane. The message read: "*Brother Lasch, tell mother and my other brothers that the police will push me from the tenth floor. I bid you farewell.*"

Questions surrounding Matthews' death

17. An inquest into Matthews' death was held at the Johannesburg Magistrates Court on 30 May 1977, under inquest number 287/77. The inquest was presided over by Magistrate WP Dormehl. The prosecutor in the inquest was Mr NJ van Vuren. Evidence by the State comprised entirely of evidence from the police officials who participated in Matthews' arrest, detention and/or interrogation.

18. As the family, we were not afforded an opportunity to lead evidence during the inquest and the process was concluded within a day without any medical information being presented, aside from the state's post-mortem report. No cross-examination of the witnesses was conducted.

MSM

19. The Court accepted without question the version of events provided by the police. Accordingly, Magistrate WP Dormehl found that Matthews died of multiple injuries which he sustained after he accidentally fell to his death from a ledge on the 10th floor of JVS. He concluded that there was nobody to blame for the death.

20. Our family, in particular our father, never accepted the police version or the finding of the inquest. The manner in which Matthews passed away was similar to the deaths of other activists during detention under the Terrorism Act.

21. On 20 February 1979, the United Nations Special Committee against Apartheid reported on Matthews' death. The Special Committee rejected the inquest finding remarking that "it would be absurd to suggest that [Matthews] attempted to escape through a window of the tenth floor of a building".

The Truth and Reconciliation Commission

22. When the TRC commenced its work in 1996, we were hopeful that the police officers who were implicated in Matthews' death would apply for amnesty so that the truth could be revealed and that we could have justice for Matthews. This did not happen.

23. My father, Phillip Mabelane, presented his story before the TRC's Human Rights Violations Committee on 23 July 1996. My father testified that on 16 February 1977, two police officers, one white and one black, came to our home and instructed him to accompany them to JVS because, as they explained in Afrikaans, Matthews had misbehaved. My father testified that:

> "We went to the tenth floor where they told me that my child was there and was interrogated and jumped through the window and fell down from

the tenth floor. I asked how did he come through because he was in your hands. No, we just saw him, suddenly we saw him going through the window.

"After that they told me that ... I do not have the right to take any steps regarding this matter, according to the law. All I could do is for them to release the corpse to me that I should bury it myself. Truly, I did that, I buried my son."

24. The TRC, at volume 3, chapter 6 of its final report, found "the former state, the minister of police and the commissioner of police at the time responsible for the death in custody of Mr Matthews Mabelane and for the gross violation of human rights."

The Family's Truth-Seeking Process

25. We do not believe the inquest finding that nobody was to blame for the death of Matthews, and we have been pushing to reopen the inquest for several years, without success. We were greatly encouraged by the historic reopening of the inquest into the death in detention of Ahmed Timol. My brother, Lasch, attended much of the hearing and asked the lawyers representing the Timol family to take up the case of Matthews.

26. Our struggle for truth and justice was spearheaded by my father, Philip Mabelane and Lasch. My father died on 9 May 2018, while Lasch died on 6 August 2020, without reaching closure.

27. We had hoped that after all these years those responsible for my brother's death would come forward with the truth. It is clear that unless they are forced to talk about what happened they will remain silent. Only a reopened inquest

can do this, but time is running out. Some of those involved have already died and those still alive are now elderly.

28. Our lawyers have submitted formal submissions for the reopening of the inquest. For several years they have been applying pressure on the NPA and DPCI to finalise their investigations and to make a decision in my brother's case. However, some 47 years after my brother's death in detention there is still no decision. We see little urgency being applied to our case by the authorities. Indeed, we have the unfortunate impression that the investigations are being dragged out for as long as possible.

Conclusion

29. We were appalled and shocked to hear that political interference following the closure of the TRC suppressed hundreds of apartheid-era cases, including my brother's case. We want to know how such an abomination of justice could take place in the new democratic South Africa. We feel utterly betrayed.

30. If the death of Matthews had been investigated promptly after the closing of the TRC we could have received closure. More suspects and witnesses would have been alive, and leads could have been followed. There must be a reckoning for the deliberate decisions that have denied us truth and justice.

31. We accordingly endorse the application for an independent commission of inquiry with the necessary powers to get to the bottom of the suppression of the TRC cases. It seems clear that the government is deeply embarrassed about its role in closing down our cases, hence the refusal to establish an inquiry. If the President persists in refusing to help us get to the truth, he must be forced to do so.

NDSM

32. We also support the claim for constitutional damages to vindicate our human rights which have been deeply violated by the suppression of our cases. Since the policing and justice authorities have proven themselves incapable or unwilling to pursue justice, we will use such funds to pursue truth and justice ourselves. We will also be able to properly commemorate the memory of our loved ones.

STEPHANS MBUTI MABELANE

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at JHB Central on this the 24 day of 10 2024.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2024 -10- 24
JOHANNESBURG CENTRAL
SUID-AFRIKAANSE POLISIEDIENS

7248128S
Cst Madebe

COMMISSIONER OF OATHS

Full Names: Mbongiseni Madebe

Business Address: 1 Commissioner Street

Designation: JHB Central

NTSM

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

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OF THE ORIGINAL

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18/01/2025

TK ASM

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

T.K ASM

SUPPORTING AFFIDAVIT – THULI KUBHEKA

I, the undersigned,

THULI KUBHEKA

do hereby make oath and state as follows:

Introduction

1. I am an adult woman, resident in KwaZulu-Natal. I am the only remaining child of Ntombikayise Kubheka ("**Ntombi**" or my "**mother**").

2. I am the 16th Applicant in this application.

3. Unless the context indicates otherwise, the facts contained in this affidavit are within my personal knowledge and are, to the best of my belief, both true and correct.

4. I depose to this affidavit on behalf of myself and generally on behalf of my family.

Ntombikayise Kubheka

5. My mother was born and raised in KwaMashu, Durban, KwaZulu Natal. She was politically active and believed greatly in the vision of democracy that compelled many to take up the fight against the apartheid regime. Ntombi was an operative for the African National Congress' armed wing, uMkhonto weSizwe.

6. Ntombi's activities aroused the suspicions of the Security Branch ("**SB**") of the then South African Police. In particular, the notorious Vlakplaas unit of the SB

T K ASM

(also known as "**C1**") sought to obtain information on Ntombi's activities involving MK operatives in and outside of South Africa.

7. Together with the Natal branch of the SB, askaris from Vlakplaas, were instructed to infiltrate Ntombi's networks in an effort to get her to divulge information regarding the liberation movement.

8. Ntombi's network was infiltrated by Xola Frank Mbane ("**Mbane**"), Nicholas Dube ("**Dube**") and Spyker Myeza. They were askaris based at Vlakplaas under the command of the infamous Eugene De Kock.

9. TRC documents record that Ntombi sought the assistance of the askaris to assist Musawakhe 'Sbho' Phewa ("**Phewa**") with the collection of firearms from Transkei. Unbeknownst to Ntombi, her plea for assistance would lead Phewa to his death.

10. Ntombi never saw nor heard back from Phewa. The TRC records show that Ntombi grew increasingly suspicious of Mbane and Dube. This presented a problem for the SB and they sought to murder Ntombi.

11. During May 1987 Ntombi was abducted. The operation was handled by Mbane operating with Dube, and other SB operatives who included Hentie Botha ("**Botha**"), Laurie Wasserman ("**Wasserman**"), Cassie van der Westhuizen ("**Van der Westhuizen**"), Joe Coetzee, Warrant Officer Basson, Salmon du Preez ("**Du Preez**"), Roelof Baker and Andy Taylor ("**Taylor**").

T. K
ASM

The TRC

12. At the TRC, there were differing accounts as to what exactly happened after Ntombi was abducted. It appeared that after Ntombi was abducted at Battery Beach in Durban, and she was driven to an abandoned shooting range in Winkelspruit, on the South Coast.

13. At Winkelspruit, Ntombi was handed over to Taylor who then "interrogated" her along with his colleagues. I say "interrogated," because that is what is noted in the TRC records. It is, however, likely that Ntombi was tortured by Taylor and his colleagues for soon thereafter, she allegedly passed from an apparent heart attack.

14. In the TRC records, it is alleged that Du Preez and Wasserman were instructed to dump Ntombi's body in an area close to KwaMashu where she would be easily identified by passersby.

15. Ntombi's body was later buried in a paupers' grave for it was never identified. The TRC investigation unit exhumed Ntombi's remains, and forensic analysis revealed that the remains were indeed those of Ntombi.

16. Ntombi's skull was positively identified. In a twist from what was claimed by the SB, it was discovered that Ntombi's skull had a bullet wound. She had been fatally shot.

17. Ultimately, Botha, Du Preez, Wasserman and Van der Westhuizen were denied amnesty by the TRC.

T. R

Post the TRC

18. It was the promise of the TRC that those who were refused amnesty would be referred for prosecution. Indeed, my mother's case and hundreds of other cases were referred by the TRC to National Prosecuting Authority ("**NPA**"). As such, it was our collective hope that the NPA would undertake this task without delay.

19. What followed the TRC, however, was a deafening silence and an all-consuming lethargy on the part of the NPA. There was no movement in the matter until 24 October 2022 when the NPA announced that it would open an inquest into the death of Ntombi. In November 2023 the Director of Public Prosecutions in KwaZulu-Natal decided to prosecute 5 persons in relation to the murder of my mother. As of August 2024, they had still not been formally indicted.

20. The inquest or prosecution of those perpetrators who are still alive is yet to commence. It has now been 37 years since Ntombi was brutally murdered and discarded like an animal.

Conclusion

21. I support the relief sought in this application.

22. I demand an independent and open commission of inquiry to get to the bottom of why my mother's case was suppressed post the TRC. I want to know why those behind the suppression saw fit to denigrate the memory of my mother who gave her life for South Africa's democracy.

23. I want to know why they treated the families who lost loved ones as second-class citizens not worthy of respect under the Constitution.

T. K ASM.

24. I also support the call for constitutional damages to be paid to vindicate our deeply violated rights and, at long last, to properly commemorate my mother and her contribution to our freedom. We also need these damages to fight for truth, justice and closure because we do not trust the state to do so. The post-apartheid state has betrayed us.

TPubheka

THULI KUBHEKA

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of OCT 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shabir Mayet

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Designation:

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11/10/2024

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
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FATIEMA HARON-MASOET	4th Applicant
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SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY OF THE ORIGINAL

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18/01/2025

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STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
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MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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SUPPORTING AFFIDAVIT – HLEKANI EDITH RIKHOTSO

I, the undersigned,

HLEKANI EDITH RIKHOTSO

do hereby make oath and state as follows:

Introduction

1. I am a pensioner and the sister of Ignatius 'Iggy' Mthebule. I am also the 17th Applicant in this application.

2. The facts deposed to in this affidavit are within my knowledge, and unless otherwise stated or indicated by the context, are true and correct to the best of my knowledge. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be correct.

3. I also depose to this affidavit on behalf of my family.

Ignatius Mthebule

4. As I will explain in this affidavit, I do not know whether my brother is dead or alive; and if he is dead, where his remains are.

5. Ignatius Mthebule, or Iggy as he was known and as I will refer to him in this affidavit, was born and primarily grew up in Tzaneen in Limpopo where he did both his primary and secondary schooling.

6. In the year 1974, Iggy enrolled at the University of the North, as it then was, where he read for a Bachelor of Commerce degree. The University of the North

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was at that time one of few higher education institutions established exclusively for Black people.

7. It was during his time at the University of the North that Iggy became a student activist and one of the founding members of the Azanian Students Organisation ("**AZASO**"), which I understand was aligned to the African National Congress ("**ANC**"). In 1977, Iggy became formally involved in the underground operations of the ANC. He was eventually expelled from the university, whereafter he relocated to Johannesburg to live with me in or around 1979. At the time, Iggy worked full time for AZASO, and he had interactions with comrades who were exiled in Swaziland and Mozambique.

8. In June 1981 Iggy left for Mozambique. He was supposed to return from this trip, but he did not realise that within his AZASO office someone was passing information about his activities to a journalist, Willie Bokala. Shortly after Iggy's departure, the Sowetan newspaper published an article which revealed that Iggy had skipped the country. We learned from the Sowetan Newspaper that Iggy had gone into exile.

9. The public report about Iggy's departure from the country prevented him from returning. At the time, we did not know exactly where he was, until we received two unaddressed letters indicating that he was still alive. Through the ANC, we were able to clandestinely meet with Iggy and became privy to his activities. He underwent military training for the ANC and its armed wing, uMkhonto weSizwe ("**MK**") in Swaziland, Mozambique and Czechoslovakia.

10. Despite being prevented from returning to South Africa, Iggy continued to secretly enter and exit South Africa. Everything pertaining to his movements and

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whereabouts was on a need-to-know basis. As such, we never questioned his whereabouts or activities.

11. We understand that around 1983, under the instructions of the ANC, Iggy established an underground unit known as the "Transvaal Urban Unit," code named the "Grace Unit," which was based in the East Rand of the then Transvaal (the "**Unit**"). The Unit consisted of about 15 members who were mostly trainees of the MK. Some surviving members of the Unit under Iggy's command are Peter Mangwane, JZ Cheela, Totsie Busisiwe Memela Khambula (current CEO of the South African Social Security Agency), retired South African National Defence Force Major General Ntshiki Memela-Motumi and current ANC and South African Deputy President Paul Mashatile.

12. The Unit reported to Sue Rabkin ("**Rabkin**"), a member of the ANC Regional Politico-Military Committee ("**RPMC**"), who in turn reported to former South African President Jacob Zuma ("**Zuma**") who was then the ANC's chief representative in Mozambique, based in Maputo.

13. Our understanding is that one Joy Harnden ("**Harnden**"), a former state security branch ("**SB**") agent under the command of one Alfred Oosthuizen ("**Oosthuizen**"), established connections with one Sheila Weinberg ("**Weinberg**"), the daughter of Eli and Violet Weinberg, both of whom were members of the ANC and the South African Communist Party. At the time, Weinberg was an executive member of the Transvaal Rural Action Committee of the Black Sash and she was banned. Oblivious to Harnden's SB connections, Sheila invited Harnden on a visit to see her ailing mother in Mozambique. The

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SB saw this as an opportunity to infiltrate the ANC in Mozambique because of Harnden's proximity to the then banned ANC.

14. In Mozambique and under the instructions of Zuma, Harnden was introduced by Weinberg as an activist and member of the Black Sash, and was linked to the Unit with the understanding that she will assist the Unit with much needed resources in its operations.

15. Iggy was one of the anti-apartheid activists who Harnden had been introduced to in Mozambique, and about six months later, around 1986, Iggy re-connected with Harnden in Johannesburg.[9] They met a few times, but Iggy failed to turn up for what would be his last pre-arranged meeting with Harnden.

Iggy's disappearance

16. Post the unbanning of the ANC, Iggy did not return along with the other political exiles. He was unaccounted for, and we enquired with the ANC's national, regional and provincial structures to establish details about his whereabouts.

17. In 1991 we secured a meeting with Zuma, Ngoako Ramatlhodi and Rabkin at the ANC's headquarters, then located at Shell House in Johannesburg. It was during this meeting that Zuma informed us of Iggy's interactions with Harnden. He told us that around February 1987, Iggy and Harnden arranged to meet at a bookshop in Hillbrow, Johannesburg. Iggy never arrived for the meeting and was not seen again.

18. In his book *Betrayal: The Secret Lives of Apartheid Spies*, author Johnathan Ancer writes that Harnden, who was in fact a Lieutenant in the SB and worked as a spy for the SB, revealed to him that she had enquired with her handler,

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Oosthuizen, about Iggy's whereabouts after his failure to arrive for their meeting in Hillbrow. Oosthuizen told Harnden that she did not "have to worry about him, and that he won't contact [her] again." Harnden understood that the SB had eliminated Iggy.

19. Zuma promised us that the ANC would investigate Iggy's whereabouts, and failing which the whereabouts of his remains. We never heard back from Zuma or the ANC despite following up again after the democratic elections in 1994.

20. In 1991, my brother Samuel Mthebule ("**Samuel**") decided to break the news about Iggy's disappearance and probable death to our mother. We held a memorialisation ceremony with the ANC in February 1992 to celebrate Iggy's life.

21. In 1994, and on the advice of the then Minister of Safety and Security, Sydney Mufamadi, we reported Iggy's disappearance at the Protea Police Station in Soweto and a missing person's case was opened. Nothing has come of that investigation.

The Truth and Reconciliation Commission

22. On 10 April 1997 Samuel presented a statement regarding Iggy's disappearance to the Truth and Reconciliation Commission's ("**TRC**") Human Rights Violations Committee. No one applied for amnesty for Iggy's disappearance.

23. Samuel told the Committee about Iggy's background, his role in the struggle for freedom, the facts that we had uncovered about his disappearance and our efforts to engage with various persons in the ANC government for assistance in locating Iggy's whereabouts.

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24. Samuel also lamented the family's pain of having to live on without having even had sight of Iggy's remains, or the location of his remains (assuming his demise). At the time of the hearings, our mother was over the age of 80. She has since passed without having had any closure on the whereabouts of her son. Samuel requested the Committee to make further investigations to at least locate Iggy's remains and bring them home to us to finally close that chapter of our lives.

25. The ANC also made brief reference to Iggy in its submission to the TRC, however, the submission (which was only one paragraph) did not contain any significant detail about Iggy's disappearance.

26. The TRC recognised Iggy as a victim of gross human rights violations. I received reparations in the amount of R30 000.00 which was divided equally between Iggy's two minor children at the time.

Post-TRC

27. It was certainly our expectation that Iggy's case would have been investigated when the TRC completed its work in 1998. This was, however, not to be the case and to date Iggy's case has not been concluded and his remains have not been found.

28. Around 2020, my nephew, Danny Mtebule, started his own investigation into Iggy's disappearance. He wrote to the Missing Person's Task Team ("**MPTT**") of the National Prosecuting Authority ("**NPA**") to enquire whether they were investigating Iggy's case but did not receive substantive feedback. Danny's confirmatory affidavit accompanies this affidavit.

29. In 2021, Danny reached out to the Foundation for Human Rights to request assistance from the Unfinished Business of the TRC programme. Pro bono lawyers were appointed to assist us in taking the Iggy's case forward. Since then, the MPTT collected DNA samples from Iggy's family members, including myself. We were hopeful at the time that results would be forthcoming, but the progress has been extremely slow.

30. Iggy's matter is presently being investigated by the Directorate for Priority Crime Investigation ("**DPCI**") and the NPA with the view to open an inquest. We are told that the investigation reached a dead end because the members of the ANC with knowledge of Iggy's disappearance are not willing to cooperate.

Conclusion

31. The lack of progress in Iggy's matter, and the ANC's apparent refusal to provide information about Iggy's disappearance has left us with feelings of frustration, disappointment, anger, betrayal and defeat. The government and the authorities responsible for the investigation and prosecution of TRC case have not kept true to the promise of the TRC. Not only was Iggy violated by the apartheid regime, but we too have been violated by our democratic government.

32. For the reasons detailed above, I support the relief claimed in this application. Constitutional damages will help us to undertake further investigations so as to establish whether Iggy is indeed deceased; and if so, how he died, who was responsible for his death, and where his remains are. I also support the relief requiring an independent and public commission of inquiry to be appointed to determine the truth surrounding the political suppression of the TRC cases.

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HLEKANI EDITH RIKHOTSO

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Mondeor on this the 16 day of **JANUARY 2025**.

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COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
SUPPLY CHAIN MANAGEMENT
2025 -01- 16
MONDEOR SAPS
SOUTH AFRICAN POLICE SERVICE

Full Names: Xolani
Business Address: 263 Royal Park dr
Designation: constable

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
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STEPHANS MBUTI MABELANE	15th Applicant
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HLEKANI EDITH RIKHOTSO	17th Applicant
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MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

CONFIRMATORY AFFIDAVIT – DANNY DANIEL MTEBULE

I, the undersigned,

DANNY DANIEL MTEBULE

do hereby make oath and state as follows:

1. I am an adult man, and I am the nephew of Ignatius 'Iggy' Mthebule and the seventeenth (17th) applicant in this matter.

2. The facts contained in this affidavit are to the best of my belief both true and correct. They fall within my personal knowledge or are apparent from documentation under my control, except where the context indicates otherwise.

3. I have read the seventeenth (17th) applicant's supporting affidavit, and I associate myself therewith and confirm the contents thereof insofar as they relate to me.

4. For the reasons set out in the supporting affidavit of the seventeenth (17th) applicant and the other papers filed herein, I support the relief sought in the notice of motion.

DANNY DANIEL MTEBULE

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at PRETORIA on this the 16th day of **JANUARY 2025**.

COMMISSIONER OF OATHS
HLANGANANI MUSHWANA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
MUSHWANA INCORPORATED RSA
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Full Names:

Business Address:

Designation:

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
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SINDISWA ELIZABETH MKONTO	14th Applicant

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OF THE ORIGINAL

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18/01/2025

T.M ASM

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
FOUNDATION FOR HUMAN RIGHTS	22nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	7th Respondent

T.M ASM

SUPPORTING AFFIDAVIT – THE FAMILY OF IRENE AND RICHARD MOTASI

I, the undersigned,

TSHIDISO MOTASI

do hereby make oath and state as follows:

Introduction

1. I am an adult male, resident in Jabulani, Soweto, Gauteng. I am the only child of Tumelo Richard Motasi and Irene Busisiwe Motasi ("my **Parents**").

2. I am the 18th Applicant in this application.

3. The facts deposed to in this affidavit are within my knowledge, unless otherwise stated or indicated by the context, and to the best of my knowledge are both true and correct.

4. I depose to this affidavit on behalf of my family and, in particular, my grandmother, Sibongile Gloria Hlabangane, the mother of the late Irene Motasi.

5. My parents were shot dead in my presence at our home in Hammanskraal on 1 December 1987 by the Security Branch (SB) of the erstwhile South African Police (the "**SAP**"). I was five years old at the time.

Irene and Richard Motasi

6. My father, Richard, was a police officer and my mother, Irene, was a nurse. They were both stationed in Hammanskraal, Pretoria, and they lived there. From what

T.M ASM

we know, my parents were not involved in the political struggle against apartheid, despite the accusation that my parents were communicating with the ANC in Zimbabwe. As far as we know, my parents were living quite a normal life, and they had no political affiliations.

7. My mother was Zimbabwean by descent and had family ties in Zimbabwe. As such, the family travelled between South Africa and Zimbabwe for familial reasons not political reasons.

8. My father was based at the Police College at Hammanskraal. During August 1986 my father had been assaulted by his superior, Colonel Van Zyl, leaving him with a burst eardrum and other injuries. With the assistance of Savage Jooste & Adams, my father instituted a personal injury claim against Constable Vreugdenburg, Sergeant Raath and Warrant Officer Le Grange, which triggered a slew of abuse and torment at his workplace, and ultimately led to his suspension from the SAP. Unsuccessful efforts were made to pressure my father to withdraw the damages claim. It is likely that my father's refusal to drop the claim led to his murder.

9. According to the TRC Report, around this time the Northern Transvaal Security Branch ("**SB**") compiled a file on my father which falsely claimed that he was an ANC operative who was handing over sensitive information over to the ANC in Zimbabwe and Johannesburg. According to evidence led at the TRC, Brigadier Jacob Gabrielle Stemmet – the Divisional Commissioner of the Northern Transvaal Division – General Marthinus Dawid Ras, Brigadier Jack Cronje and Colonel Koos Kloppers decided that my father should be eliminated as he posed

T.A.
ASM

a threat to national security. This order was given to Captain Philipus Johannes Corenelius Loots, Captain Jacque Hechter and Warrant Officer Paul van Vuuren.

10. According to the Amnesty Committee decision (AM5462/97), on the morning of 1 December 1987, Loots, Hechter and Van Vuuren met to plan the murder. They put together a team, which included the notorious askari from Vlakplaas, Joe Mamasela.

11. On the evening of 1 December 1987, our house was invaded, and my parents were shot and killed. As I was an infant at the time, and given the massive trauma I suffered, I am not able to recall the events of that tragic night.

12. My grandmother testified at the TRC that while she was in mourning, a police officer visited her demanding my father's police uniform. The manner in which my grandmother was approached caused her much hurt and torment. She was threatened with a gun, and she was intimidated. The week leading up to the burial of a loved one is a deeply solemn time in our culture. It is a time of ritual, remembrance and familial comfort. By bringing in an element of violence into that space, by intimidating my grandmother, and by bringing weapons, the police officers showed utter contempt for my grandmother and our family.

The TRC

13. Loots, Hechter, General Ras and Brigadier Cronje applied for amnesty. Ras and Loots were granted amnesty for both murders.

14. Joe Mamasela, Colonel Kloppers, Commissioner Stemmet and Mr Danny Selahle, who drove the perpetrators to our home, did not apply for amnesty.

T.M ASM

Hechter and Van Vuuren were granted amnesty for my father's murder, but not my mother's murder.

15. Following the TRC, we received reparations of about R30,000.00 (thirty thousand Rands), and my children received bursaries from the Presidential Fund, but this has not done little to heal the emotional wounds we bear as a family.

Post the TRC

16. It was our expectation that after the TRC, prosecutions would follow. We expected, in particular, that Commissioner Stemmet, Joe Mamasela, Colonel Kloppers and Danny Selahle would be prosecuted as they did not apply for amnesty. We expected Hechter and Van Vuuren to be prosecuted for the murder of my mother, as they were denied amnesty for her killing.

17. The political suppression of the cases has ensured that most of the suspects were allowed to go to their graves without facing justice. As far as we are aware, only Stemmet, Ras, Loots, Kloppers and Mamasela remain alive today. The authorities could have taken legal steps against Stemmet, Kloppers and Mamasela, as they did not apply for amnesty, but they have failed or declined to do so.

18. Instead, what followed was a long period of silence. It was only in 2018 that the Hawks approached us and informed us that they were now investigating the matter. This followed prompting by the Foundation Human Rights in early 2018, which urged the NPA and DPCI to investigate approximately 20 emblematic cases from our past, which included the murder of my parents. Unfortunately,

T.M
ASM

nothing much has happened pursuant to this investigation, which is apparently ongoing. The investigation officers have been changed repeatedly.

19. It has been nearly 37 years since my parents were murdered. The inexcusable delay in the investigation and prosecution of this matter has been deeply hurtful for us. My grandmother who is now 92 years old has waited all these years for justice and truth. She has been denied closure, even in the twilight of her life. I too have also been deeply emotionally scarred by the murder of my parents. The subsequent failure to hold those responsible accountable has added insult to injury and exacerbated our trauma.

20. Living without parents, over all these years, has been extremely painful for me. My mental health has substantially deteriorated and I have even received treatment for depression and anxiety.

21. We now feel betrayed by the government for deliberately blocking justice that was due to us. The conduct of the post-apartheid state has been disgraceful and unforgiveable. They have treated the victims of apartheid-era crimes with contempt and disdain. There must be a reckoning.

Conclusion

22. We support the relief sought in this application. An independent and open commission of inquiry is necessary to get to the bottom of the political interference. We need answers and we have a right to know who was behind the mass denial of justice to us. We also support the claim for constitutional damages to address the deep violation of our constitutional rights to human dignity, equality and the rule of law.

T.M ASM

TSHIDISO MOTASI

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 11th day of OCT 2024.

COMMISSIONER OF OATHS

Full Names: Ahmed Shabir Mayet

Business Address:

Designation:

A. S. MAYET
Commissioner of Oaths
Practising Attorney
401 Elizabeth House
18 Pritchard Street
Johannesburg
11/10/2024

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

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ALEGRIA KUTSAKA NYOKA	2nd Applicant
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MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – NOMALI RITA GALELA

I, the undersigned,

NOMALI RITA GALELA

do hereby make oath and state as follows:

Introduction

1. I am an adult female pensioner resident in Gqeberha in the Eastern Cape. I am the wife of the late Twasile Champion Galela ("**Champion**" or "**my husband**").

2. I am the 19th Applicant in this application.

3. The facts contained in this affidavit are within my knowledge, and unless otherwise stated or indicated by the context, are true and correct to the best of my knowledge.

4. I depose to this affidavit on behalf of my family, and on behalf and with the support of the families of the late Sipho Hashe ("**Sipho**") and Qaqawuli Godolozi ("**Qaqawuli**"). The supporting affidavits of the Hashe family and the Godolozi family are attached hereto, marked as "**NRG1**" and "**NRG2**". The deponents to NRG1 and NRG2 are Phumeza Mandisa Hashe and Mkhontowesizwe Godolozi, the 20th and 21st Applicants in this application.

5. Champion, Sipho and Qaqawuli were members of the Port Elizabeth Black Civic Organisation ("**PEBCO**"), an affiliate body of the then United Democratic Front ("**UDF**") which was aligned to the African National Congress ("**ANC**"). They were

kidnapped by the Port Elizabeth Security Branch ("**the PE SB**") of the former apartheid state on 8 May 1985. They were murdered a day or two after their kidnapping and their bodies were burnt and disposed. Champion, Sipho and Qaqawuli became widely known as the PEBCO 3.

Champion Galela

6. Champion was born on 24 October 1947 in Korsten, Port Elizabeth. His family relocated to KwaZakhele, a township in Port Elizabeth, in 1957 where he continued his education at Ebhongweni Primary School and Zikweni Primary School before he completed his schooling at KwaZakhele High School.

7. Champion and I married in 1975. Two sons, Tebogo Galela and Lehlohonolo Galela were born of our marriage. My children were two and five years of age when Champion disappeared in 1985.

8. During the late 1970s, Champion worked as a salesperson at Town Talk Furniture in Port Elizabeth. He was also a passionate photographer who took photographs at social events, and a sports fanatic who especially loved martial arts (he had a black belt in karate).

9. Champion was active in the struggle against the apartheid regime. Whilst employed at Town Talk Furniture, he was a member of the General Workers Union of South Africa. In 1894, he was co-opted to the PEBCO. He became the Organising Secretary under Qaqawuli Godolozi, the President of PEBCO since 1980, and he also worked closely with Sipho Hashe, the fourth General Secretary of the PEBCO. The PEBCO 3 played a prominent role in organising and coordinating resistance activities in the Port Elizabeth area such as consumer

and bus boycotts, stay aways and protest marches. These activities were so effective that they forced the Port Elizabeth Chamber of Commerce to negotiate with the PEBCO leadership. Their demands included better housing and affordable rent for black residents of Port Elizabeth, better living conditions, better working conditions and wages, transport, education, schools, medical care and the abolishment of the bucket system. Some describe that the activities of PEBCO rendered the Eastern Cape in general and particularly Port Elizabeth ungovernable for the apartheid state.

10. The activities of PEBCO placed Champion on the radar of the PE SB. He was subject to constant harassment by the security forces, he was arrested, detained on several occasions and our family home was constantly raided.

The kidnapping and murders of the PEBCO 3

11. Some days before the murders, Sipho made telephone contact with Tozamile Botha, a co-founder and former member of the PEBCO who was exiled in Lusaka, Zambia. Sipho requested Botha to organise funding for the PEBCO, and Botha in return indicated that he would ascertain the possibility of obtaining funding from the British Embassy. The conversation between Sipho and Botha was intercepted by Colonel Gideon Nieuwoudt ("**Nieuwoudt**"), a notorious member of the PE SB who was monitoring Sipho's movements and activities.

12. On 8 May 1985, the PE SB lured the PEBCO 3 to the then Hendrik Verwoerd Airport in Port Elizabeth under the impression that they were to meet an official from the British Embassy who would give them funding for their political activities. When the PEBCO 3 arrived at the airport, they were swiftly kidnapped by the PE SB and a Security Branch unit from Vlakplaas that was deployed to the Eastern

Cape. The members of the PE SB unit who participated in the operation to kidnap the PEBCO 3 were Nieuwoudt, Captain Johannes Martin 'Sakkie' Van Zyl ("**Van Zyl**"), Sergeant Gerhardus Jacobus Lotz ("**Lotz**"), Colonel Hermanus Barend Du Plessis ("**Du Plessis**"), and Colonel Harold Snyman ("**Snyman**"). The Vlakplaas unit was deployed by Colonel Jan Hattingh 'Jack' Cronje ("**Cronje**") and consisted of Colonel Roelof Jacobus Venter ("**Venter**"), Warrant Officer Gerhardus Cornelius Beeslaar ("**Beeslaar**"), Sergeant Joseph Tshepo 'Joe' Mamasela ("**Mamasela**"), Warrant Officer Johannes Koole ("**Koole**"), and Askari Kimani Peter Mogoai ("**Mogoai**"). The security forces planned to kill the PEBCO 3 to weaken the PEBCO in its mass mobilisation campaigns.

13. The Security Branch transported the PEBCO 3 to the old disused Post Chalmers Police Station near Cradock where they were held. They were interrogated and tortured for extended periods before they were executed after on or about 9 and/ or 10 May 1985. The weapon that was used to execute the PEBCO 3 was Van Zyl's private unlicensed .22 calibre firearm. Van Zyl confessed to the Truth and Reconciliation ("**TRC**") that he executed Sipho. Champion was executed by Lotz and Qaqawuli by Nieuwoudt.

14. The executions took place after Du Plessis signalled to the Security Branch at Post Chalmers Police Station that "the coast was clear", meaning that the security forces had not been seen by anyone when they kidnapped the PEBCO 3 at the airport the previous day. The bodies of the PEBCO 3 were placed on a pile of wood and burnt with diesel.

15. Weeks after Champion disappeared, I was guarded by the Amabutho detachment who were comrades that had undergone military training. The

Amabutho detachment guarded me because my house was under constant threat and harassment from the PE SB. Collaborators of the SB would throw bricks through my windows because they thought that I knew my husband's whereabouts. Unbeknownst to me, my house was also used to store hand grenades. In June 1985, the security police raised my home and found the hand grenades in my roof. I was arrested, detained and interrogated over a period of a couple of days.

16. In 1990 a criminal case of kidnapping and murder in respect of the PEBCO 3 was registered as 'HF Verwoerd Airport CR 17/07 1990'.

The TRC process

17. On 11 November 1997, Nieuwoudt applied to the TRC for amnesty for the kidnapping and murder of the PEBCO 3. He implicated several members from the PE SB and the Vlakplaas unit. Nieuwoudt's amnesty application was followed by the applications of Du Plessis, Snyman, Van Zyl, Lotz, Beeslaar, Mogoai, Koole and Venter.

18. The brief facts surrounding the kidnapping, interrogation, assault, torture and murder of the PEBCO that I have outlined above is based on the information that was revealed during the amnesty hearings. Mamasela also testified about his involvement in the kidnapping and murders of the PEBCO 3, but he did not apply for amnesty.

19. The TRC refused the amnesty applications of Nieuwoudt, Van Zyl, Lotz, Du Plessis, Venter, Beeslaar and Koole. Snyman and Mogoai were the only SB members who were granted amnesty because the TRC found that they made full

and frank disclosures about their roles in the kidnapping and murders of the PEBCO 3.

20. The TRC held the promise that those whose crimes were not amnestied would be investigated and prosecuted by the policing and prosecuting authorities of the democratic government ("**the TRC cases**").

The failed prosecution of Nieuwoudt, Van Zyl, and Koole and the discovery of the remains of the PEBCO 3

21. During March 2003, the Priority Crimes Litigation Unit ("**PCLU**") was set up within the National Prosecuting Authority ("**NPA**") to investigate cases that were identified by the TRC and recommended for possible prosecution. The PEBCO 3 case was one of the identified cases.

22. On 11 February 2004, Nieuwoudt, Van Zyl and Koole were charged with the kidnapping and murders of the PEBCO 3. This was the first case that the PCLU brought in respect of perpetrators who had been denied amnesty by the TRC. Shortly after their bail hearings, Nieuwoudt and Van Zyl applied to the High Court to review the decisions of the TRC to refuse them amnesty. Nieuwoudt died in August 2005 before the review application was finalised.

23. The review was delayed for nearly five years because the Department of Justice failed to file answering papers. Eventually, in 2009 the High Court order the Department reconvene an Amnesty Committee to hear Van Zyl's amnesty application. The charges against Nieuwoudt, Van Zyl and Koole were provisionally withdrawn in 2009 because the NPA took the view that the prosecution could not proceed while there was an amnesty application pending.

The Department of Justice never reconvened the Amnesty Committee and the charges against Van Zyl and Koole were never reinstated. Koole is deceased and Van Zyl died in August 2011.

24. Around August 2007, the remains of 5 persons were discovered by the NPA's Missing Persons Task Team at Post Chalmers. The remains were excavated from a shallow fire pit that measured roughly 2m x 3m with a depth of approximately 20cm. On 12 September 2009, the Minister of Justice handed over the remains to our families.

25. Between 2011 and 2019 the PEBCO 3 docket was held by the PCLU at NPA's Head Office, under the control of Adv Chris Macadam. To our knowledge, no further work was done to investigate or prosecute the remainder of those who were refused and/or did not apply to the TRC for amnesty. These officers included Lotz, Du Plessis, Venter, Beeslaar, and Mamasela. Lotz died in March 2016 at the age of 56.

26. In August 2019, the PEBCO 3 families approached the Foundation for Human Rights (FHR) for assistance. In November 2019, the Foundation's investigator, Retired Brigadier Marion, provided the Directorate for Priority Crime Investigation of the South African Police Services ("**DPCI**") and the NPA with a suggested investigative task list with the intention to reopen the investigation into the kidnapping and murders of the PEBCO 3. We subsequently appointed pro bono attorneys who have been providing considerable support to the DPCI and the NPA.

27. Unfortunately, in the five years that the Foundation and our attorneys have been pressing the DPCI and the NPA to take the PEBCO 3 case forward, very little

progress has been made. On 16 May 2023 Du Plessis died. This was some 3 years and 8 months after we had asked the DPCI and the NPA to reopen the PEBCO 3 case.

28. On 1 December 2023 our legal team handed over a detailed 147 page analysis of the evidence to the NPA, which called for criminal charges to be preferred against the last three suspects who remained alive, former Vlakplaas members: Venter (aged 75), Beeslaar (aged 85) and Mamasela (aged 70). Our lawyers implored the NPA to act expeditiously given the advanced ages of the suspects. They asked for a meeting with the NPA to discuss the evidence.

29. The NPA offered to do a 'meet and greet' meeting with the families in early 2024 but said they would not respond to the analysis or talk about the substance of our case. We refused to meet with them if it was just going to be a courtesy call. Our lawyers suggested that they take another 4 weeks to consider the evidence and then meet with us. They did not respond to this proposal. Notwithstanding multiple follow up communications, we were only able to meet with the NPA on 3 December 2024. To the dismay of the families, the prosecutors said they were not ready to respond to the recommendations of our lawyers, even after being in possession of our lawyer's analysis for more than a year. They claimed that their hands had been tied by the NPA head office, which only gave them decision making powers in the case in September 2024.

30. Shortly before this meeting we learned that Venter died of "natural causes" on 28 July 2024. There are now only two surviving suspects, Mamasela and Beeslaar, who will soon be 87 years old. We are bitterly disappointed with the cavalier approach of the NPA to the PEBCO 3 case. We get the impression that

they have little or no interest in pursuing justice in this matter. We are left with the unfortunate view that the NPA, through design or negligence, delays cases like the PEBCO 3 to the point where suspects either die or can no longer stand trial.

Conclusion

31. At the conclusion of the TRC, we expected that the policing and prosecuting authorities would imminently investigate and prosecute the heinous crimes that were committed against the PEBCO 3 and many others who died during apartheid.

32. My children and I suffered greatly after Champion died, we relied heavily on the generosity of the church and welfare organisations to survive. The situation was dire, and poverty was at my door. I hoped that the democratic dispensation would ensure that justice would prevail for the PEBCO 3, but this turned out not to be the case. My sons, Tebogo and Lehlohonolo, passed away in 1996 and 2011, adding to the suffering that I endured after my husband's disappearance and death. I am taking care of Lehlohonolo's daughter who is almost in matric.

33. Learning that the TRC cases were deliberately suppressed by officials at the highest level of the democratic government was heartbreaking. We now know that the lives of the PEBCO 3 and many other activists who fought for freedom against the oppressive apartheid state never really mattered to the democratic government. The idea that justice will prevail does not apply to families of victims of apartheid-era crimes.

34. We wholeheartedly support the relief that is sought in this application. The claim for constitutional damages is necessary to vindicate our violated rights, to assist us to celebrate our loved ones and to continue with the quest for justice. We also deserve to know why the TRC cases were deliberately suppressed. The truth must prevail.

NR Galela

NOMALI RITA GALELA

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at KWAZAKHELE SAPS on this the 13 day of 12 / 2024.

Ndabula
7201066

COMMISSIONER OF OATHS

Full Names: ZOLILE NDABULA
Business Address: MBILINI ROAD KWAZAKHELE
Designation: CONSTABLE

SUID-AFRIKAANSE POLISIEDIENS
KWAZAKELE
2024 -12- 13

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – PHUMEZA MANDISA HASHE

I, the undersigned,

PHUMEZA MANDISA HASHE

do hereby make oath and state as follows:

1. I am an adult female resident in Gqeberha in the Eastern Cape. I am the eldest daughter the late Sipho Samuel Charles Hashe ("**Sipho**" or "**my father**"). My father is one of the PEBCO 3.

2. I am the 20th Applicant in this application.

3. The facts contained in this affidavit are within my knowledge, and unless otherwise stated or indicated by the context, are true and correct to the best of my knowledge.

4. I have read the supporting affidavit of Nomali Rita Galela. I confirm the content thereof in so far as it relates to the kidnapping and murders of the PEBCO 3, the Truth and Reconciliation ("**TRC**") process, the failed prosecution of Gideon Nieuwoudt, Johannes Martin 'Sakkie' Van Zyl, and Johannes Koole, and the discovery of the remains of the PEBCO 3. I will not rehash those facts in this affidavit.

5. I depose to this affidavit on behalf of the Hashe family, in particular my sister Nontuthuzelo Hashe, my brother Malixole Charles and my brother Vusumzi Charles.

6. My father was born in 1934 near Middledrift in the Eastern Cape in a village called Ngcabasa. He left the village during the 1950s to look for greener pastures in Port Elizabeth. My father established himself in a location called Korsten, which was populated by both the Black and the Coloured communities, where he had met my mother Nondyebo (Nothobile) Elizabeth Ningiza. My mother was originally from a village called Hewu which was located near Queenstown. My parents married in 1955.

7. My parents were relocated under the Group Areas Act (the apartheid government's influx control legislation that designated certain geographic areas for use by a single race) to KwaZakhele township where they were allocated a four-roomed house. At that time, my father identified as Samuel Charles to avoid being sent back to Ngcabasa by the apartheid government.

8. My father's involvement in political activities started during the early 1960s. He was a member of the member of the African National Congress ("**ANC**") and Umkhonto weSizwe ("**MK**"), the military wing of the ANC. When the ANC was banned in 1961, he operated underground. He was arrested in 1962, charged with sabotage and sentenced to imprisonment on Robben Island where he remained for ten years.

9. In October 1973, my father was released from Robben Island and placed under a banning order for five years. He was restricted to our home in KwaZakhele and prohibited from being in the company of more than two people at a time. Being under house arrest did not deter my father my father from working underground to further the struggle against apartheid. When my father's banning order lapsed, he played a critical role in the formation of PEBCO in 1979. He

was the organisation's fourth General Secretary when he was kidnapped and murdered by the Security Branch in May 1985.

10. My father was a considerate person who had a good heart and wanted to support all those who were suffering during apartheid. He was a visionary man who stood for non-racialism and equality for all.

11. My father's disappearance in May 1985 had a devastating effect on my mother. She was totally shattered because this was the second time that she lost her husband (the first was when my father was incarcerated for ten years on Robben Island in 1962). My mother was financially dependent on my father. After his death she had to feed, raise, school, cloth and to provide a roof over the heads of her six children. She was strong woman, but she suffered emotionally and physically.

12. For years my mother struggled to come to terms with my father's murder. She lived hoping that one day he will come home and be reunited with his loved ones. As the years passed by, her hope diminished, and her health started deteriorating drastically. She developed multiple underlying health problems including a heart condition that led to her death on 11 March 2003. She died not knowing what had happened to my father, and without having the opportunity to bury his remains.

13. When the remains of the PEBCO 3 were found in 2007 and handed over to our families in 2009, we expected that the investigation into the murders would progress. We were hopeful that the police officers who were refused amnesty by the TRC would be prosecuted for kidnapping and killing of the PEBCO 3, and that this process would lead to the entire truth behind crimes being revealed.

Unfortunately, SAPS and the NPA did not pursue the case. Justice for the PEBCO 3 remained out of reach. To this day this position remains.

14. Our family is bitter about the treatment we received from the democratic government and the authorities responsible for the investigation and the prosecution of TRC cases. The very same government that my father sacrificed his life for has dismally failed us.

15. The Hashe family supports the relief that is sought in this application. Constitutional damages are necessary to vindicate our rights. The damages will enable us to commemorate the PEBCO 3 and pursue justice. The President must appoint an independent commission of the inquiry to investigate the suppression of TRC cases. We deserve to know who is responsible and why they believed that we do not deserve justice for our loved ones.

PHUMEZA MANDISA HASHE

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at KwaZakhele Police station on this the 23rd day of December 2024.

COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
KWAZAKELE
VISPOL
2024 -12- 23
KWAZAKELE
SOUTH AFRICAN POLICE SERVICE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

CERTIFIED A TRUE COPY OF THE ORIGINAL

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BA Law (UP) - LLB (UP)
Commissioner of Oaths
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18/01/2025

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – MKHONTOWESIZWE GODOLOZI

I, the undersigned,

MKHONTOWESIZWE GODOLOZI

do hereby make oath and state as follows:

Introduction

1. I am an adult male resident in Gqeberha in the Eastern Cape. I am the son of the late Qaqawuli Godolozi ("**Qaqawuli**" or "**my father**"). My father is one of the PEBCO 3.

2. I am the 21st Applicant in this application.

3. The facts contained in this affidavit are within my knowledge, and unless otherwise stated or indicated by the context, are true and correct to the best of my knowledge. I depose to this affidavit on behalf of the Godolozi family, in particular my mother, Buyelwa Monica Godolozi, and my sister, Nombeko Edith Godolozi.

4. I have read the supporting affidavit of Nomali Rita Galela. I confirm the content thereof in so far as it depicts the facts relating to the kidnapping and murders of the PEBCO 3, the Truth and Reconciliation ("**TRC**") process, the failed prosecution of Gideon Nieuwoudt, Johannes Martin 'Sakkie' Van Zyl, and Johannes Koole, and the discovery of the remains of the PEBCO 3. For the sake of brevity, I will not repeat those facts in this affidavit. In this affidavit I pay tribute to my father by elaborating on his role in the struggle for our freedom and I

M. G .00

describe the pain and suffering that our family had to endure because of my father's murder and the delay in investigating and prosecuting those security police members who perpetrated the crimes against the PEBCO 3.

Qaqawuli Godolozi

5. My father was born in Durban on the 26 July 1955 to Mbuyiselo Godolozi and Nobubele Jafta. His family relocated to Peddie in the Eastern Cape where he grew up and spent his teenage life. He received his primary education at Hotorn Higher Primary School where he passed his standard six and then proceeded to Healdtown Boarding School where he matriculated.

6. After my father completed his schooling, he relocated to Port Elizabeth and began to work as a clerk at a construction company. He then joined the Port Elizabeth Black Civic Organization (PEBCO). PEBCO was an affiliate of the United Democratic Front (UDF). In 1980 and 1984 he was elected as the President of PEBCO. My father, Sipho Hashe and Champion Galela played a prominent role in organising and coordinating resistance activities such as consumer and bus boycotts, stay aways and protest marches. These activities were so effective that they forced the Port Elizabeth Chamber of Commerce to negotiate with the PEBCO. These activities led to my father's continued harassment by the security police.

7. On 8 May 1985, the PEBCO 3 were kidnapped by the Security Branch at the then Hendrik Verwoerd Airport, in Port Elizabeth. They were taken to Post Chalmers, an abandoned police post near Cradock in the Eastern Cape, where they were severely tortured and murdered. Their bodies were burnt, and their remains were disposed of.

M. G

The effect that my father's murder and the delay to investigate and prosecute had on our lives

8. Our family learned of my father's gruesome murder during the Truth and Reconciliation Commission ("**TRC**") process. Shortly after my father's murder was disclosed before the TRC, my mother experienced a severe psychiatric disorder which led to her losing her employment. She was later diagnosed with chronic depression, and she takes chronic medication for her mental illness. My mother still suffers from constant psychological episodes and has lost all hope for enjoyment of amenities of life, her social appetite deteriorated and her emotional state is also unstable.

9. Summarily, my sister and I, as well as our children, suffered severe psychological, emotional and financial prejudice as a result of our father's loss. It was only in 2002 that our mother received a social grant which we all lived on. The social grant was insufficient to maintain all my mother's dependents. My sister had no choice but to drop out of school to hustle to maintain herself and to support our family.

10. We are very unhappy with the undue delay and/or failure to by the authorities to timeously investigate and prosecute the perpetrators who were involved in the kidnapping, torture and murder of the PEBCO 3. In addition to the violation and suffering that that the apartheid system caused to our family, we have been deprived of justice and fairness by the democratic state. Our fundamental rights to life and dignity have been violated. We are merely sojourning through the maze of life but without any meaningful living. The Godolozi family still endures the pain occasioned by the loss of our father and the impossibility of justice

M. G

worsens our lives' misfortunes. We are the victims of unfair and unjust treatment by the government and the policing and prosecuting authorities.

Conclusion

11. The Godolozi family supports the relief that is sought in this application. Constitutional damages are necessary to vindicate our rights that have been violated by the deliberate suppression of TRC cases. The damages will enable us to celebrate the PEBCO 3 and to continue with our quest for justice. The President must be compelled to appoint an independent commission of the inquiry to establish why and by whom the TRC cases were deliberately suppressed. We deserve to know the truth.

MKHONTOWESIZWE GODOLOZI

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at KARIEGA on this the 18TH day of DECEMBER 2024.

SOUTH AFRICAN POLICE SERVICE
VISPOL
18 DEC 2024
STATION COMMANDER
KARIEGA
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS

Full Names: SHANTALL DOLLELIS
Business Address: 10 CHURCH STR, CENTRAL, KARIEGA
Designation: SGT. SA POLICE SERVICE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

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Commissioner of Oaths
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PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

SUPPORTING AFFIDAVIT – MOGAPI SOLOMON TLHAPI

I, the undersigned,

MOGAPI SOLOMON TLHAPI

do hereby make oath and state as follows:

1. I am an adult male resident in Ikageng, Potchefstroom. I am the brother of Nicholas Ramatua 'Boiki' Tlhapi. Boiki forcefully disappeared at the hands of the Security Police in March 1986. He was 26 years old at the time of his disappearance.

2. I am the 22nd Applicant in this application.

3. The facts contained in this affidavit are both true and correct.

4. I depose to this affidavit on behalf of my mother, Thalitha Makgomo Tlhapi and my four siblings Theledi Jacob Tlhapi, Motlagomang Selinah Magau, Raseiso Jacobus Tlhapi and Mathibane Dorothy Tlhapi. Boiki's children, Kamogelo, Oukat, Tshenolo, Tsholofelo and Mathapelo are also recognised in this affidavit.

Boiki Tlhapi

5. Boiki was born to Barileng James Tlhapi and Thalitha Makgomo Tlhapi on 22 January 1960 in Ikageng Township, Potchefstroom. He was the eldest of six children. Boiki was schooled in Nanogeng Primary School, Keagile Higher Primary and Tlokwe Secondary School. He left school when he completed form 3, the equivalent of grade 10.

6. Boiki was a loving, caring and intelligent son and brother who was well known and respected in Ikageng. He cared deeply for his family and his community and wanted to see them free from the oppression of the apartheid regime.

7. We knew that Boiki was an activist, but we never participated in his political involvement. Our father was conscious of the threat that political activism posed to our safety and security, and he tried to shield us from potential harm. Boiki became a member of the ANC Youth League. He was resolute in his fight against the apartheid government. His political involvement placed him on the radar of the security police. He was arrested on several occasions but never charged.

8. On 20 March 1986, Boiki and a number of his friends left Ikageng for Klerksdorp to attend the funeral of various comrades of the Jouberton Youth Congress who were killed by the police during unrest. On their way to Klerksdorp, the kombi that the group was travelling in was stopped at a roadblock by the police. Boiki and several other members of the group were arrested in Jouberton and subsequently detained at the Joubert and Stilfontein Police Stations. Boiki never returned home.

9. Boiki's comrade, George Mangoeyane, who was also arrested on 20 March 1986 but released shortly thereafter, informed our father of Boiki's arrest. George told my father that Boiki was viciously assaulted by the police. He saw Boiki lying motionless on the floor in the passage at the Stilfontein Police Station, bleeding from his mouth and nose.

10. My father investigated Boiki's disappearance with the assistance of my mother's employer, a white man from Potchefstroom who we knew as Mr Strauss. They

went to the Stilfontein Police Station to make enquiries about, but it came to nought. My father was told that the police had no record of Boiki being detained at Stilfontein Police Station, however, the police later conceded that Boiki had been arrested on 20 March 1986 but that he was released the following day.

The 1994 inquest

11. In 1993, a former police officer who was stationed at the Stilfontein Police Station, Constable George Mbathu, deposed an affidavit in which he revealed that he had knowledge of Boiki's disappearance. Mbathu stated under oath that Warrant Officer Willem Petrus Viljoen, Sergeant Itumeleng Moses Matiti and Constables Tseladimitlwa, April Tswaedi, Majaja and Tsetsi John Mano had been involved in the arrest, interrogation and torture of Boiki and his friends. He also alleged that Boiki was killed by the police and that his body had been dumped down a mine shaft near Stilfontein. Mbathu later pointed out the infamous James Shaft, which had been abandoned at the time. The James Shaft has since been closed with a large concrete seal.

12. Lawyers for Human Rights, our family's lawyers at the time, accompanied the South African Police and the Independent Board of Inquiry to James Shaft in 1993. The police lowered a camera down the shaft to establish whether there were bodies dumped in the shaft. At the time, the same police officers who were responsible for Boiki's arrest and disappearance were the ones who conducted the investigation at the shaft. The video footage revealed a number of shadows but there was no conclusive proof that Boiki's body had been dumped there.

13. Our lawyers demanded a further investigation and in 1994 an inquest docket was registered (GO 49/94) at the Klerksdorp Magistrates' Court. Despite obtaining

several statements from Boiki's friends and the police officers who were stationed at the Stilfontein Police Station on the night of Boiki's arrest, the Inquest Magistrate returned a finding that it could not conclude that Boiki was deceased. It took nearly a year for the Magistrate to deliver the ruling.

The Truth and Reconciliation Commission

14. Our father continued to pursue Boiki's disappearance. On 29 September 1996, my father presented a plea for justice to the Truth and Reconciliation Commission's ("**TRC**") Human Rights Violations Committee. During my father's testimony, my mother continuously wept and ultimately collapsed and was rushed to hospital as my father related what he had gone through in search of Boiki.

15. None of the police officers who made statements during the inquest applied for amnesty for Boiki's disappearance. On the strength of my father's statement, the Human Rights Violations Committee declared Boiki a victim of gross human rights violations. The Committee found that Viljoen, Makiti, Tseladimitlwa, Tshwaedi, Majaja and Mano assaulted and tortured Boiki. It also found the Jouberton Security Branch, together with the Commissioner of Police, the Head of the Security Branch and the Minister of Law and Order responsible for Boiki's disappearance.

16. Our family, and in particular my father, expected that the police and prosecuting authorities under the democratic government would continue the search for Boiki. My father hoped that an investigation would lead to the arrest of those responsible for Boiki's forceful disappearance and he wished that his son's

remains would ultimately be returned to our family so that we could hold a proper burial for Boiki.

The toll on our family

17. My father never stopped pursuing Boiki's disappearance. He dedicated the rest of his life to searching for his missing son and this affected him greatly. He was never really the same again after Boiki disappeared. In some way one could say that a part of our father left us when Boike disappeared.

18. In March 2017, 30 years after Boiki's disappearance, my father, in response to a question from a journalist said:

> "How can I sleep at night knowing my son's body, which was last seen battered and bloodied in some office at a police station, is possibly lying at the bottom of a disused mine shaft for the past 30 years?"

My father carried the pain of Boiki's disappearance with him to his grave when sadly he passed away in September 2020 at the age of 80, without knowing what happened to his son. The City Press article titled "'I must bury my son's bones before I die': Activist's parents plead for closure" in which my father is quoted is attached as annexure "**MST1**".

19. My mother also suffered severely from Boiki disappearance. She is now 82 years old and struggles with her hearing. The pain and hurt that she suffered when Boiki disappeared 38 years ago is still extremely raw. Her biggest fear is that she will depart this earth without knowing what happened to her son and without giving him a proper burial. This is a pain that no mother deserves to endure, let alone for a continuous period of 38 years.

20. My siblings and I, and Boiki's children, were also affected by his disappearance. We miss our brother dearly and we do not have closure. We were deprived of a life with Boiki, who we believe would have had a bright future. He could have taken care of us, but because of the horrendous acts of the apartheid police and the regime, we were left to fend for ourselves and to take care of Boiki's children.

Conclusion

21. The police are currently investigating Boiki's case with a view to reopen the 1994 inquest into his disappearance. This investigation has been ongoing since November 2022 and has been conducted at snail's pace. Without the assistance of the Foundation for Human Rights and our pro bono lawyers we do not believe that the case would have progressed to this stage. We recently learned that the Minister of Justice is considering a request to re-open the inquest into Boiki's death.

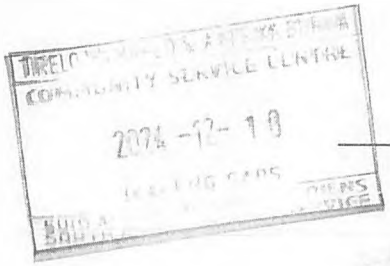
22. The harsh reality for our family, and so many others whose loved ones were killed or disappeared under apartheid, is that the democratic government has failed us over the past three decades. The politicians and government officials who suppressed TRC cases know why they decided to deprive us of truth, justice and closure. This truth has not been forthcoming, and the time has come for it to be told - the government must do what is right. Our rights to human dignity have been deeply violated. We deserve to know why our cases were neglected for decades after the conclusion of the TRC in 1998. The truth must prevail, and justice must be done.

23. I support the relief claimed in this application. Constitutional damages will help us to commemorate Boiki's life and to continue pursuing truth and justice. An

independent and public commission of inquiry must be established to investigate the political suppression of the TRC cases.

MOGAPI SOLOMON TLHAPI

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Klerksdorp on this the 10 day of 12 2024.



COMMISSIONER OF OATHS

Full Names: R.U Mayeke
Business Address: 3335 Jotlhole
Designation: Warrant Officer

"MST1"

15 Mar 2017

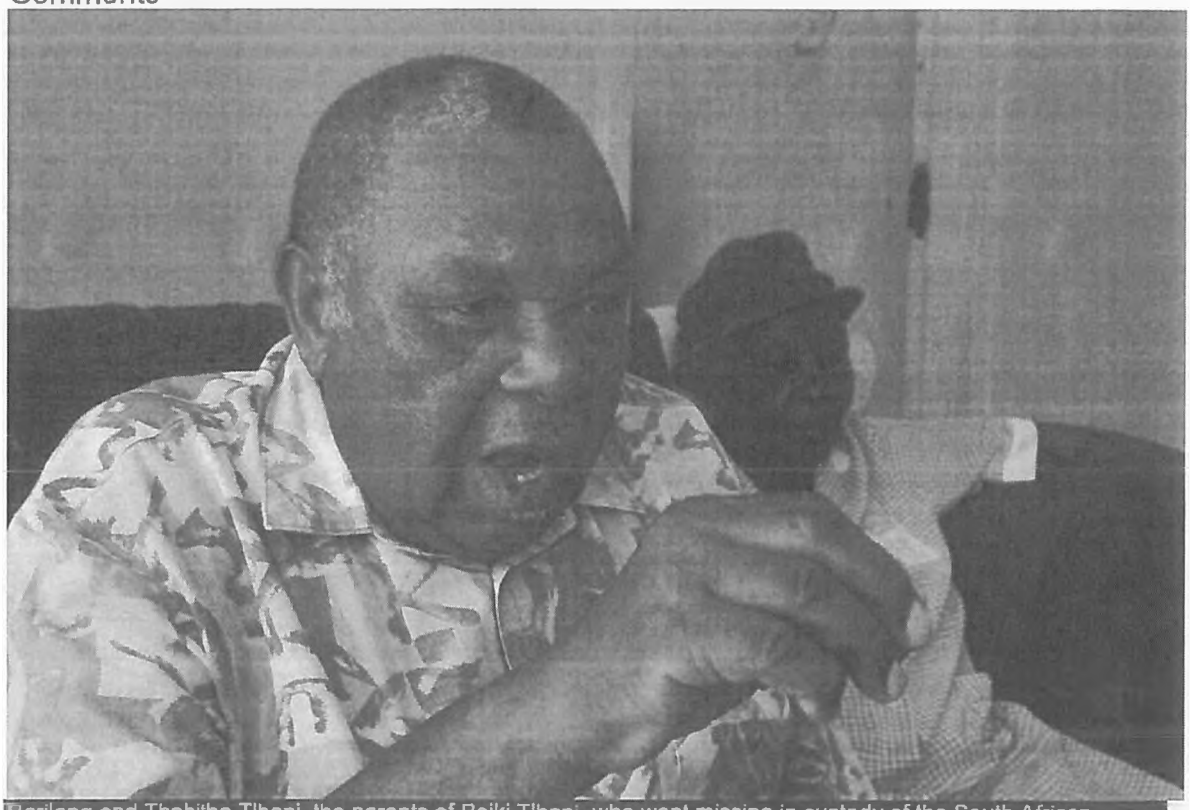
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'I must bury my son's bones before I die': Activist's parents plead for closure

City Press

Poloko Tau

Comments



Barileng and Thabitha Tlhapi, the parents of Boiki Tlhapi, who went missing in custody of the South African Police in the1980s. Picture: Tebogo Letsie

The family of struggle activist Ramatha Tlhapi say they have been let down by the National Prosecuting Authority's missing persons task team, which has not recovered his remains believed to be at the bottom of a disused mine shaft for the past 30 years.

"How can I sleep at night knowing my son's body, which was last seen battered and bloodied in some office at a police station, is possibly lying at the bottom of a disused mine shaft for the past 30 years?" said Barileng Tlhapi, the father of Ramatha.

Affectionately known as Boikie, Tlhapi's son was a struggle activist who never made it back home after he was arrested with several others while on their way from Potchefstroom to a night vigil of a fellow activist in Klerksdorp, North West, on March 20 1986.

On Monday March 20, it will be exactly 30 years since Tlhapi saw his son alive. The family's last hope of finding his remains relies on claims made by a former apartheid policeman, George Mbathu, that he saw a badly injured Boikie at Stilfontein police station where he worked at the time. He also claimed that Boikie's body was later loaded into a police van and dumped in the infamous James Shaft – an abandoned mine shaft nearby.

The Tlhapi family have been hoping that someone in the NPA would at least give Mbathu's statement some attention and the benefit of the doubt by going down the shaft to Boikie's body and that of other activists that disappeared in the small town.

Not convinced

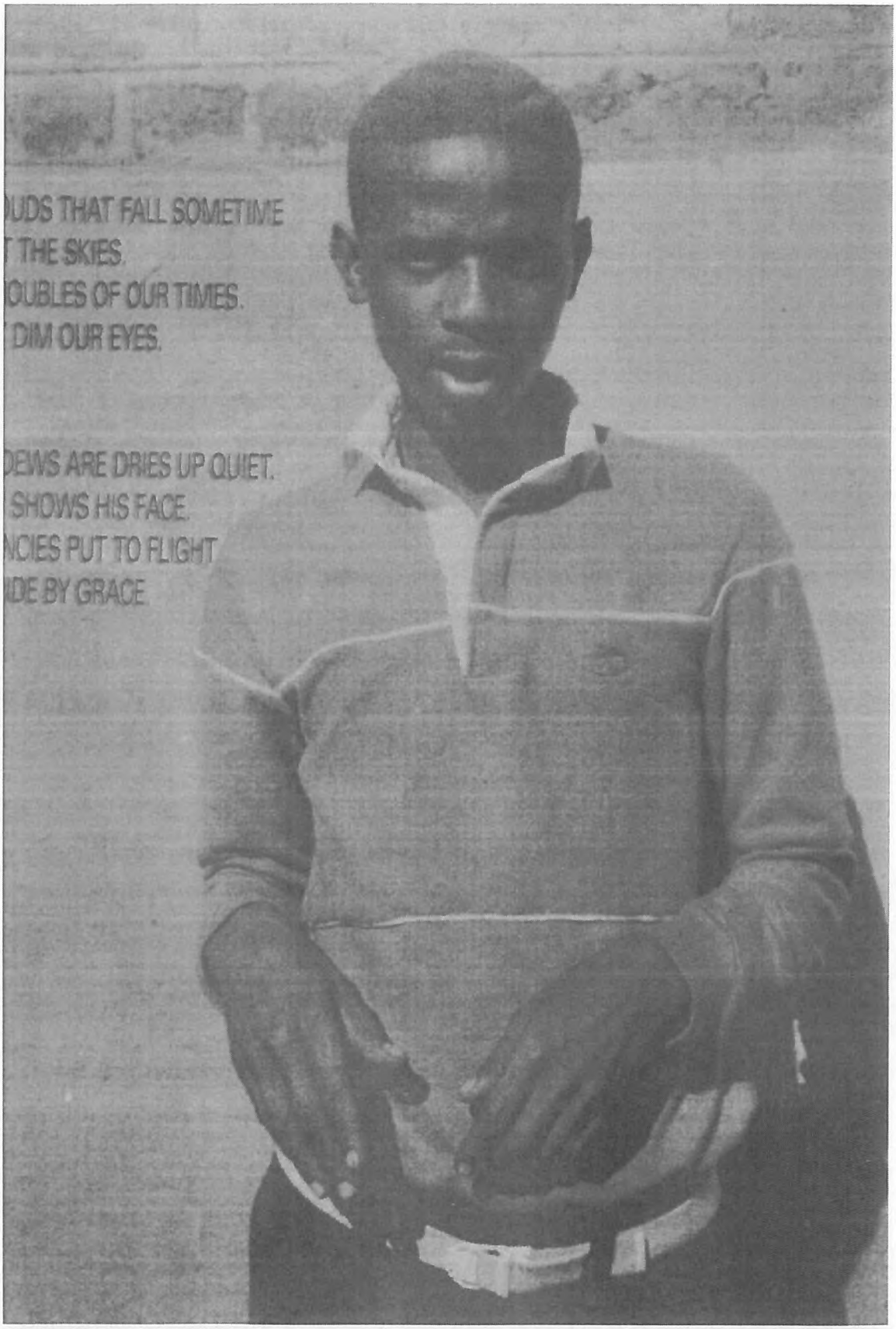
The authorities, however, do not seem convinced. They have not rushed to explore the shaft in search of the bodies despite the information coming from Mbathu.

The missing persons task team told City Press they were aware of Boikie's disappearance and claims around what happened to his body. The task team's head, Madeleine Fullard, said Mbathu's statement was only "hearsay" and that "something concrete" was needed to trigger such enormous work at the shaft, believed to be more than 2 000 metres deep.

"We need conclusive facts and not just hearsay but we have been working on the case and our investigation continues. I am not saying we will never go search the shaft," Fullard said.

Her statement has given the family some hope even though they have ran out of patience with authorities.

Desperate for closure



Boikie Tlhapi, who went missing in custody of the South African Police in the 1980s. Picture: Tebogo Letsie

Back in Ikageng township in Potchefstroom, the Tlhapi family is desperate for closure. The mood was sombre inside the family lounge where Boikie's framed picture is still hanging on the wall.

"We're desperate for closure. Who in our shoes would not believe Mbathu?" Tlhapi senior said.

If he could, he said, he would go down the shaft himself and retrieve his son's remains. But this is a dangerous mission that requires experts with specialised equipment, he lamented.

Boikie's 75-year-old mother Thalitha remained silent during the interview. Her face shiny, with sunken eyes, she often nodded in agreement with her husband as she shared the heart-rending tale of her family's three decades of torment and endless questions about what could have happened to their child.

Thalitha was rushed to hospital 20 years ago after she fainted at the Truth and Reconciliation Commission (TRC) hearings while her husband was giving testimony on the disappearance of their son. No police officer applied for amnesty or confessed to killing or disposing of Boikie's body.

Tlhapi told the TRC: "The people involved are Viljoen and April [two police officers] and this other one who witnessed the electrocution of my son. I would appreciate it if they come to tell exactly what they did to him. If my child is alive, please bring him back. If he is dead, it is still okay; bring him back and I will bury him."

Key man dead

City Press has since learnt that April Tshwaedi – who has been named by Tlhapi and Mbathu as one of those who last saw Boikie – died earlier this year possibly taking the secret to the grave with him.

The Hawks spokesperson Brigadier Hangwani Mulaudzi told City Press they found out that the "central person who knew about the allegations was Tshwaedi, who unfortunately allegedly committed suicide".

Fullard said her task team has tried to make contact with Tshwaedi but said he had been "evasive". It was not clear where the other policeman last seen with Boikie, "Viljoen", was.

"Around 2007 or 2008 our team unsuccessfully tried to interview an implicated former police officer Tshwaedi. We then interviewed Mbathu in 2013 and also made some inquiries on the shaft looking for details like owners, its depth and so on," Fullard said.

"The challenge is we don't have anything from any of the alleged perpetrators. Going down the shaft would be a huge and dangerous operation that we would like to do [if we had] conclusive facts. We appeal to anyone with information to come forward even if it means doing so anonymously to ourselves," she said.

Dad's visits

Nothing will make Tlhapi, now 77, happier than dying knowing he gave his missing son a decent burial.

"We're about to die having not seen our son's bones. We are hugely disappointed. But we still hope that someone in government somewhere would move to our side and help us find closure.

"Individuals within the police service have failed us by not telling the truth and not applying for amnesty. Some of them have taken it to the grave and thus denied us justice and closure," he said.

Tlhapi said he had twice been to James Shaft where divers went on a "search for about four minutes and came back empty handed".

"When we went back few months later, I think in the early 90s, surprisingly the shaft was covered with concrete. A remote-controlled camera was lowered into the shaft and we watched on a monitor from the surface. I saw some black things and lots of water," Tlhapi said.

"Later a white man came to me and said: 'Are you satisfied now. There are no bodies down there.' He threw his hands in the air and walked away when I said to him, I saw black things and we're told bodies were covered in black plastic bags before they were thrown in there."

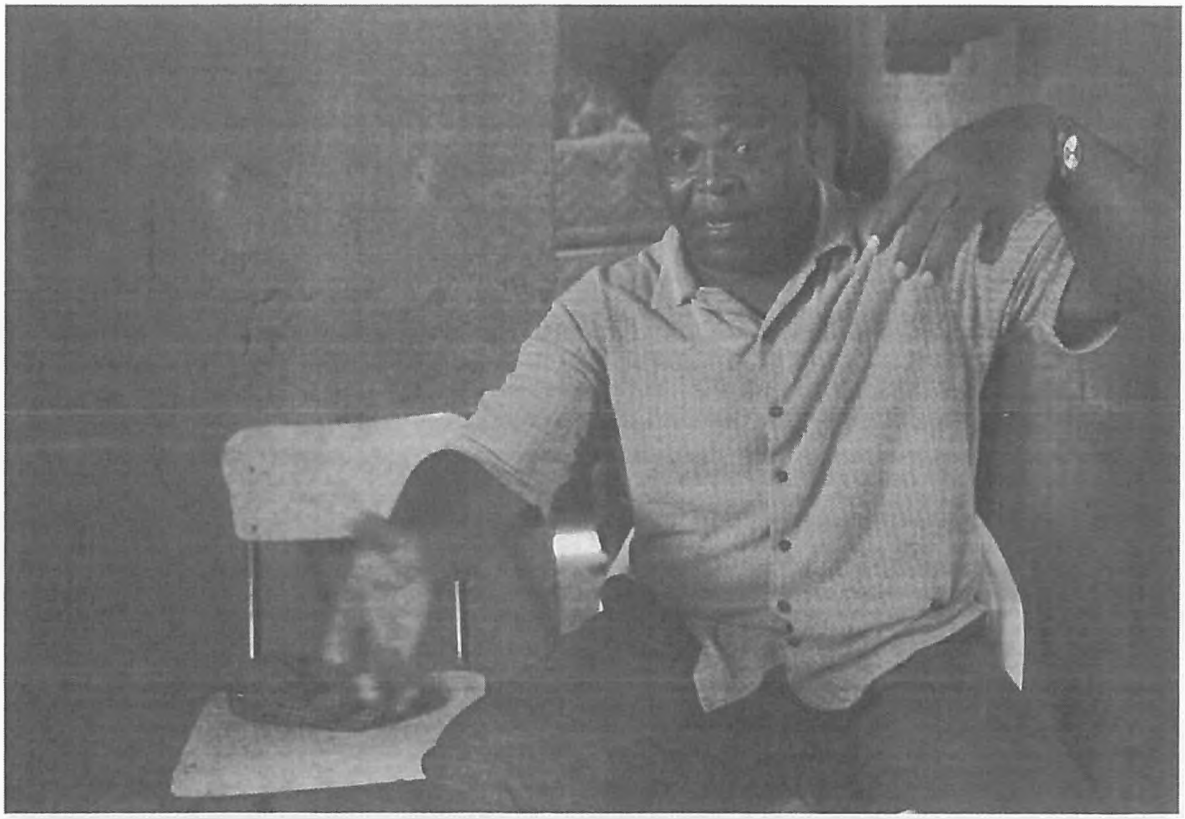
Tlhapi said he was not satisfied with these efforts. "Technology has now advanced and I ask myself why police come to take statements from us almost every year but nothing is happening. Mbathu has provided information ... why can't they act on it and retrieve my son's body?" he asked.

Fullard noted work done by the Lawyers for Human Rights on Boikie's case in the late 80s and 90s.

"It went as far as inquest, which I think was inconclusive. We also did not get any report or footage from the time when a camera was lowered into the shaft," she said.

Charge me if I lied

Mbathu remains unyielding in his belief that the bodies are down the shaft. He has put his head on the block saying: "Please charge me if you go there and return empty-handed. I am saying Boikie Thapi's body was thrown down James Shaft and many other bodies have ended up in there."



George Mbathu a former police officer in the 1970's untill early 1990s, says he knows where polictical activists' bodies were discarded during the apartheid struggle in Klerksdorp and Potchefstroom. Picture: Tebogo Letsie

He told City Press he had an office not far from the one Boikie was kept.

"I went to that office on March 21 1986 and when I could not open the door I walked around and through the window, I saw Boikie lying there covered in blood which was also coming out his mouth and nose ... he had been badly beaten."

"There were two officers, April Tshwaedi and Viljoen, in the office and the next day records showed that Boikie was released and I ask myself how they released him when he did not look like he was alive," he said.

He said he also saw officers loading a black plastic bag in the bakkie and I knew very well that was Boikie's body. One officer later came to me and said: "We're done with those people. You will sleep in peace; that boy has been thrown in the shaft".

Mbathu said the "sleeping in peace" referred to him not having to worry about his house in the township being stoned or torched after it had happened several times before.

Meanwhile, Fullard said her team was also aware of claims made by Mbathu that the body of another struggle activist, Nokuthula Simelane, ended down the same shaft. She said a probe into Simelane's disappearance was also continuing.

Simelane, an uMkhonto weSizwe member, was abducted in 1983 at the age of 23 and the TRC heard of how she was beaten and tortured by the security police. There were contradicting statements of her body buried somewhere around Rustenburg while others claimed the body was last seen in Potchefstroom.

Mbathu claimed to have seen her body at Stilfontein police station where he worked – which is about 35km away from Potchefstroom. Simelane's body was never found and her sister, who is now the mayor of Polokwane in Limpopo, Thembi Nkadimeng, said the "search continues".

Meanwhile, a friend of Boikie, George Magwejane, corroborated Mbathu's version, suggesting they saw Tlhapi's son lying injured on the floor at the police station.



George Magwejane a friend of Boikie Tlhapi, who went missing in custody of the South African Police in 1980s. Picture: Tebogo Letsie

"We were arrested together and the following day I was being led to another office for my turn to be tortured when I saw him lying motionless on the floor. I can't say if he was alive or not but I noticed blood coming out of his mouth, ears and nose," Magwejane said.

"I was severely beaten and tortured but my injuries were nothing compared to what Boikie looked like." He said.

The missing persons task team has unearthed the remains of apartheid victims from all over the country and beyond borders. It remained unclear whether the "notorious" shaft is ever going to be searched for any possible human remains.

The Hawks said they were dealing with separate TRC matters. They referred City Press to North West provincial detective offices.

The provincial police spokesperson, Brigadier Sabata Mokgwabone, did not respond to City Press enquiries.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

CERTIFIED A TRUE COPY
OF THE ORIGINAL

TAYLA ILSLEY
BA Law (UP) - LLB (UP)
Commissioner of Oaths
Ex Officio / Practising Attorney R.S.A
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18/01/2025

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THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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SUPPORTING AFFIDAVIT – DR ZAHEED KIMMIE

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I, the undersigned,

DR ZAHEED KIMMIE

do hereby make oath and state as follows:

1. I am an adult male and the Executive Director of the Foundation for Human Rights ("**FHR**" or "**the Foundation**"), registered as a non-profit company, situated at the 7th Floor, Metal Box Building, 25 Owl Street, Braamfontein, Johannesburg.

2. I have a PhD in Mathematics from the University of Cape Town and a Master's in Public Health from Harvard University. Prior to joining the FHR I was a Senior Statistician and Group Manager for Planning with the Council for Scientific and Industrial Research.

3. I am duly authorised to depose to this affidavit on behalf of the FHR.

4. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

5. I have read the notice of motion, the founding affidavit of Lukhanyo Calata and the supporting affidavit of Yasmin Sooka. I confirm the contents thereof insofar as they relate to the FHR.

6. In amplification thereof, and in what follows, I set out:

6.1 a brief history of the FHR's involvement in seeking justice for victims and families of victims of apartheid-era gross human rights violations;

6.2 the need for this application.

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About the Foundation for Human Rights

7. The FHR is a non-profit human rights organisation based in Johannesburg working to protect and promote human rights and the values and commitments enshrined in South Africa's Constitution. One of the FHR's flagship programmes has been the "Unfinished Business of the Truth and Reconciliation Commission Programme", which works towards criminal accountability for apartheid-era crimes, in particular for gross human rights violations where amnesty was refused by the Truth and Reconciliation Commission ("**TRC**") or not applied for.

8. The FHR was established in 1996 by the European Union and the Government of South Africa to address the historical legacy of apartheid, to promote and advance transformation in the country, and to build a human rights culture based upon the principles of the new Constitution.

9. Over the past two decades, the Foundation has consistently pursued the unfinished business of the TRC using a variety of intervention strategies. FHR has played a leading role in promoting the rights of victims of apartheid-era crimes by supporting the recommendations of the Truth and Reconciliation Commission, particularly those related to accountability for gross violations of human rights, reparations for victims, and public access to the records of the TRC currently with the state archives.

10. After the winding up of the TRC, the FHR helped to establish a new government unit to trace the remains of activists who were disappeared or murdered by apartheid security forces – the Missing Persons Task Team located within the National Prosecuting Authority ("**NPA**"), through the provision of seed funding. The grant enabled the unit to recruit its first staff

members and begin work. The work of the unit has led to the discovery, recovery, and reburial of the remains of former activities killed by the apartheid regime.

11. The Foundation has a long history of advocating for criminal accountability for the TRC cases and supporting the efforts of victims seeking justice. The TRC cases involve gross human rights violations such as killings, torture, kidnappings and enforced disappearances. Many of these violations are likely to amount to serious international crimes such as crimes against of humanity under customary international law.

12. In 2002, the FHR assisted the Khulumani Support Group to bring a court application against 20 large corporations in the USA under the Alien Tort Claims Act seeking compensation for the companies' role in aiding and abetting the oppressive and criminal system of apartheid.

13. The FHR supported the court applications opposing the 2005 amendments to the NPA's Prosecution Policy and President Mbeki's 2007 Special Dispensation on Political Pardons, which were aimed at introducing "backdoor amnesties" for apartheid-era gross human rights violations, and which were successfully stopped in the courts.

14. The Foundation commissioned an analysis of all the amnesty cases that came before the TRC in order to identify which cases ought to be investigated further with a view towards future prosecutions. The TRC recommended investigations into several hundred cases arising out of the amnesty process.

15. The FHR engaged the services of a human rights investigator, the late Frank Dutton, the former police detective who investigated notable cases such as the Trust Feeds and KwaMakutha massacres and who conducted investigations

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for the Goldstone Commission. Dutton reviewed all of the amnesty cases, which included 76 deaths in detention, and identified priority cases for further investigation and prosecution by the NPA.

16. One of the Foundation's most important objectives is to ensure that cases against alleged perpetrators who were denied amnesty or who did not apply for amnesty, are prosecuted to the fullest extent under the law. To this end, the FHR has established a dedicated programme, known as the Unfinished Business of the TRC ("**UBTRC**"), which is aimed at ensuring criminal accountability for apartheid-era crimes through:

16.1 supporting victims' families to pursue their matters through the courts,

16.2 advocacy efforts on behalf of these families as well as in the public interest.

17. The FHR works in close collaboration with the South African Coalition for Transitional Justice, an umbrella body of organisations and individuals working to advance the rights of victims of apartheid era gross human rights violations and to hold the South African government accountable to its obligations. The Coalition focusses on issues that impact the rights of victims including pardons, prosecutions, reparations, and torture and disappearances.

18. Between 2015 and September 2024, the FHR has spent a total of **R8 482 232** on direct support to the TRC cases including on investigations, legal fees and expert fees. See **Table 1** attached to the memorandum titled "Estimated Costs" annexed hereto marked **"ZK"**. If requested by this Honourable Court we can supply the invoice analysis, methodology employed and underlying documentation.

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19. This amount includes disbursements such as transport, accommodation, lunches, refreshments, printing and other incidental costs incurred by victims' families, investigator and counsel. However, this amount excludes the cost of FHR staff, as well as associated administrative, communication, logistical support costs, and other disbursements incurred on behalf of the FHR.

20. This amount also does not include the time contributed by the lead counsel on the TRC cases, who between 2005 and 2023 worked on all cases pro bono, which included more than 100 days in court, not counting time spent in preparation. Some of the technical experts who provided expert reports and testified in the reopened inquests also worked without charge or on the basis of discounted fee.

Supporting victims' families to pursue their matters through the courts

21. For the past twenty years, the FHR has advocated for the completion of the unfinished business of the TRC. The FHR supports many of the families who went through the TRC process who are still seeking truth, justice and closure.

22. Victims of human rights violations and their families are at the heart of the UBTRC. They are the key drivers behind the pursuit of justice and the quest for truth behind long standing apartheid era crimes.

23. A primary focus of the FHR has been to assist families in their engagements with the Directorate of Priority Crime Investigations ("**DPCI**") and the NPA to take their cases forward.

24. In 2005, the FHR was first approached by Thembi Simelane to assist with the case into the disappearance and murder of her sister, Nokuthula Simelane, as

described in the Founding Affidavit, and the supporting affidavit of Ernestina Simelane.

25. In 2017, the historic reopened inquest into the death in detention of Ahmed Timol took place. It culminated in Judge Mothle's judgment, which found that Ahmed Timol was tortured and murdered by the Security Branch of the South African Police. The FHR supported the efforts of the Timol family in their endeavours to seek truth and closure. Encouraged by the success of the Timol inquest, other families approached FHR for assistance.

26. Subsequently, other inquests into the deaths in detention of Dr Neil Aggett, Ernest Dipale, Dr Hoosen Haffejee and Imam Haron were reopened. In the Aggett judgment delivered in March 2022, the court overturned the suicide findings of the 1982 Inquest Court. It rejected the finding of "suicide", and ruled that Dr Aggett was tortured and murdered by the Security Branch of the South African Police. In 2023, courts delivered judgments in the reopened inquests into the deaths in detention of Dr Hoosen Haffejee and Imam Haron, also overturning the initial findings of suicide and implicating Security Branch members in their deaths.

27. In January 2024, the Minister of Justice announced the reopening of a third inquest into the murders of the Cradock Four activists. However, the commencement of the inquest was further postponed to June 2, 2025. The collapse of the inquest occurred notwithstanding strenuous efforts made on behalf of the families to ensure a timely start. Legal representatives of the former SAP and SADF witnesses complained that they were notified too late to prepare for the inquest and have not been able to secure state funding for their legal costs.

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28. In 2023, FHR has also been informed that inquests into the 1993 Highgate Massacre and murder of Dr Rick Turner would be reopened. The Highgate Massacre inquest has been set down for hearing on 27 January – 7 February at the High Court in East London. Unfortunately, despite the efforts to push the matter forward, the Turner inquest is yet to be set down for hearing at the Durban High Court.

29. In October 2022, the NPA opened inquests into four other matters, namely the murders and enforced disappearances of the ANC activists and MK operatives in Kwa-Zulu Natal: Ntombikayise "Ntombi" Kubheka, Musawakhe "Sbho" Phewa, Zamukwenzani Bright Mlobeli/Sokhulu, and Jameson Ngoloyi Mngomezulu. The Kubheka and Phewa families have since instructed the FHR to assist with their matters. The inquests into these matters are now held in abeyance, pending criminal prosecutions of the alleged perpetrators, which appear to have stalled.

30. The FHR and its legal teams are also supporting families in the few cases that are subject to prosecution, including the murders of anti-apartheid activists Nokuthula Simelane and the COSAS Four. As at the time of writing these cases, regrettably, remain stalled. However, on a positive note, Johan Marais, one of the four former police officers accused in the 1987 murder of anti-apartheid activist Caiphus Nyoka, pleaded guilty to the murder charge in the Pretoria High Court on 12 November 2024.

31. In November 2024, the NPA confirmed in writing that the Minister of Justice has formally reopened an inquest into disappearance of Ramatua Nicholas Tlhapi and requested the Judge President of the Hight Court to appoint a judge to preside over the inquest.

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32. All the cases described above have progressed largely due to consistent pressure from the families, legal representatives and the FHR. In virtually all the TRC cases before the courts today, the victims' families, supported by FHR and their legal teams, had to litigate or threaten litigation to force the NPA and the DPCI to act.

33. The FHR currently provides active assistance to victims' and victims' families in 24 TRC cases.

FHR's advocacy efforts

34. In addition to pursuing justice on behalf of victims' families, the FHR has attempted to address the systemic challenges within the NPA by focusing on concentrated strategic interventions. The FHR has also established a website on the Unfinished Business of the TRC, which monitors all key developments.

35. A key intervention has centred on advocacy to set up dedicated capacity to deal with the TRC cases within the NPA and the DPCI. In order to address the lacklustre delivery in respect of the TRC cases the FHR since 2019 has been pressing the state to introduce a specialist capacity to investigate and prosecute crimes from the apartheid era. This included providing an opinion on how this could be done within existing legal frameworks, such as establishing an investigating directorate. These efforts led to the establishment of the TRC Components within the NPA and DPCI in 2021, with their operationalisation following in 2022. However, the powers, functions, and composition of these bodies fall significantly short of the recommendations made by the FHR.

36. In addition, the FHR has made proposals around the need to set up a liaison structure between the NPA and interested parties (i.e., FHR, victims' groups

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etc.) to create a permanent communication channel for regular progress reporting and information sharing about the TRC cases. To date, these efforts have not been successful with no regular liaison, and only occasional meetings with the NPA's TRC Component, typically only once a year.

37. Since 2005, the FHR and legal teams representing the families of anti-apartheid activists, have had numerous interactions with the NPA aimed at convincing them to include serious international crimes under customary international law as per section 232 of the Constitution in the indictments of accused. With the exception of the COSAS Four case these attempts have been unsuccessful.

38. The FHR first raised the issue of international criminal charges with the NPA in 2005 and revisited the matter following the indictment issued in the Nokuthula Simelane case in 2016. In total the FHR has submitted 6 legal opinions and memoranda on this issue.

39. Since 2022 the FHR has been advocating for the creation of dedicated courts (like the Sexual Offences Court and the Special Commercial Crime Courts) to deal expeditiously with the TRC cases.

40. The Foundation has also supported the civil society call to the President to set up an independent and public commission of inquiry with the necessary powers under the Commissions Act 8 of 1947 to investigate the suppression of the TRC cases and the political interference in the work of the NPA and the police.

41. The FHR continues to advocate for:

41.1 Closure, truth and healing for victims and victims' families;

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41.2 Access to state information and archives related to apartheid era human rights violations;

41.3 Successful prosecutions through new independent and specialist investigations;

41.4 Effective and capable state law enforcement agencies to pursue these crimes;

41.5 Meaningful reparations as recommended by the TRC under the Promotion of National Unity and Reconciliation Act, No. 34 of 1995,

41.6 Greater public awareness about the TRC and post-TRC processes and developments.

The need for this application and the court's intervention

42. Prosecution of perpetrators is a necessary legal step in line with the Constitution and envisaged in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the TRC Act") and recommended in the Final Report of the TRC published in 2003.

43. The persistent, long-term failure of the South African government to complete the unfinished business of the TRC has led to a whole series of consequences at different levels.

44. At the level of victims and their families, there has been a lack of justice, truth and accountability for human rights violations of the past. At the level of the perpetrators of these crimes, there has been impunity for the commission of gross violations of human rights. At a wider societal level, this has contributed to a culture of impunity for committing serious crimes and a diminution in

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respect for the rule of law in post-apartheid South Africa. The finalisation of these cases remains extremely urgent.

45. Given the wholescale suppression of the TRC cases over some two decades, and the dire failure of the state to purse its constitutional obligations, the FHR endorses the orders sought compelling the President to establish an independent commission of inquiry, as well as the payment of constitutional damages to the families to vindicate their deeply violated rights.

46. The FHR has provided guidance to the legal team in determining the quantum sought under the constitutional damages claim. This process has been informed by decades of experience working on TRC cases. A detailed narrative substantiating the amounts requested under the "Advance Truth, Justice, and Closure" component of constitutional damages is attached to this affidavit marked as annex "**ZK**".

47. I further confirm that the amounts listed under the head of constitutional damages titled "Memorialisation, commemoration and public education" in the founding affidavit are consistent with the amounts that FHR has granted for similar or equivalent projects over the years.

48. Accordingly, the Foundation is in strong support of the relief sought in the Notice of Motion and prays for the granting of these remedies to the families. We wish to place on record that should a fund to support the legal and other costs of families of victims be established as a result of this action, the Foundation will not access any monies from that fund for its own staffing or administrative costs.

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DR ZAHEED KIMMIE

Signed and sworn to before me at SANDTON on this the 17 day of JANUARY **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

COMMISSIONER OF OATHS

Full Names: Nicola Grace Irving

Business Address: 15 Alice Lane, Sandton

Designation: Commissioner of Oaths Ex Officio

Capacity: Practising Attorney, Republic of South Africa

Annex "ZK"

Estimated costs of investigations, inquests and prosecutions

Purpose of the document

The document has been prepared by the Foundation for Human Rights and provides estimations of costs needed to cover three sets of cases:

- A typical inquest
- A typical prosecution
- A case that has advanced neither to an inquest nor to prosecution (an investigative case).

This document has been prepared to substantiate the amounts requested under the "Advance Truth, Justice, and Closure" component of constitutional damages.

General comments about the estimates

1. The figures below draw on the actual expenditure for the TRC cases incurred by the Foundation for Human Rights and Webber Wentzel, as well as their experience supporting the TRC cases. However, they represent estimated costs for 'a typical inquest', 'a typical prosecution' and 'a typical investigative' case.

2. The administrative costs have been calculated based on what would be a reasonable fee for managing the case. They do not reflect the level of support provided by FHR's staff for the TRC cases, which at times included an enhanced level of assistance that will not always be required in the administration of such cases.

3. The estimated costs below do not include media & communication costs, which the FHR would typically incur as part of its mobilisation, advocacy and raising awareness work but which are not necessary to successfully conduct an inquest.

4. For the purposes of these estimates and this document, "investigation" encompasses all investigation-related activities, including but not limited to investigator fees, tracings, background checks and research or analysis of evidence.

A typical inquest

Inquest's length

5. The inquest days range from 8 days in Haron, to 16 days in Timol, 18 days in Haffejee and 44 days in Aggett **[See Table 1 annexed].** We have estimated that a typical inquest would therefore run for 15 days (3 weeks) for the purpose of the calculations below.

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Investigation

6. We have considered the costs incurred by the FHR in the previous inquests (particularly in Timol, Haffejee and Aggett) and have established that investigations in a typical inquest would cost approximately R400,000.

Legal costs

7. Our experience shows that a typical inquest would require one lead counsel, two junior counsel and three attorneys.

8. In addition to 15 days in court, we have calculated two additional days per court day to estimate the time that would be typically required by attorneys and counsel to prepare for an inquest. We have used 45 days as a baseline for a typical inquest.

9. Counsel and attorneys' fees:

    10.1. We have used a daily tariff (Scale A) of R11,500 as prescribed by the High Court Rules. We have used the lowest rate, which seems the most reasonable in our case.

    10.2. We have used an FHR-reduced rate of R6,000/day to calculate the costs of junior counsel for a typical inquest **[See Table 2 annexed]**. The R6,000/day is the FHR's highest daily rate for a junior counsel with 2-10 years of experience in the bar.

    10.3. We have used an FHR-reduced rate of R12,000/day to calculate the costs of senior or experienced counsel for a typical inquest **[See Table 2 annexed]**.

Expert fees

11. Our experience shows that a typical inquest would require experts' reports (e.g., forensic pathology, ballistic, architectural and/ or aeronautical engineering). Based on the FHR's actual expenditure and experience, we have estimated a cost of R60,000 per expert report.

Disbursements

12. These include all inquest-related disbursements e.g., transport and accommodation for the legal team, accommodation and transport for witnesses and families, lunches, refreshments, printing, etc.

13. The cost of disbursements depends on various factors, such as whether the legal team and the families are based in the location where the inquest takes place. As a result, the level of disbursements will vary from one inquest to another, making it difficult to estimate accurately.

14. Drawing on the expenditure incurred by the FHR and Webber Wentzel on disbursements, we have estimated approximately R400,000 for these costs.

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Administrative costs

15. These costs include all administrative, financial, logistical and coordination support of conducting a successful inquest.

16. We have adopted an approach of estimating these costs based on reasonableness, proposing that 15% of the total costs be allocated to administrative expenses.

A typical prosecution

General observations:

17. The role of victims and their lawyers in the criminal process is more limited than a typical inquest. However, given the numerous legal and practical challenges involved in prosecuting historical crimes, as well as the defence's potential use of delay tactics, the legal support required by victims and their families may demand significant resources.

18. It is very difficult to outline a typical prosecutorial case, as various factors—such as the length of proceedings and the presence or absence of interlocutory matters—can greatly affect the nature of the case.

19. None of the TRC-related trials in which the FHR and Webber Wentzel have been involved have reached a conclusion yet.

Investigations

20. A private investigator conducted initial investigations in both the Simelane and Nyoka cases, supported by FHR and Webber Wentzel, which are now at the trial stage. Similarly, the private investigator carried out an initial investigation in the COSAS 4 case, another FHR-supported matter. Based on the expenditure incurred in the Simelane case, we have estimated R200,000 for investigations.

Legal costs

21. Our experience indicates that a typical prosecutorial case requires two attorneys and a lead counsel. Additionally, in some instances, the case may require the support of a junior counsel, particularly when interlocutory proceedings are initiated.

22. The length of trials will vary. Since 2015 and 2019, respectively, the attorneys from Webber Wentzel spent approximately 153 days working on the Simelane matter and approximately 66 days on the Nyoka matter.[1] Hence, we estimate that attorneys will spend approximately 70 days on a trial case.

23. Lead and junior counsel typically become involved if interlocutory or associated civil proceedings are initiated, such as presumption of death proceedings,

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[1] These have been back calculated using the Webber Wentzel numbers. The calculation is for a 8-hour day.

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amicus briefs, legal costs litigation, or reviews of amnesty decisions. Assuming one interlocutory proceeding per case, we have estimated the counsel's time spent on the trial as follows:

23.1. Lead counsel: 10 days
23.2. Junior counsel: 15 days
23.3. Counsel and attorneys' fees: We have used the same fees as for the inquests.

Disbursements

24. Webber Wentzel has incurred R221,839 in disbursements in the Simelane matter, and R24 747 in the Nyoka matter. The FHR expenditure towards the disbursements in the cases at the trial level have not been significant. Hence, we have estimated R200,000 towards disbursements in relation to cases at the trial level.

Administrative costs

25. These costs include all administrative, financial, logistical and coordination support of conducting a successful inquest.

26. We have adopted an approach of estimating these costs based on reasonableness, proposing that 15% of the total costs be allocated to administrative expenses.

A private prosecution

27. For the purposes of the funding affidavit, we assume that private prosecutions require twice the funding of typical prosecutions to account for the need to put up security for costs.

A typical case that has advanced neither to an inquest nor to prosecution

General observations

28. In some instances, a case has prospects of success but there is no decision regarding a potential inquest or prosecution, or at some point, the NPA declines to prosecute. Such cases will require largely 'investigative' and expert support, and some minimal level of support from the counsel.

Investigations

29. We estimate that an investigative case will require the same level of funding as a trial case, and therefore, project the cost to be R200,000.

Legal costs

30. Our experience indicates that a typical case requires two attorneys and, in some circumstances, (see below), a counsel or an expert.

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31. We estimate that attorneys will spend approximately 35 days on an investigative case, which is half the time for a typical trial case.

32. In some instances, the involvement of an expert or counsel might be required at the investigative stage to provide an analysis of evidence or a legal or expert opinion. Based on our experience, we have estimated two expert/legal reports/opinions per case at R60,000 each. This amount corresponds to 10 days of work of a senior counsel at the FHR's rate of R12,000/day.

Disbursements

33. We estimate non-significant expenditure towards the disbursements in such cases. Hence, we have estimated R100,000 towards disbursements.

Administrative costs

34. These costs include all administrative, financial, logistical and coordination support of conducting a successful inquest.

35. We have adopted an approach of estimating these costs based on reasonableness, proposing that 15% of the total costs be allocated to administrative expenses.

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Table 1: Summary of FHR UBTRC Program expenses: 1 Aug 2015 to 12 Sept 2024

1. Simelane matter	**509 233**
Investigations	208 517
Legal fees	299 437
General disbursements	1 279
2. Timol inquest	**551 568**
Investigations	357 885
Legal fees	85 500
General disbursements	108 183
3. Rodrigues	**123 103**
Legal fees	123 103
General disbursements	0
4. Aggett inquest	**1 528 378**
Investigations	756 369
Legal fees	635 513
Expert fees	76 902
General disbursements	59 594
5. Haffejee inquest	**499 070**
Investigations	171 255
Legal fees	230 660
Expert fees	0
General disbursements	97 155
6. Haron inquest	**397729**
Investigations (carried out by Webber Wentzel)	0
Legal fees	160473
Expert fees	83258
General disbursements	153998
7. Cradock 4	**834 935**
Investigations	508 861
General disbursements	30 067
Legal fees	206 425
Support to Cradock 4 families to engage with the NPA	89 582
8. TRC Programme - Other cases than above	**4 038 216**
Legal fees	1 266 884
Investigations	2 197 607
Watching briefs	172 325
Expert fees (other than above)	141 750
General disbursements in support of the TRC cases	259 650
TOTAL	**8 482 232**

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Table 2: Estimated cost of typical inquest and prosecution

A typical Inquest				
	Unit	*No. of units*	*Value of the unit*	*Total*
Investigation	Lump sum	1	400 000	400 000
Legal costs				
3 Attorneys' fees	Day	135	11 500	1552500
Junior counsel fees	Day	45	6 000	270000
Senior counsel fees	Day	45	12 000	540000
Expert fees	Report	3	60 000	180000
Disbursements	Lump sum	1	400 000	400000
Administrative costs (15% of all cost)	Percentage	1	501375	501375
			Total	**3 843 875**

A typical prosecution				
	Unit	*No. of units*	*Value of the unit*	*Total*
Investigation	Lump sum	1	200 000	200000
Legal costs				
2 Attorneys' fees	Day	70	11 500	805000
Junior counsel fees	Day	15	6 000	90000
Senior counsel fees	Day	10	12 000	120000
Disbursements	Lump sum	1	100 000	100000
Administrative costs (15% of all cost)	Percentage	1	197250	197250
			Total	**1512250**

A typical case that has advanced neither to an inquest nor to prosecution				
	Unit	*No. of units*	*Value of the unit*	*Total*
Investigation	Lump sum	1	200 000	200000
Legal costs				
2 Attorneys' fees	Day	35	11 500	402500
A legal/expert opinion	Opinion	2	60 000	120000
Disbursements	Lump sum	1	100 000	100000
Administrative costs (15% of all cost)	Percentage	1	123375	123375
			Total	**945875**

NGI

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

CERTIFIED A TRUE COPY
OF THE ORIGINAL

TAYLA ILSLEY
BA Law (UP) - LLB (UP)
Commissioner of Oaths
Ex Officio / Practising Attorney R.S.A.
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18/01/2025

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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SUPPORTING AFFIDAVIT

CNP

I, the undersigned,

ODETTE HELENA GELDENHUYS

do hereby make oath and state as follows:

1. I am an adult female attorney and the head of the Webber Wentzel pro bono team ("**the pro bono team**"), based in Cape Town.

2. The facts contained in this affidavit are within my personal knowledge and are, to the best of my belief, true and correct.

3. I have read the founding affidavit of Lukhanyo Bruce Matthews Calata, and I confirm the content thereof in so far as it relates to the pro bono legal services that the pro team has and continues to provide to families of victims of apartheid-era human rights violations.

4. The purpose of this affidavit is to explain and contextualise the basis of the sum of damages that the applicants are claiming under the first head of the claim for constitutional damages, namely, advancing truth, justice and closure.

The Webber Wentzel pro bono team

5. Webber Wentzel is a corporate law firm that is committed to serving our community and upholding our duties as members of the legal profession. The pro bono team was established in 2003 as a dedicated team within the firm whose mandate it is to provide free legal services to poor and/or vulnerable members of the public.

6. The focus of the pro bono team is to provide pro bono legal assistance on matters that serve to uphold the values set out in the Constitution, particularly related to the enforcement, advancement and protection of rights contained in

the Bill of Rights and to protect and advance the rule of law. Over the more than last two decades, our team has worked on many key public interest matters that have positively impacted on the lives of many thousands of people.

7. As part of our commitment to the Constitution and the rule of law, the pro bono team provides legal services to several families of victims of apartheid-era human rights violations. We assist the families in their quests to secure justice for their loved ones and to find closure in the pain, suffering and injustice that they have endured over many decades.

8. Since about 2015, the pro bono team has assisted the families of some key anti-apartheid and pro-democracy individuals who had died at the hands of the apartheid-era security forces, among others: Ahmed Timol, Dr Neil Aggett, Nokuthula Simelane, Imam Abdullah Haron and Caiphus Nyoka.

9. Below we provide a high-level description of the legal assistance that the pro bono team has provided to each of the families, together with the details of hours worked, the commercial monetary value of the attorneys' fees and necessary disbursements incurred, which include counsel fees (but excludes our lead counsel's time, who also worked pro bono on those matters). The purpose hereof is to give this Honourable Court insight into the untaxed legal costs that the families would have incurred to advance the cases of their loved ones had they not been legally assisted by the pro bono team.

10. The details of the hours worked are based on actual time recordings and the value of the fees is based on our commercial rates. We similarly record the disbursements incurred and charges paid in each matter. The disbursements and counsel fees were primarily paid by the Foundation for Human Rights.

Ahmed Timol

11. The pro bono team provided legal assistance to the Timol family from November 2015 to November 2022. During this time, we acted on the family's behalf in:

11.1 the reopened inquest into the 1971 death in detention of Ahmed Timol;

11.2 the Rodrigues stay of prosecution litigation in the High Court, the Supreme Court of Appeal and the Constitutional Court;

11.3 the watching brief in relation to the prosecution of Joao Rodrigues and the process to obtain a prosecutorial decision against Neville Els and Seth Sons following the reopened inquest.

12. In the reopened inquest, the pro bono team worked a total of 1 153.20 hours. This amounts to R2 685 755.00 in attorneys' fees. The time sheets can be made available to the Court on request.

13. In the Rodrigues stay of prosecution litigation, the pro bono team worked a total of 442.60 hours. This amounts to R1 401 245.00 in attorneys' fees. The time sheets can be made available to the Court.

14. In the Timol watching brief, the pro bono team worked a total of 71.40 hours. This amounts to R268 110.00.00 in attorneys' fees. The time sheets can be made available to the Court.

15. The total disbursements and charges incurred in the three matters referred to in paragraph 11 amounted to R360 489.82.

CNP

Dr Neil Aggett

16. The pro bono team provided legal assistance to the Aggett family from March 2017 to January 2023. During this time, we assisted the Aggett family in securing the decision to reopen the inquest into the 1982 death in detention of Dr Aggett and we acted on their behalf in the reopened inquest proceedings.

17. In this process, the pro bono team worked a total of 3 957.30 hours. This amounts to R8 423 235.00 in attorneys' fees. The total disbursements and charges incurred were R735 816.65. The time sheets can be made available to the Court.

Nokuthula Simelane

18. The pro bono team has provided legal assistance to the Simelane family since June 2015. During this time, we acted on behalf of the Simelane family in:

18.1 the process to compel the National Director of Public Prosecutions and the Minister of Justice to open a formal inquest into the 1983 disappearance of Nokuthula Simelane;

18.2 the litigation to compel the Minister of Police to pay the legal fees of the former Security Branch officers who have been indicted for the murder of Nokuthula Simelane;

18.3 the litigation to declare Nokuthula Simelane deceased;

18.4 the prosecution of Msebenzi Timothy Radebe (deceased), Willem Helm Johannes Coetzee, Frederick Barnard Mong (deceased), and Anton Pretorius as a watching brief (the instruction in the watching brief includes

a watching brief in the investigation and possible prosecution of the 1991 murder of Adriano Louis Bambo).

19. In the process to compel the opening of a formal inquest, the pro bono team worked a total of 89.70 hours. This amounts to R281 660.00 in attorneys' fees.

20. In the legal fees litigation, the pro bono team worked a total of 249.50 hours, which amounts to R585 210.00 in attorneys' fees.

21. In the presumption of death litigation, the pro bono team worked a total of 190.30 hours. This amounts to R501 435.00 in attorneys' fees.

22. In the watching brief, the pro bono team worked a total of 1 231.03 hours. This amounts to R2 459 992.00 in attorneys' fees. The time sheets can be made available to the Court.

23. In the four matters referred to in paragraph 18, the total disbursements and charges incurred to date is R223 133.51.

Imam Abdullah Haron

24. The pro bono team has been providing legal assistance to the Haron family since April 2019. During this time, we assisted the Haron family in securing the reopened inquest into the 1969 death in detention of Imam Haron and we acted on their behalf in the reopened inquest proceedings.

25. In this process, the pro bono team has worked a total of 1 738.80 hours. This amounts to R6 283 530.00 in attorneys' fees. The total disbursements incurred was R338 029.36. The time sheets can be made available to the Court.

Caiphus Nyoka

26. The pro bono team has been providing legal assistance to the Nyoka family since October 2019. We hold a watching brief on behalf of the family in the murder prosecution of Johan Marais, Leon Louis van den Berg, Abraham Hercules Engelbrecht and Pieter Egbert Stander.

27. To date the pro bono team has worked a total of 530.70 hours. This amounts to R1 604 075.00 in a attorneys' fees. The total disbursements incurred to date is R24 746.66. The time sheets can be made available to the Court.

Conclusion

28. The total number of hours worked by the pro bono team on these cases amounts to 9 654.53 hours, which amounts to a total of R23 233 247.00 in attorney's fees (had such fees been charged).

29. While Webber Wentzel will continue to act on a pro pono basis to assist similarly situated families, we understand that there are law firms that are willing to also represent such families, but that they cannot do so on a pro bono basis.



ODETTE HELENA GELDENHUYS

Signed and sworn to before me at CAPE TOWN on this the 17TH day of JANUARY **2025**, the deponent having acknowledged in my presence that she knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

COMMISSIONER OF OATHS

Full Names:

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Designation:

Capacity:

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