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## TRUTH AND RECONCILIATION COMMISSION: PROSECUTIONS

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### 1. INTRODUCTION

The National Prosecuting Authority (NPA) has acknowledged that the unmerited delay of prosecutions of the Truth and Reconciliation (TRC) cases amounts to the denial of justice to the victims of apartheid era atrocities.

It was reported on **3 December 2021** that the Fort Calata Foundation had expressed disappointment with the NPA and particularly with the National Director for Public Prosecutions, Adv Batohi for missing a deadline to provide the families of the Cradock Four (Mr Fort Calata, Mr Matthew Goniwe, Mr Sparro Mkonto and Mr Sicelo Mhau) with a prosecutorial decision in relation to their abduction and murder by the apartheid state security police in June 1985.<sup>1</sup>

The following may be noted:

- The respective families of the Craddock Four had approached the NPA in **May 2020** to make a final prosecutorial decision by 20 July 2020.
- The families' frustrations at lack of progress grew following the death of Mr Matthew Goniwe's widow Mrs Nyameka Goniwe in **August 2020** and little evidence of any real progress in the investigation as well as concerns about a missing investigation docket.
- In **July 2021** Mr Lukhanyo Calata, son of Mr Fort Calata, applied to court in a bid to compel the NPA to make a decision on whether it will prosecute those suspected of being behind the 1985 murder of the Cradock Four. Mr Calata said despite 36 years passing and countless pleas from the families of the Cradock Four, the SAPS had

<sup>1</sup>Thamm M, NPA misses deadline on prosecutions for apartheid-era Cradock Four murders — families to take legal action (Accessed at <https://www.dailymaverick.co.za/article/2021-12-03-npa-misses-deadline-on-prosecutions-for-apartheid-era-cradock-four-murders-families-to-take-legal-action/>)



failed to finalise its investigations and the NPA had yet to take a decision whether to prosecute “known suspects”.<sup>2</sup>

- According to the families’ legal representatives the NPA reportedly committed to undertake a decision whether or not to prosecute no later than **2 December 2021**.
- The Fort Calata Foundation has requested the NPA to address the Cradock Four matter by **13 December 2021**, or else it will have to pursue the matter through litigation.<sup>3</sup>

In a media briefing on **6 December 2021**, the NPA reported as follows:

- The TRC cases had taken a substantive time to be addressed.
- There was a commitment to work with families and their legal representatives.
- 59 cases were under investigation.
- In September 2021 a new dedicated component had been created in the NPA.
- Overall responsibility for outstanding TRC matters would fall under Deputy National Director of Public Prosecutions: National Prosecutions Service Adv De Kock.
- There was a need for a core of dedicated prosecutors to deal with the TRC matters. Twenty-five posts had been created. Prosecutors would be hired on a contract basis for three years.
- In respect of the Craddock Four case when the application was launched by the families for the NPA to make decision in respect of prosecution there was insufficient evidence to proceed. The docket needed to be reconstructed.
- The commitment by the Eastern Cape prosecutors dealing with the Craddock Four case to report by 2 December 2021 was made in good faith. The prosecutors could not meet this deadline because there are still aspects of the investigation that need to be resolved.
- A letter was written to the families on 1 December 2021 indicating there was a need to resolve outstanding issues.

The Portfolio Committee has requested a briefing from the NPA on this matter on 8 December 2021.

## 2. BACKGROUND

In 2003 the Truth and Reconciliation Commission handed the National Prosecutorial Authority (NPA), more than 300 cases for further investigation and prosecutions. There were a number of matters, where amnesty was not granted or where perpetrators did not come forward and apply for amnesty. Despite repeated pleas by the families of the victims, there are concerns that limited action has been taken by police and prosecution authorities in cases of apartheid crimes.<sup>4</sup> According to human rights lawyer Yasmin Sooka, “We are now in a major battle

<sup>2</sup>Carlisle A, Court bid to see Cradock Four investigations finalised (Accessed at <https://www.dispatchlive.co.za/news/2021-07-21-court-bid-to-see-cradock-four-investigations-finalised/>)

<sup>3</sup>Modise K, NPA wants a commission of inquiry into unresolved cases from the TRC (Accessed at <https://ewn.co.za/2021/12/07/npa-wants-to-launch-commission-of-inquiry-into-unresolved-cases-from-the-trc>)

<sup>4</sup>The families of the Cradock Four, Nokuthula Simelane, Imam Haron, Matthew Mabelane, Caiphus Nyoka, Coline Williams, Bayempini Mzizi, to name but a few, continue their fight for justice.



against time and age.”<sup>5</sup> This is a concern that has been repeatedly echoed by the Portfolio Committee.

In 2019, former Security Branch police officer and murder accused Joao Rodrigues bought a case against the NPA seeking a stay of prosecution for his role in the murder of anti-apartheid activist Ahmed Timol in 1971. In its judgment, a full Bench of the Gauteng North High Court rebuked the NPA for permitting political interference in these cases and stated that:<sup>6</sup>

“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.**<sup>7</sup>

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.<sup>8</sup>

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 measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.”<sup>9</sup>

Subsequently, in June 2021, the Supreme Court of Appeal dismissed Rodrigues’ appeal,<sup>10</sup> it noted that “*the Full Court rightly recommended a proper investigation into these issues by the NDPP and a determination whether any action in terms of s 41(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was necessary.*”<sup>11</sup>

<sup>5</sup>Heywood M, Apartheid-era crimes: A commission of inquiry is needed to establish the truth (Accessed at <https://www.dailymaverick.co.za/article/2021-06-21-apartheid-era-crimes-a-commission-of-inquiry-is-needed-to-establish-the-truth/>)

<sup>6</sup>Rodrigues v National Director of Public Prosecutions of South Africa and Others (76755/2018) [2019] ZAGPJHC 159; [2019] 3 All SA 962 (GJ) (3 June 2019)

<sup>7</sup>Ibid para [64]

<sup>8</sup>Ibid para [65]

<sup>9</sup>Ibid para [65]

<sup>10</sup>Rodrigues v National Director of Public Prosecutions and Others (1186/2019) [2021] ZASCA 87; [2021] 3 All SA 775 (SCA) (21 June 2021)

<sup>11</sup>Ho U, Speed up inquests into apartheid-era deaths, says Ahmed Timol’s family after Security Branch cop João Rodrigues dies (Accessed at <https://www.dailymaverick.co.za/article/2021-06-21-apartheid-era-crimes-a-commission-of-inquiry-is-needed-to-establish-the-truth/>)



### 3. SPECIALISED INVESTIGATORS AND PROSECUTORS

On **27 June 2021**, the NPA and the Directorate for Priority Crime Investigation (Hawks) released a statement addressing several issues related to Truth and Reconciliation Commission cases.

The NDPP and Hawks Head Lieutenant General Godfrey Lebeya welcomed the SCA decision in the Rodrigues case 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”. **The statement noted that the NPA and the Hawks were bolstering resources to go after those responsible for apartheid-era atrocity crimes.**<sup>12</sup>

The NDPP reported on the transfer of Truth and Reconciliation Commission cases to the relevant Directors of Prosecutions, in the applicable regions where the crimes were committed. It was contended that this approach increased the number of experienced prosecutors available to handle these complex cases. As a result, the number of cases had increased from four to 53.

In addition:<sup>13</sup>

- The Hawks had created **a dedicated detective team of 34** "competent and highly skilled" former police officials to assign to such cases to deal exclusively with TRC cases. They were appointed from 1 April on a contractual basis of three years.
- The NPA had obtained **special approval from the Department of Public Service and Administration to have 23 prosecutors dedicated to TRC cases**. While a dedicated national office capacity will provide specialised advice, coordination, and monitoring and support.
- The inquests into the deaths in detention of Neil Aggett and Ernest Dipale, which were reopened, were at an advanced stage.

On **5 November 2021** the Minister of Justice and Correctional Services Mr R Lamola in his address to the **Inaugural Fort Calata Foundation Memorial lecture** indicated that the TRC cases would receive priority attention from the NPA, the Hawks and the SAPS.<sup>14</sup> The Minister noted that:<sup>15</sup>

- During the lockdown period, the head of the NPA’s Priority Crimes and Litigation Unit had conducted an audit of all the deaths in detention cases reported by the TRC

<sup>12</sup>Etheridge J, NPA to set up specialist unit to probe, prosecute apartheid-era atrocity crimes (Accessed at <https://www.news24.com/news24/southafrica/news/npa-to-set-up-specialist-unit-to-probe-prosecute-apartheid-era-atrocity-crimes-20210627>)

<sup>13</sup>Ibid

<sup>14</sup>Sidimba L, Dedicated team of prosecutors, cops to tackle apartheid-era TRC crimes <https://www.iol.co.za/news/politics/dedicated-team-of-prosecutors-cops-to-tackle-apartheid-era-trc-crimes-acf4c5bd-a0e4-4a81-ac00-f86a37f6c314>

<sup>15</sup>Ibid



between 1963 and 1990, resulting in a further 57 cases being identified. Following representations from relatives of the victims, a further three cases have been opened.

- Steps were being taken to have the inquests into the deaths of Soweto anti-apartheid activist Mr Ernest Moabi Dipale and KwaZulu-Natal inyanga Mr Bayempini Mzizi reopened as their deaths, also in detention, are connected to those of Dr Neil Aggett in 1982 and dentist Mr Hoosen Haffajee in 1977.
- There would be an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. 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". However, the Minister did not provide term of reference for the inquiry or the identity of the judge.

#### 4. ISSUES FOR CONSIDERATION

Since **2019** the National Director of Public Prosecutions (NDPP) Adv Batohi has assured the Portfolio Committee that the Truth and Reconciliation Commission (TRC) cases are receiving the necessary attention.<sup>16</sup> In **March 2020**, the NDPP informed the Committee that she had met with academics and civil society and recognised that there was a need to address the deaths in detention during the apartheid era in a more focused way.<sup>17</sup>

While noting that the challenges in investigating these cases cannot be underestimated, the NDPP has also acknowledged 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."<sup>18</sup>

Following the death of Joao Rodrigues in September 2021, Mr Imtiaz Cajee, nephew of Ahmed Timol stated that: We will never know the truth, and nobody will ever be held criminally accountable for the death of Ahmed Timol. We recognise, however, that we are in a better position than most victim families, having forced the state to reopen the inquest and reach an honest conclusion.<sup>19</sup>

##### Comment

- During the NPA press conference on 6 December 2021 Adv R De Kock stated that the commitment by the Eastern Cape prosecutors dealing with Craddock Four case to report by 2 December 2021 was made in good faith. The prosecutors could not meet this deadline because there are still aspects of the investigation that need to be resolved. The Committee could consider asking (i) whether the NPA engaged

<sup>16</sup>PMG, Briefing to the Portfolio Committee on Justice and Correctional Services 9 July 2019 (Accessed at <https://pmg.org.za/committee-meeting/28532/>)

<sup>17</sup>PMG, NPA 2019/20 Quarter 2 & 3 performance; recruitment plan & progress in establishing Investigative Directorate; Magistrate salaries, with Deputy Minister (Accessed at <https://pmg.org.za/committee-meeting/29956/>)

<sup>18</sup>Etheridge J, NPA to set up specialist unit to probe, prosecute apartheid-era atrocity crimes (Accessed at <https://www.news24.com/news24/southafrica/news/npa-to-set-up-specialist-unit-to-probe-prosecute-apartheid-era-atrocity-crimes-20210627>)

<sup>19</sup>Cajee I, The death of Joao Rodrigues: Now we will never know the truth about the death in detention of my uncle Ahmed Timol (Accessed at <https://www.dailymaverick.co.za/article/2021-09-09-the-death-of-joao-rodrigues-now-we-will-never-know-the-truth-about-the-death-in-detention-of-my-uncle-ahmed-timol/>)



adequately with the legal representatives/ families involved to ensure that they were timeously informed of the status of the matter, (ii) whether it is possible that any time frames can be provided in respect of the Craddock Four matter.

- The Committee may be interested in more information on the following:
  - The number of TRC cases that have now been identified by the NPA, following an audit by the Priority Crimes and Litigation Unit.
  - The reasons for implementing a decentralised model in which investigations and prosecutions would be managed by the Director of Public Prosecutions where the crimes were committed.
  - Progress with the appointment of the 25 prosecutors dedicated to TRC processes and collaboration with the HAWKS.
  - Whether the constraint posed by archived records has been resolved.
  - Given that Adv De Kock has reportedly taken overall responsibility for these cases what will be the role of the Priority Crimes and Litigation Unit?
- On 5 November 2021 it was reported that the Justice Minister had stated that there would be an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. 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." The Committee may be interested in any progress with the establishment of this inquiry.

## 5. SOURCES

Cajee I, The death of Joao Rodrigues: Now we will never know the truth about the death in detention of my uncle Ahmed Timol (Accessed at <https://www.dailymaverick.co.za/article/2021-09-09-the-death-of-joao-rodrigues-now-we-will-never-know-the-truth-about-the-death-in-detention-of-my-uncle-ahmed-timol/>)

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