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NATIONAL PROSECUTING AUTHORITY: TRUTH AND RECONCILIATION COMMISSION – PROGRESS WITH PROSECUTIONS

TABLE OF CONTENTS

1. INTRODUCTION.....	1
2. NPA AND DPCI COMMIT TO ESTABLISH A DEDICATED CAPACITY FOR APARTHEID ERA CRIMES	3
3. SOURCES	6

1. INTRODUCTION

On **8 December 2021** the Portfolio Committee was briefed by the National Director of Public Prosecutions (NDPP) Adv Batohi on the reasons that the National Prosecuting Authority (NPA) had missed a deadline (*of 2 December 2021*) for issuing a prosecutorial decision in the 1985 murder of **the Cradock Four**.¹² The families of some of the Cradock Four had taken the NPA to court in order to get a firm commitment with timeframes for a resolution to the matter.³

In response, 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 for investigations would not be met, a letter was sent to the legal representatives of the families of the Cradock four on 1 December 2021 to indicate this. Unfortunately, it appeared that this letter did not reach the lawyers timeously.⁴

Notably, the Committee expressed:⁵

¹PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)

² The Cradock Four is a collective name given to Mr Fort Calata, Mr Matthew Goniwe, Mr Sicelo Mhlau, and Mr Sparrow Mkhonto. On 27 June 1985, on their way back to Cradock from Port Elizabeth, the four were arrested at a roadblock set by the Security Branch, assaulted, and murdered. In 1987, a first inquest concluded that the Cradock Four had been killed by 'unknown persons'. Therefore, no one was prosecuted for assault or murder. A second inquest in 1993 found that the Cradock Four's deaths had been caused by the police. However, no individuals were named responsible. Again, no one was prosecuted. In 1999, six former police officers involved in the Cradock Four's arrest and murder appeared before the Amnesty Committee of the Truth and Reconciliation Commission (TRC), but none of them were granted amnesty.

³ On 20 July 2021 – on the anniversary of the Cradock 4 funeral, Mr Lukhanyo Calata (son of the late Fort Calata) and the widows of Mr Sicelo Mhlau and Mr Sparrow Mkhonto launched an application to compel the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) to finalise the investigation into the murder of the Cradock 4. 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/>)

⁴ While the matter was in court, the NPA had made a commitment to make such a decision by 2 December 2021. This was dependent on investigations being completed. The prosecutors had handed the docket over to the lawyers representing the families, who subsequently identified a range of issues which required further investigations. It had thus become clear that the NPA would not meet the agreed deadline. Reportedly, Adv Barry Madolo, Director of Public Prosecutions: Eastern Cape Division, Mthatha, NPA, sent a letter on 1 December to indicate that the NPA could not meet the deadline. He attempted to inform the lawyers, however, it seemed that the letter did not reach the lawyers.

⁵PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)



- Particular concern that the Truth and Reconciliation (TRC) matters have been delayed for so long.⁶ More than two decades into democracy, families like those of the Craddock Four still do not have closure.⁷
- Its disappointment at how the matter was handled, as the families of the Craddock Four were not informed prior to the deadline that it would not be met. The NPA conceded that it should have handled the matter better, by informing the families' legal representatives earlier of the delay. It agreed that in future it will communicate timeously.

1.1 INQUIRY INTO NPA CONDUCT IN RESPECT OF THE DELAY IN PROSECUTING TRC CASES

In addition, the Committee also asked for information on the appointment of a judge to head an inquiry to investigate the suppression of the cases referred by the TRC to the NPA.⁸⁹ In this regard the following may be noted:

- In 2019, former Security Branch police officer and murder accused Mr Joao Rodrigues bought a case against the NPA seeking a stay of prosecution for his role in the murder of anti-apartheid activist Mr 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.¹⁰
- In June 2021, the Supreme Court of Appeal dismissed Rodrigues' appeal, 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."***¹¹

⁶In 2003 the Truth and Reconciliation Commission handed the National Prosecutorial Authority (NPA), more than 300 cases for further investigation and prosecutions. It also indicated that "a bold prosecution policy" should be put in place to hold the perpetrators to account.

⁷It is not the families of the Craddock four alone that have been compelled to apply to the courts to assist with moving these processes forward. In 2016, Ms Thembi Nkadimeng, sister of Ms Nokuthula Simelane filed an application before the Gauteng Division of the High Court seeking to compel the National Director of Public Prosecutions to make a decision in respect of the 33-year-old disappearance of her sister. It was only as a result of the relentless pressure from the Timol family that the inquest into the death of Mr Ahmed Timol was reopened in 2018. On 29 July and 15 August 2019 lawyers acting on behalf of the families of the late Dr Neil Aggett and Mr Hoosen Haffeejee stated they would present 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.

⁸Smith T, No slipping through the cracks for TRC case (Accessed at <https://www.newframe.com/no-slipping-through-the-cracks-for-trc-cases/>).

⁹The Foundation for Human Rights has called for a public inquiry. (Accessed at <https://www.fhr.org.za/2021/06/28/the-fhrs-statement-with-respect-to-the-announced-dedicated-capacity-for-the-apartheid-era-crimes/>)

¹⁰Rodrigues 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) (Accessed at <http://www.saflii.org/za/cases/ZAGPJHC/2019/159.pdf>). The Full Bench stated that:

- "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.** It is not open to the NPA to seek to absolve itself of its constitutional duty in failing to pursue the TRC cases.
- 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.
- 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."

¹¹Rodrigues v National Director of Public Prosecutions and Others (1186/2019) [2021] ZASCA 87; [2021] 3 All SA 775 (SCA) (21 June 2021 para [27], p11(Accessed at www.saflii.org/za/za/cases/ZASCA/2021/87.pdf)



- 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 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 in terms of Section 41[1] of the NPA Act."**¹²

The Justice Minister informed the Portfolio Committee on **8 December 2021** that former Constitutional Court Justice Kate O'Regan had been approached, but she was unavailable to assist, and hence the search was still ongoing. The Minister was **hopeful that the judge would be appointed before the end of 2021**.¹³

The Portfolio Committee, in a media statement:¹⁴

- 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.
- Urged that the appointment of a retired judge, as promised by the Minister, should be urgently finalised.

2. NPA AND DPCI COMMIT TO ESTABLISH A DEDICATED CAPACITY FOR APARTHEID ERA CRIMES

On **8 December 2021**, the NDPP Adv Batohi and Adv Rodney De Kock, Deputy National Director of Public Prosecutions informed the Committee that:¹⁵

- It was only in **2017** when investigations into these matters were, on paper, set to begin. (*This was largely in response to the increasing pressure placed on the NPA and DPCI by the families (assisted in many cases by pro-bono legal counsel and the Foundation for Human Rights) to respond to the TRC Report, as well as the findings of the court in the Ahmed Timol inquest.*)¹⁶
- The DPCI and the NPA had both faced various challenges which had resulted in a lack of dedicated capacity to properly deal with these matters.

¹² NPA Act 32 of 19198. Section 41: Offences and penalties – provides that: (1) 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 (1) (b) provides that: (1) Impartiality of, and oath or affirmation by members of prosecuting authority; (b) 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.)

¹³PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)

¹⁴ Media Statement, Justice and Correctional Services Committee wants Quarterly Progress Reports on TRC Matters (dated 8 December 2021)

¹⁵PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)

¹⁶SAFLII, The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 (12 October 2017) (Accessed at <http://www.saflii.org/za/cases/ZAGPPHC/2017/652.pdf>). Judge Mothle in his recommendations pointed out that there are many more families who are seeking closure on the unanswered questions concerning the death of their relative in detention. They like all families whose relative died in detention, need healing. They need closure. Para [139], p127.



- In **2020** she had met with National Head of the Directorate for Priority Crime Investigation (DPCI) Gen. Godfrey Lebeya, to deal with the issue of TRC matters. At that time the TRC matters were still being dealt with by the Priority Crimes Litigation Unit (PCLU) that was seized with TRC matters as well as other priority crimes. There was a very small capacity within the NPA to deal with a range of priority crimes. General Lebeya had committed to the NPA that he would recruit investigators which would be dedicated to TRC matters, and she had simultaneously committed to the DPCI that the NPA would recruit dedicated prosecutors for TRC matters.
- It was realised in **2021** that it was extremely important for the NPA to engage with the victims of the apartheid era crimes, and to keep them informed of the progress that the NPA was making.
- **A decision was made to establish a dedicated prosecutorial force within the National Prosecutions Service (NPS) under the direct supervision of Adv Rodney De Kock, Deputy National Director of Public Prosecutions.**
- Gen. Lebeya had also recruited dedicated investigators who were deployed in various parts of the country alongside the dedicated prosecutors. **The DPCI initially appointed 34 investigators but this had recently increased to 40 investigators** to deal exclusively with those cases. **The NPA had obtained approval from the Department of Public Service and Administration to designate 23 prosecutors** exclusively to TRC cases which had to be prosecuted within a period of three years. It was reported during the meeting that the NPA would soon have 25 prosecutors dedicated to TRC matters.
- The NPA had developed **a decentralised approach** to the TRC matters with cases being handled in the regions. Seven TRC cases were being attended to in the Eastern Cape, two in the Free State, eight in Johannesburg, seventeen in KwaZulu-Natal, two in Limpopo, two in Mthatha, four in the North West, one in the Northern Cape, eight in Pretoria, and six in the Western Cape. There were 13 general TRC cases dealt with by the head office. In total there were 103 TRC cases being dealt with.
- Where it was decided that there was insufficient evidence in a matter, **the NPA would request an inquest**, so that the evidence could be placed before a competent court. This would enable the court to make a decision as to liability.
- Ultimately, though, **there probably wouldn't be prosecutions for many of the cases of apartheid-era crimes stemming from the Truth and Reconciliation Commission.**

2.1 Update on Progress

In its presentation to the Committee (dated 1 June 2022) the NPA reports that 97 cases are currently under investigation, **(the majority of which (55 or 60%) are categorised as Category A matters, which means prosecutors/investigators are dealing with the**



available evidence, docket, inquest report etc), while 18 are awaiting re-opening. It reports on progress with the matters under investigation as follows:¹⁷

INVESTIGATIONS - CATEGORIES	CASES
Category A: Available evidence, docket, inquest report etc.	55
Category B: Expert reports.	13
Category C: Stages nearing completion of investigations and/or decision making.	24
TOTAL	92

Comments

- In the previous meeting with the NPA on 8 December 2021 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 Reconciliation Commission cases.¹⁸
- The Committee may be interested to know how the NPA/DPCI has determined the list of TRC cases to be investigated.
- Some concern was also expressed by the Committee previously as to whether the DPCI and the NPA were providing adequate resources in respect of investigators and prosecutors to the TRC matters.¹⁹ According to the NPA presentation (dated 1 June 2022) there are 16 dedicated prosecutors and 33 dedicated DPCI investigators allocated to TRC matters.²⁰ It appears that this is less than initially reported to the Committee during the meeting of 8 December 2021 and the Committee may want clarification. For instance, the NPA reported previously that it had obtained approval from the Department of Public Service and Administration to designate **23 prosecutors** exclusively to TRC cases.²¹
- In the NPA's presentation to the Committee (dated 1 June 2022) the NPA reports that the dire need to prioritise TRC matters resulted in joint NPA/DPCI regional workshops co-ordinated by the National Prosecuting Service National Office to take place from 13 June 2022. This means these workshops have not yet taken place. The Committee could ask why, if both the NPA and DPCI have identified a dire need to prioritise these matters, such workshops are only happening in June 2022.
- According to the NPA's presentation (dated 1 June 2022) - the institution reports on 97 cases under investigation (as per slide 8) and then 92 in which there has been some recorded progress (as per slide 9).²² The Committee could consider asking what is the status of the five cases in which there does not appear to have been any progress.
- The NPA has reported that it is committed to working with families and stakeholders. This appears to be contradicted to some degree by the contents of the letter that was

¹⁷Presentation to Portfolio Committee on Justice and Correctional Services 01 June 2022 Progress on TRC Cases

¹⁸PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)

¹⁹Presentation to Portfolio Committee on Justice and Correctional Services 01 June 2022 Progress on TRC Cases

²⁰Ibid Slide 5

²¹PMG, Cradock Four matter & Resignation of NPA Investigating Directorate Head: Ministry & NPA briefing (Accessed at <https://pmg.org.za/committee-meeting/34059/>)

²² Presentation to Portfolio Committee on Justice and Correctional Services 01 June 2022 Progress on TRC Cases



forwarded by the Foundation for Human Rights (FHR).²³ The FHR reports for instance in respect of the Cradock Four matter that - *despite the assistance and pressure by the attorneys for the families, little progress has been made in the investigation and a number of investigative tasks remain outstanding. In addition, the lawyers for the family have been unable to secure the meeting with the NPA and DPCI team to follow up on the discussion and commitments.*²⁴ The Committee has also expressed concern previously about the channels of communication and it may be interested to know how the NPA has improved its collaborative approach to these matters.

- The NPA states that in respect of its response to apartheid era crimes: *“Time is not on our side. That’s why we are acting with urgency to develop strategies, capacities and partnerships to ensure progress in these cases.”*²⁵ However, the Foundation for Human Rights reports that - currently the FHR supports a number of legal teams on at least 36 cases where we represent the families of apartheid era victims who are seeking justice, **and are deeply concerned at the lack of progress and delays in dealing with these cases.**²⁶ The Committee may want re-assurance from the NDPP and Adv. De Kock that there is indeed a sense of urgency and for more information on the additional strategies, capacities and partnerships that are being developed to ensure progress.

3. SOURCES

Foundation for Human Rights Letter - The Unfinished Business of the TRC and delays in the Cradock 4 case (dated 22 May 2022)

Media Statement, Justice and Correctional Services Committee wants Quarterly Progress Reports on TRC Matters (dated 8 December 2021)

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²³ Foundation for Human Rights Letter - The Unfinished Business of the TRC and delays in the Cradock 4 case (dated 22 May 2022)

²⁴ Ibid

²⁵ Presentation to Portfolio Committee on Justice and Correctional Services 01 June 2022 Progress on TRC Cases

²⁶ Foundation for Human Rights Letter - The Unfinished Business of the TRC and delays in the Cradock 4 case (dated 22 May 2022)



SAFLII, The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 (12 October 2017) (Accessed at <http://www.saflii.org/za/cases/ZAGPPHC/2017/652.pdf>).