IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

In the matter between:

THABO MVUYELWA MBEKI AND OTHERS

Applicants

and

JUSTICE SISI KHAMPEPE, THE CHAIRPERSON OF THE COMMISSION

Respondent

ANSWERING AFFIDAVIT –
APPLICATION FOR THE RECUSAL OF THE CHAIRPERSON

I, the undersigned,

ISHMAEL ANTHONY MMAKWENA SEMENYA

declare and affirm as follows:

1 I am an adult male practising as an advocate and as a Senior Counsel under the auspices of the Legal Practice Council.

2 The averments made herein are true and correct and are, save where I say so or the context indicates otherwise, within my own personal knowledge and belief.

3 I have deposed to an affidavit in answer to an application by former President Zuma for the recusal of the Chairperson, which is in essence the relief that the

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Applicants herein also seek. In order not to burden this affidavit unduly, I do not repeat the contents of that affidavit but incorporate them in this affidavit by reference, especially where it relates to matters common to both applications.

4 I have read the Founding Affidavit. I intend responding to the allegations therein. Former President Thabo Mbeki has filed an application for the recusal of the Chairperson of the Commission of Inquiry into Stopped TRC cases ("stopped TRC cases.").

5 Former President Mbeki deposes to the affidavit on his own behalf, as well as on behalf of Mrs Bridgitte Mabandla, Mr Charles Nqakula, Mrs Thoko Didiza and Mr Ronnie Kasrils (collectively, "the former members of the Executive, the Applicants, the former Ministers or Mr Mbeki"). The application is in essence in support of an application brought by former President Zuma for the Chairperson's recusal.

6 Former President Mbeki's application is based on two grounds. The first ground concerns the Chairperson's past institutional involvement in matters which the Applicants claim are directly connected to the TRC investigations and the NPA, and will create an "objectively grounded concern" that she may not bring the requisite detachment and impartiality to an inquiry scrutinising conduct and decisions of institutions in which she previously played "material roles".

7 The second ground is the manner in which the Chairperson handled alleged conflict of interest objections pertaining to myself as Evidence Leader and her "endorsement" of an alleged procedurally irregular arrangement between myself

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and Advocate Howard Varney which permits the latter to lead the Calata Group's witnesses.

8 The application for the recusal of the Chairperson by the Applicants, as is that brought by former President Zuma, is unmeritorious and also tainted with *mala fides*. I say this for reasons set out below. The Applicants knew or ought reasonably to have known that –

8.1 the establishment of the Commission was published in Government Gazette No 264 of 2025 ("the Proclamation") as early as 29 May 2025;

8.2 the Proclamation made it plain that Justice Sisi Khampepe (Retired Constitutional Court Justice) was to preside over the Commission's hearings;

8.3 it is important to magnify and locate what the Commission is assigned to do in terms of its Terms of Reference (TORs). In relevant part, the TOR provide:

> *"1. The Commission must, in relation to the **period since 2003**, **inquire into, make findings, report on and make recommendations** concerning the following, guided by the Constitution, relevant legislation, policies and guidelines -*
>
> *1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the South African Police Service or the National*

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Prosecuting Authority to stop investigating or prosecuting TRC cases;

1.2 *whether any members of the South African Police Service or the National Prosecuting Authority improperly colluded with such attempts to influence or pressure them; and*

1.3 *whether any action should be taken by any Organ of State, including possible further investigations to be conducted or prosecutions to be instituted, where appropriate, of persons who may have acted unlawfully by -*

1.3.1 *attempting to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases; or*

1.3.2 *members of the South African Police Service or the National Prosecuting Authority colluded with or succumbed to attempts to influence or pressure such members to stop investigating or prosecuting TRC cases; and*

1.4 *whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate."* [My emphases.]

9 I submit that in this application the focus ought to be on the following issue: what evidence do the Applicants offer for the contention that a reasonable person viewing the correct facts reasonably and objectively, would reasonably apprehend that the Chairperson would not bring an impartial mind to bear to the adjudication of the matters falling within the Commission's mandate.

10 The Applicants do not allege or contend that the role that the Chairperson played in the TRC or the Amnesty Committee of the TRC had even a remote relationship with the possible interference by anyone in the non-investigation or prosecution of TRC cases or any of the other TOR of this Commission. The timelines do not coincide with the Chairperson's role in the TRC and/or Amnesty Committee, which was between 1995 and 2001.

11 The TOR are specific: they required the Commission to inquire into whether there was any interference, or attempt to interfere, in the investigation or prosecution of cases of persons who were refused amnesty by the TRC or who did not apply for amnesty. There is no conceivable basis to even suggest that the Chairperson, in whatever capacity she served in the TRC, would have inquired into any attempts or interference in the investigation or non-prosecution of the TRC cases.

12 The contention that the Chairperson would not be in a position to be impartial to adjudge the matters defined in the TOR, simply on account of the fact that she was a Deputy NDPP from 1998 to 1999, is also without merit. The TOR are pointed: the Commission is to inquire into interference, or attempts to interfere, *since 2003*. The Applicants offer no evidence whatsoever why the Chairperson's

previous positions would impair her impartiality on issues that are relevant to the TOR. Nor indeed can they, because there is no such evidence.

13 The Ruling that the Commission made on whether I was conflicted, given my previous involvement in the ***Nkadimeng*** matter, is challenged by the Applicants on spurious grounds. The Applicants knew that there was an application to have me removed as an Evidence Leader. They elected not to participate in the application for my recusal. The Applicants now seek to resuscitate that issue via the back door.

14 The Applicants allege that they raise the issue of the application for my recusal only now because they waited to see what the Zuma application set out as the grounds for the recusal of the Chairperson were. One must infer that, having seen the Zuma application, the Applicants do not have confidence in the case made out in the Zuma application for the recusal of the Chairperson. It is for that reason that they have brought their own application. With respect, they in essence unwittingly simply support the Zuma application, and in substance rely on the same or similar grounds. However, like the Zuma application, their application also falls to be dismissed.

15 The Applicants would have been properly advised that an application for the recusal of a member of an investigating panel must be made as expeditiously as the alleged possible bias is apprehended. This, however, the Applicants failed to do, given that they knew or ought to have known as early as 29 May 2025 that the Chairperson was appointed to preside over the issues identified in the TOR.

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16 When the application for my recusal was brought, the Applicants correctly decided not to enter the "fray" as there was no case made out for my removal/recusal.

17 It is not surprising that the Calata Group is opposing the application for the recusal of the Chairperson. The Calata Group is properly and soundly legally advised. They know that there is no substance to the application for the recusal of the Chairperson and that such endeavours are mainly directed at delaying the easing of the pain and suffering of persons who were victims and survivors of apartheid era atrocities by perpetrators who were not granted amnesty by the TRC or did not apply for amnesty.

18 The Applicants present not even a morsel of evidence on why they did not raise their concerns shortly after 29 May 2025, despite obvious knowledge of the alleged involvement of the Chairperson in matters with which the Commission is seized.

19 In this regard, I invite the Applicants to explain why they thought it wise not to deal properly with this issue in their founding papers. When the Applicants sought to intervene in the application in the High Court, they surely knew what assertions were made against them individually and/or collectively.

20 In addition, the Applicants received the notices in terms of Rule 3.3 of the Commission's Rules setting out those assertions. They have not responded to the substance of those assertions.

21 As I detail hereunder, they instead prevaricated and to date have not given statements that explain their conduct, which I submit points to the absence of *bona fides* on their part.

22 I submit that the public interest decidedly points to the need, where the evidence shows that there was a failure or refusal by any person or entity to investigate or prosecute persons who were refused amnesty or did not apply for such amnesty, to ascertain the reasons for such failure or refusal.

23 In the premises I submit that neither of the two grounds on which the Applicants rely, considered individually or collectively, provide proper support for the recusal of the Chairperson.

24 In the paragraphs immediately hereunder, I consider somewhat more fully the two grounds. Thereafter, I will respond to the specific allegations made in the founding affidavit.

GROUND ONE: CHAIRPERSON'S PRIOR ROLES AND REASONABLE APPREHENSION OF BIAS.

25 As emerges from what I have stated above, the essence of this ground is this: the Chairperson had prior involvement in two institutions and processes that are relevant to the Commission's mandate, namely the TRC and the NPA, including a structural unit within the NPA that directly dealt with TRC cases. Accordingly, she would not bring an independent mind to bear on the matters that this

Commission will be inquiring into. In my brief response to the allegations made in support of those allegations and contentions, I record the following.

26 The following are matters of public record: the Chairperson was appointed as a TRC Commissioner by President Nelson Mandela on 15 December 1995; and her term of office ended on 31 March 2001.

27 It is also not in dispute that she served as a member of the TRC Amnesty Committee from 1996 until 2001.

28 The foregoing matters, however, do not serve to disqualify her from chairing this Commission. There is no suggestion or evidence, or any recognised legal principle, which disqualifies her from presiding over the Commission simply because of her previous role as a TRC Commissioner or being a member of the Amnesty Committee.

29 The Commission's TOR have been published and are a matter of public record.

30 Paragraph 1 of the TOR states in express terms that the Commission must, in relation to the period *since 2003*, inquire into, make findings, report on and make recommendations concerning the matters set out in TOR 1.1, 1.2,1.3, and 1.4.

31 The TOR also record that the interested parties in the Commission include the following parties:

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31.1 the parties in the proceedings in the matter of *LBM Calata and 22 others v The Government of the Republic of South Africa and Five others* [Case number 2025-005245 of the North Gauteng Division) (TOR 2.1); and

31.2 families of or victims of atrocities other than the Applicants referred to in TOR 2.1, who have a substantial interest in the matter set out in TOR 2.1, and who are admitted as parties in the Commission under the regulations that are made under the Commissions Act, No 8 of 1947.

32 What is important to note is that the period covered by the TOR is the period *since 2003*.

33 In this regard, I reiterate that the Chairperson served as a TRC Commissioner during the period 15 December 1995 to 31 March 2001. This precedes the period covered by the TOR.

34 Although the TOR deal with allegations regarding efforts or attempts having been made to stop the investigation or prosecution of TRC cases, this is not something that the Chairperson was required to deal with during her tenure as a TRC commissioner. The TOR do not cover any role that she played during her tenure as a TRC Commissioner.

35 In his founding affidavit, the First Applicant alleges that the Chairperson apparently played a role in the Human Rights Investigation Unit [HRIU] established by the then NDPP, Mr Bulelani Ncquka, to advise him on how to

handle the cases referred to the NPA by the TRC. This allegation is stated to be based on a letter dated 11 November 2025 from Webber Wentzel attorneys.

36 The First Applicant notes that the timelines show that the Chairperson's TRC role [1995 to 2001] overlapped to some extent with her NPA senior management role [1998 to 1999]. He further alleges, at paragraph 27, that during this overlap the Chairperson was simultaneously an adjudicator in the Amnesty Committee and a senior official responsible for prosecutorial policy relating to TRC matters.

37 The First Applicant goes on to allege that the Commission is mandated to investigate whether, *during that very period*, steps were taken, or not taken, to pursue TRC-related prosecutions, and whether political or institutional pressure contributed to such failures (if any). I submit that it is clear from the undisputed facts that, even on First Applicant's own version, the Chairperson's involvement with the TRC and/or the NDPP does not coincide with the period covered by the TOR, which I emphasize is *from the year 2003* and thus not prior thereto.

38 The First Applicant alleges that the TRC submitted its report in 1998, which must have surely set in motion what needs to be done with those whose amnesty applications were denied. He then goes on to allege that the question must have arisen before 2003 as to what must be done with those who had not applied for amnesty but who continued to claim that they acted on political instructions. I point out in response that the TOR do not cover what happened in 1998, when the report was submitted: they specifically cover the period *after 2003*.

39 The First Applicant recognises and concedes, as he must, that the TOR cover the period *from 2003*. However, in order to get around this difficulty, he submits that the issue of the time delineated by the TOR is itself irrational and that the Applicants would instruct their legal team to raise this anomaly. With respect, that cannot be correct: the Chairperson is required to operate within the ambit of the TORs. If the First Applicant is of the view that there is an anomaly, he ought to have challenged the TOR, which have been in operation since 29 May 2025. He is not entitled or empowered to ask that the ambit of the TOR be broadened in order to accommodate his narrative or suit his application.

40 In this regard, I point out that the TOR have been set by President Ramaphosa: only he has the power to amend them.

41 In addition to the foregoing matters, I point out that the First Applicant's grounds for the recusal of the Chairperson evidences a disconnect between the conduct of the Applicants prior to and also since the gazetting of the Proclamation establishing the Commission and the "reasonable apprehension of bias and impartiality" on the part of the Chairperson now alleged by the Applicants. In this regard, the following facts are of significance and starkly illustrate such incongruence.

41.1 Prior to the establishment of the Commission, former President Thabo Mbeki was quoted repeatedly commenting on the potential establishment of the Commission and what the Commission was likely to find. One such

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commentary is contained in the following link: https://youtu.be/X6vZHMKyomo?si=LBEtB1CceULY0FIG

41.2 Another demonstration of the keen interest and awareness of former President Thabo Mbeki of the issues that the Commission is seized with as well as the establishment of this Commission follows from engagements between former President Thabo Mbeki's Office and journalist Karen Maughan, which emerge in the following link: https://share.google/jYzTA1v2Ymx8n5heW.

41.3 Former President Thabo Mbeki was aware of, and even attempted to intervene in, the proceedings brought by the Calata Group of Applicants in the Pretoria High Court, in *Calata and Others v Government of the Republic of South Africa and Others* (005245/2025) [2025] ZAGPPHC 1078 (3 October 2025).

41.4 Accordingly, when the Commission was established by President Ramaphosa, through the Proclamation that was gazetted on 29 May 2025 and identified retired Justice Sisi Khampepe as the Chairperson of the Commission, former President Mbeki was aware of her appointment. He did not challenge it. Yet now, almost eight months later, he brings this application and, in the main, upon grounds that he had been aware of all along.

41.5 What is even more startling is that former President Thabo Mbeki, former Ministers Ms Bridgitte Mabandla, Ms Thoko Didiza, Mr Ronnie Kasrils

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and Mr Charles Nqakula were at all material times legally represented by Boqwana Burns Incorporated, who in turn briefed counsel. In all the pre-hearing meetings, the attorney and junior counsel team were present; yet not even a whisper of concern about the Chairperson's previous role in the NPA and the TRC Amnesty Commission was raised by the legal representatives of the Applicants.

41.6 This, notwithstanding that the Applicants were aware of the Chairperson's role. Instead, the Applicants without exception, through their legal representatives, responded to correspondence from the Commission, with the latest engagement being the Applicant's attorneys making a tentative undertaking to provide the long-awaited mooted statements from their clients to the Commission.

41.7 In fact, the Commission was expecting to meet with the legal representatives of former President Thabo Mbeki and the former Cabinet Ministers on the 12th of January 2026 with the purpose of discussing the draft statements of their clients and finalising them before the commencement of the Commission's hearings on the 26th of January 2026. In this regard, I annex hereto a letter marked **"SC1"** from the Applicants' legal representatives dated 9 December 2025 confirming such deliberations.

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41.8 Further to the foregoing, I refer hereunder to some of the relevant correspondence between the Commission and the Applicants and their legal representatives, to illustrate this disconnect.

Participation of the Applicants in the Commission

42 On 25 September 2025, the Commission issued Rule 3.3 Notices to former President Thabo Mbeki, former Ministers Ms B Mabandla, Ms T Didiza and Mr Kasrils. The respective Notices are annexed hereto as **"SC2", "SC3", "SC4" and "SC5"**, respectively.

43 On 9 October 2025, Mr Kasrils responded to the Commission via e-mail indicating that he was not in a position to timeously respond due to ill-health and in a further e-mail enquired about the costs of legal representation. Again, there were no hints of unease or concern about the Chairperson's position. Instead, Mr Kasrils expressed his commitment to co-operate with the Commission, I annex copies of these exchange as **"SC6".**

44 Boqwana Burns Incorporated placed themselves on record as the legal representatives of former President Thabo Mbeki and former Ministers Mabandla and Didiza on the 2nd of October 2025. A copy of the letter evidencing this is annexed as **"SC7"**. In that letter, no issue of bias or perceived bias was raised about the Chairperson.

45 On the 6th of October 2025, Boqwana Burns Incorporated indicated their commitment to the work of the Commission, undertaking to furnish the

Commission with statements following consultations with their clients and confirmation of funding from the state for the legal representation of their clients. I annex copies of the exchanges as **"SC8"**, in support of this averment.

46 On the 14th of October 2025, Mr Kasrils wrote an e-mail to the secretariat of the Commission requesting to be furnished with a copy of the minute of the meeting with Advocate Pikoli that was mentioned in Mr Kasril's Rule 3.3 Notice. I record that the concern here was about documentation to be furnished to Mr Kasrils in order for him to comply with the Commission's Rules and not about the Chairperson of the Commission. This e-mail is annexed as **"SC9"**.

47 On 14 October 2025, Boqwana Burns Incorporated placed themselves on record as the legal representatives of Mr Kasrils and requested an extension for the filing of Mr Kasrils' and their other clients' statements. I annex a copy of this letter as **"SC10"**.

48 On 17 October 2025, Boqwana Burns Incorporated e-mailed the Commission confirming their attendance of the Commission pre-hearing meeting of 27 October 2025 and listing the names of those who would be in attendance. A copy of this e-mail is annexed as **"SC11"**.

49 On 21 October 2025, Boqwana Burns Incorporated placed themselves on record as the legal representatives of former Minister Charles Nqakula. This was after the Commission sent a Rule 3.3 Notice to Mr Nqakula on the 20th of October 2025. I annex a copy of the letter from Boqwana Burns Incorporated and of the Rule 3.3 Notice as **"SC12"** and **"SC13"** respectively.

50 On the 24th of October 2025, Boqwana Burns Incorporated addressed correspondence to the Commission requesting further documentation in respect of the allegations raised in their clients' Rule 3.3 further information. At all material times, the clear message was that Boqwana Burns Incorporated was at work to furnish the Commission with the statements of their clients. No question at all was raised about the Commission being presided over by the Chairperson or of her possible recusal. I annex a copy of the correspondence as **"SC14"**.

51 On 27 October 2025, representatives from Boqwana Burns Incorporated and their counsel attended the pre-hearing as scheduled by the Commission. Again, no concerns were raised about the Chairperson. Rather, the main concern was the permission granted to Advocate Varney to lead the evidence of the Calata Group of witnesses.

52 On 28 October 2025, Boqwana Burns addressed correspondence to the Commission requesting copies of witness statements and the supporting documents of the Calata Group of witnesses. The Commission responded and forwarded the statements to the legal representatives of the Applicants. A copy of the letter from Boqwana Burns Incorporated and the Commission's response thereto is annexed as **"SC15"** and **"SC16"**, respectively.

53 On 3 November 2025, Boqwana Burns Incorporated addressed further correspondence in connection with witness statements and further evidence implicating their clients for the purpose of preparing witness statements. Again,

no issue of alleged bias was raised against the Chairperson. This letter is annexed as **"SC17"**.

54 I submit that it is highly, if not decisively, significant that the Boqwana Burns Incorporated group of clients at no earlier stage raised any objection to either the Chairperson's or the Chief Evidence Leader's participation in the work of the Commission. The only concern they raised related to the process followed in granting permission to Advocate Varney to lead the evidence of the Calata Group of witnesses. They did not participate in the application for my recusal, even when all interested parties were invited by the Commission to do so, if so minded.

55 On 3 December 2025, the Commission held a virtual meeting for the purpose of addressing challenges faced by the Applicants' legal representatives in furnishing the Commission with witness statements and in light of the tight timeframes and the extension granted for the life of the Commission. Again, no concerns about the Chairperson and her previous roles were raised. Instead, the commitment to assisting the Commission was re-affirmed. In this regard, I refer to a copy of the letter from Boqwana Burns Incorporated of 9 December 2025, which I annex as **"SC18"**.

56 On the bases of the foregoing, I submit that the first ground is not a valid basis in law to justify the recusal of the Chairperson.

GROUND TWO: OBJECTIONS RELATING TO MY ROLE AS EVIDENCE LEADER

57 The second ground on which the Applicants found their recusal application relates to the Chairperson's handling of a series of objections raised by several parties before the Commission, including the NPA, the Department of Justice, the South African Police Services and members of the former Executive.

58 In respect of this ground, the Applicants seek in particular to impugn the Chairperson's handling of the failed application for my recusal as the Chief Evidence Leader.

59 In my broad response to the allegations made in respect of that issue, I begin by noting the following. The Applicants' reliance on this ground is not easy to comprehend. This is because of the following. The application for my recusal was brought by the NPA and the Minister of Justice. Significantly, the Applicants did not join in the application for my recusal. It is so that the Applicants did raise objections to certain arrangements which I had made with counsel for the Calata Group, for him to lead the evidence of their witnesses. However, the application in support of my recusal was argued only by the legal teams for the Minister and the NPA. The Applicants only made written submissions in support of their objection to the arrangement, but not in respect of my recusal.

60 Before the objections could be argued, all the objectors agreed to an order of settlement which was made an Order by the Commission.

61 The application for my recusal was dismissed in a written Ruling handed down by the Commission. I submit the Ruling speaks for itself.

62 With respect, that Ruling disposes of the issues raised in the applications for my recusal. In light thereof, I submit that it is impermissible for the Applicants to hark back to the issues which formed the backdrop to that recusal application and in which they elected not to participate.

63 It would appear from the allegations made in the First Applicant's Founding Affidavit that the Applicants are dissatisfied with and aggrieved by the outcome of the application for my recusal and the Commission's consideration of that application. Whether or not such dissatisfaction or aggrievement is justified is, I submit, irrelevant for the purposes of the present application.

64 I say this on account of the following. First, the ordinary remedy of a party who is aggrieved by a Ruling handed down during proceedings is not an application for the recusal of the Chairperson or a member of the panel. This is especially so in respect of a Ruling on an aspect that had been raised by other parties but not the aggrieved party.

65 Second, the challenge to such a Ruling may only be made by an application for a re-consideration of the Ruling (to the panel who made the ruling) or by way of an application to the High Court to have that Ruling reviewed and set aside.

66 Third, however, save in highly exceptional circumstances, the High Court will not entertain an application to review a Ruling during the course of on-going

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proceedings. I submit that that is the reason that the Applicants seek to address their grievance through the present application – for the recusal of the Chairperson. With respect, such an approach is misconceived. It is impermissible for the Applicants to address their grievance through a recusal application. In this regard, I respectfully point out that the basis of their alleged apprehension of bias or lack of impartiality on the part of the Chairperson cannot legitimately be founded on my continuing to be the Chief Evidence Leader.

67 Fourth, the attempt to even suggest that there is a link between my continued participation in the work of the Commission and an alleged apprehension of bias on the part of the Chairperson must with respect fail. No objective link has been alleged, nor can one be suggested. This is because I am not a party to the proceedings: I am one of the Evidence Leaders who is responsible for the presentation of the evidence of the witnesses to the Commissioners.

68 In addition to the foregoing, I make the following averments and submissions.

69 The First Applicant seems to found this ground on the continued role of the Chairperson on events which are tied to my recusal. Those events are irrelevant and cannot form the basis of the recusal of the Chairperson. They can play no role in what happens in the Commission thereafter.

70 As I pointed out in my Answering Affidavit in the Zuma application, the standard to be applied when deciding whether a case for the recusal of the Chairperson has been made out has been established in our jurisprudence. I respectfully request that the averments I made therein on this issue be incorporated herein.

Further legal submissions on this issue will be made at the hearing of this matter. Suffice it to state that the Applicants have not provided any evidence which could lead to the conclusion that they reasonably apprehend that, on a proper consideration of the correct facts, a reasonable person will apprehend that the Chairperson will or is likely to be biased.

71 The Applicants also neglect the fact that the Commission is not accusatorial but inquisitorial in nature. Its function is to gather evidence in line with the TOR and then make recommendations to the President.

72 In the present circumstances, what the Applicants are required to do is cooperate with the Commission, as they have undertaken to do, and provide such information and evidence as may be in their possession, which will be evaluated objectively and impartially by the Commission.

73 The Applicants have all the procedural safeguards to ensure that they are treated fairly and impartially. They have a right to present whatever information and evidence is in their possession or knowledge. To the extent that anyone may implicate them, they have all the procedural safeguards, including cross examination and impeachment of such evidence.

74 In the premises, as with the first ground on which the Applicants rely, there is no merit in the second ground, and I reiterate that it is misconceived.

75 Accordingly, their application for the recusal of the Chairperson has no merit and falls to be dismissed.

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76 In the paragraphs above I have largely dealt with the main thrust of my response to the merits of the application. However, for completeness' sake, I respond to the extent necessary to the specific allegations made in the Founding Affidavit.

Ad paragraphs 1 to 5

I note the allegations in these paragraphs.

Ad paragraphs 6 to 11

77 I deny that the application has any merit. I have demonstrated that the two grounds on which the Applicants rely have no merit. On the first ground, the past positions held by the Chairperson do not disclose any ground in law for her recusal in the circumstances of this matter. The roles she played predate the period covered by the TOR and do not disclose any justifiable ground in law for her recusal.

78 The Applicants do not offer any explanation for the lateness of this application. There was no information which was unknown to the Applicants regarding the Chairperson at the time President Ramaphosa issued the Proclamation establishing this Commission.

79 The previous positions held by the Chairperson are matters of common and public knowledge. There is no justifiable reason why this application is only brought at this late stage. The only discernible reason appears to be to frustrate the work of the Commission.

80 It is apparent from the record of the proceedings so far, particularly the prehearing meeting held on 27 October 2025, as well as the objections raised by the legal representatives of the Applicants both orally during the prehearing and in writing subsequently, that there has been strong objection against the leading of certain of the evidence by the counsel for the Calata Group. The strong objection by the legal representatives of the Applicants appears to be based on their perception that the Commission is merely a dress rehearsal to the litigation in the High Court instituted by the Calata Group. This is a mischaracterization of the Commission's proceedings. The Commission is inquisitorial in nature and in no way is it a mirror representation of the High Court matter.

81 The Commission made a Ruling on the objections, after the parties had agreed to the terms of an order, just before the arguments were to be heard. Notably, the applicants' legal representatives were not present then and apparently elected not to participate despite knowing of those proceedings. In terms of a later Ruling, the Calata Group are allowed to have the evidence of their witnesses led through their legal representatives. This matter has been settled and decided but it appears that the Applicants are not satisfied with the outcome. Hence this belated application.

82 In the application for my recusal, the Commission emphasized that it is trite law that applications for recusal must be brought as soon as the cause for concern becomes known because it is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature are raised at the earliest possible stage. (See paragraph 64 of the Ruling.)

83 From the chronology of events set out above in respect of this application, it is clear that it has been brought at a late stage in the proceedings and that the delay was undue. Yet no explanation, let alone a proper explanation, has been proffered for the undue delay.

84 Regarding the second reason for the recusal, concerning the manner in which the Chairperson handled the alleged conflict of interest objections, the allegations contained herein are denied.

Ad paragraphs 12 – 13

85 The contents of these paragraphs are not disputed.

Ad paragraphs 14

86 The mere fact that former President Mbeki has been issued with a Rule 3.3 Notice does not make him a party before the Commission. All that he is required to do, like all persons who are issued with a Rule 3.3 Notice, is to provide information and, if necessary, to give evidence. This is not an accusatorial process. Accordingly, to characterize the former President as "a party" is simply incorrect. All that the Commission is required to do is to gather the necessary evidence and make recommendations to the President, who is free to either accept or reject the recommendations.

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Ad paragraphs 16–34

87 I have dealt with the grounds for recusal raised in these paragraphs. I reiterate that they have no basis in law. Legal submissions will be presented on these issues at the hearing of this matter.

Ad paragraphs 35 – 47

88 The Chairperson allocated time to hear argument from various parties in the applications for my recusal and then issued her Ruling. It is impermissible for the Applicants to address their grievances about that Ruling through a misguided application for the recusal of the Chairperson. Even if the Ruling is impugnable in law, and I deny it is, recusal of the person who made the Ruling is not a remedy recognised in law therefor: an application for the Chairperson's recusal is accordingly impermissible on this ground.

89 The Applicants' legal representatives attended the Pre-hearing on 27 October 2025. At that meeting objections were raised to Adv Varney's leading the witnesses of the Calata group. Those objections, together with those from other parties, i.e., the NPA, the SAPS, and the Minister of Justice and Constitutional Development, were carefully considered by the Chairperson, and a decision was made to permit Adv Varney to lead the Calata witnesses.

90 I deny that the Chairperson failed to interrogate the objections submitted by the various parties. In fact, the Chairperson considered all submissions, including those of the Commission's evidence leaders, and after such consideration, came

to the reasonable conclusion that the decision to grant the Applicant's right to lead evidence of their witnesses is the prerogative of the Chairperson. She subsequently granted Adv Varney's application to lead his own witnesses. In fact, this is in line with the very submissions on this issue previously submitted by the applicants' legal representatives and their advocates briefed in this matter.

91 It is so that the Applicants' legal representative asked for the reasons for the Chairperson's decision. She was however under no obligation to provide such reasons. In the letter in response to the request, the Commission stated:

> "*Rule 3.1 gives the Chairperson the power to give directions for the presentation of witness' evidence and does not require reasons to be furnished for a direction made in terms of that rule*".

Ad paragraphs 48 and 50

92 The contents of these paragraphs are denied.

Ad paragraphs 51 to 60

93 The test for recusal is well established in our law. I deny that it is applicable in this matter. Legal submissions will be presented at the hearing of this matter.

Ad paragraphs 61

94 The Applicants have not made out a proper case for recusal or claims of alleged prejudice: they have not shown a reasonable basis for allegations of perceived

bias. The alleged apprehension of partiality or bias is not reasonable and no reasonable person would on the correct facts apprehend that there might be bias.

CONCLUSION

95 I submit, on the strength of what I have stated above, that the application for the recusal of the Chairperson falls to be dismissed.

96 I also point out that it is telling that such applications are not being supported by the parties who have been described as "interested parties" in the Proclamation. This is because they are devoid of merit.

WHEREFORE the application for the Chairperson's recusal and other relief sought by the Applicants falls to be dismissed.

DEPONENT

I CERTIFY THAT the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at SANDTON on this 26TH day of DECEMBER 2025 under compliance with the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended).

I certify that this document is a true copy of the original which was examined by me and that, from my observation the original has not been altered in any manner.

SIGNATURE
DINANA REID INC
Commissioner of Oaths (RSA)
Member nr: 45818
Unit C36 Block C Lonecreek, 21 Mac Mac Road & Howick Close
Waterfall Park, Midrand
Date: 26/12/2025

COMMISSIONER OF OATHS

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The Secretary:

The Judicial Commission of Inquiry into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases

Per e-mail: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
Date: 09 December 2025
Email: irvine@boqwanaburns.com
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Dear Madam

RE: WITNESS STATEMENTS IMPLICATING OUR CLIENTS

1. We refer to our letters to the TRC Commission of Inquiry ("the Commission") dated 03 November 2025 and 07 November 2025; wherein we requested that the Commission provide us with witness statements and documents of the Calata Group of Witnesses that will be relied on by the Commission.

2. In response to our request of 07 November 2025, you advised that our concerns will be forwarded to Webber Wentzel, the attorneys of record for the Calata Group of Witnesses for their response. We once again wish to put on record that we find this approach undesirable as the Evidence Leaders seems to have outsourced the responsibility to some group of witnesses. We reiterate that we

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are responsive to the Commission and Evidence Leaders and not Webber Wentzel.

3. We further refer to our Mr Boqwana's virtual meeting with the Commission's Chief Evidence Leader, Adv Ishmeal Semenya SC, where he requested for the filing of the witness statements to be made on or before the 12 January 2026. This was also discussed with our Counsel and below is our response to both of the above points.

4. As directed by the Commission, we proceeded with the request. In response to our request, Webber Wentzel did not provide witness statements, rather it:

4.1. provided a list of their witnesses; and

4.2. reference to various paragraphs from affidavits filed in the High Court for purposes of the litigation before that Court ("Calata litigation"), that they would be relying upon.

5. It must be placed on record that this approach is unhelpful in preparing our clients' statements for the Commission; as we simply do not know the case we must answer in relation to our clients. Treating paragraph references from different proceedings as a substitute for coherent witness statements is, at best, an untenable approach and makes it difficult for clients to be convinced of their participation in this matter. For example:

5.1 Webber Wentzel has advised that Mr Lukhanyo Calata intends to rely on his entire founding affidavit in the Calata litigation. You will appreciate that we are familiar with that affidavit, given that our clients sought to intervene in the High Court proceedings. Our understanding is that that Affidavit seeks to justify a different relief than what the Commission seeks to achieve. So, the Affidavit is wholly inadequate.

5.2 It is the Commission that requires our client's attendance and must have on its own satisfied itself of the basis for our client's appearance. To this end we need the Commission's own questions and specific issues that our client are required to address.

5.3 In relation to Mr Michael Schimdt, we are advised that the Commission will rely on paragraphs 382 to 394 of the Calata founding affidavit and Annexure FA59. For clients to be required to answer on the opinions expressed in books is most undesirable. We have nevertheless looked at relevant extracts, with reference to specified paragraphs:

> *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 Niel 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 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).*

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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. Kogi, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was in the form

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of discussions followed by a dinner hosted by Mr Kogi. 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.

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.....

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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 Kogi 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.*

390 *At the ANC's 51st national conference in December 2002 in Stellenbosch, a discussion of guidelines for a broad national amnesty,*

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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 Nuremburg 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

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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 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.

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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.

6. It is not clear if the Commission or the Evidence Leaders have scrutinised this and determine its veracity and then questions to be answered by clients.

7. The Commission will appreciate that our clients have been out of government for nearly twenty years. The extract referred to above, together with others, makes reference to various meetings, written submissions, and detailed proposals. Yet none of these documents, including meeting minutes, have been provided to us, despite our repeated requests.

8. Our clients remain willing to assist the Commission. However, for us to meet the Evidence Leaders' deadline of 12 January 2026, we require specific questions to each of our clients. This is precisely why, from the outset, we requested written statements from the Commission together with the relevant documents in the custody of government. You will agree that it is neither desirable nor fair for our clients to be expected to guess the case they must meet; such an approach is highly prejudicial.

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9. In light of the above, we must again insist on receiving written statements from the Commission, together with supporting documents, setting out clearly the case our clients are required to answer.

10. To this end we wish to restate our request, that ***you provide us with specific questions/issues/concerns/information that the Commission seek to be addressed by clients, individually and collectively.*** For instance, allegations against Ms Didiza relates to a meeting that allegedly took place at the late Minister Zola Skweyiya's house. We require the minute of this meeting. This will assist us to provide the statement on behalf of Ms Didiza.

11. For avoidance of confusion and misunderstanding we request that the Commission and Evidence Leaders direct any correspondence with regard to this matter to ourselves and place any request including that of dates in writing.

Yours faithfully

Boqwana Burns Inc.

NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

TO: **THABO MBEKI**

EMAIL: ivine@bogwanaburn.com

aneesa@bogwanaburns.com

INTRODUCTION AND ESTABLISHMENT OF THE COMMISSION

1. On 29 May 2025, the President of the Republic of South Africa issued Proclamation Notice No. 264 of 2025, establishing the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("the Commission").

2. The Commission was appointed in terms of section 84(2)(f) of the Constitution, 1996. The Honourable Madam Justice S. Khampepe serves as Chairperson, with the Honourable Mr Justice F. D. Kgomo and Adv A. Gabriel SC as members.

3. In terms of its mandate, the Commission is required to inquire into, make findings, report on, and make recommendations concerning allegations that, since 2003, efforts or attempts were made to influence, pressure, or

otherwise improperly prevent the South African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

4. Among the parties identified as having a substantial interest in these proceedings are:

   a. The applicants in the matter of L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245, North Gauteng High Court, Pretoria); and

   b. The families of victims in TRC cases who have a substantial interest in the matters under inquiry.

NOTICE IN TERMS OF RULE 3.3

5. This notice is issued in terms of Rule 3.3 of the Rules of the Commission, read with the Regulations made under Government Notice R.278 of 2025.

6. The Commission's Evidence Leaders intend to present the evidence of one or more applicants in the Calata case, and any person who in the opinion of

the Evidence Leaders possesses information that relates to the paragraph 9 allegations against you and is relevant to the Commission's work.

7. The specific date and venue for the hearing at which such evidence will be presented will be communicated to you in due course.

8. The paragraph 9 evidence, being the extract of the Calata matter's founding affidavit, with corresponding paragraph numbering, implicates, or may implicate, you in allegations regarding efforts or attempts to halt or suppress the investigation or prosecution of TRC matters. Further details of the Calata proceedings, including the said affidavit, are available on the Commission's website at www.trc-inquiry.org.za.

PARTICULARS OF IMPLICATION

9. It is alleged as follows:

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

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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. ...

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."

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**.

125. 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.

125.1 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.

125.2 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*".

125.3 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.

126. 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.

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

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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.

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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.

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:

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".

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131.2.1 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.

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.

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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.

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.

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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":

131.6.1 Prosecutions not to be conducted on a piece meal basis except

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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)*

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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 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)*

134. 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."

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135. 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 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).

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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

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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 issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues.

You are therefore 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

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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 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 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.

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.

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ix) 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.

x) 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.

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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."

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.

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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.

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**).

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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.

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

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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 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:

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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.

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.

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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.

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. 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

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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.

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.

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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 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.

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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.

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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**).

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.

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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.

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'.

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.

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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*".

168.2 They also doubted that "*the motivation for such legislation would meet the requirements of section 36 (the*

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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 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

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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 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

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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.

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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:

"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.

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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 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

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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, 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

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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.

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.

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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 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.

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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 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.

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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.

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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.

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*:

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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.

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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

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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.

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:

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

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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;

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

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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.

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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 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 **39**

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 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.

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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 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:

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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 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

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.

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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

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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 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.

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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 [ ] 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.

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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

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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.[...] The memorandum alleged that Britz was "*sympathetic*" to former members of the SB and opposed their prosecutions. According to Ackermann, Britz had leaked 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.

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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 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.

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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

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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.

> 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.

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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 postTRC 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."

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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 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.

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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

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of the Presidency to be part of the group assessing 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

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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

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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

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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.

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,

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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 twostage 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.

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

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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

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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.

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

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

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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).

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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

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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

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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 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:

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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." (Bold added).

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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 he did not get an immediate

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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

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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 **56**

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.***

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.*

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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.

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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.

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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

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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.

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

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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

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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. 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

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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

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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

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Ackermann from his duties in respect of those cases. Pikoli declined to do so.

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.

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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

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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:

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

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documents. She complained that she had not been advised of the decision to investigate and wanted to know the basis thereof.

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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 subcommittee 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 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

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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

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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.

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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.

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.

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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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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.

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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.

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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:

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

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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*

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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

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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**.

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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 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.

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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,

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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.

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

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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.

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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*" 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."

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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,

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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*

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Convention for a Democratic South Africa (CODESA) not to prosecute the TRC cases." He said, "*Minister Lamola had 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**.

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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*

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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**.

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:

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379.1. De Klerk often consulted with President Mbeki directly or with other highranking 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.

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

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with the aim of discussing questions of criminal accountability arising from the past.

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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

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continued until early 2003, with a few follow-up meetings held in 2004.

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.

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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 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).

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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.

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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.

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

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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.

WDR

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 nationbuilding. 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

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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

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amnesty with no disclosure required – but the government appeared only willing to offer an amnesty based on full disclosure to be decided on a caseby-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.

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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 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.

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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 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.

> I also recall that the same Pikoli who allegedly buckled under pressure of "executive interference" concerning the TRC cases,

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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

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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.

YOUR RIGHTS AND OBLIGATIONS

10. You are entitled to attend the hearing at which the evidence relating to the above allegations, and any other that may be led against you, is presented. You may be represented by a legal practitioner of your choice.

11. Rule 3.4 requires that, within fourteen (14) calendar days of this notice, you submit a statement in the form of an affidavit responding to the allegations. Your affidavit must specify which parts of the evidence are disputed or denied, and set out the grounds for such dispute or denial.

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12. If you wish to—

    a. give evidence yourself;

    b. call any witness in your defence; or

    c. cross-examine the witness whose evidence implicates you,

    you must apply in writing to the Commission for leave to do so within fourteen (14) calendar days of this notice, accompanied by your affidavit.

13. You may also apply for leave to make written and/or oral submissions regarding the findings or conclusions that the Chairperson should draw from the evidence relating to you.

COMMUNICATION WITH THE COMMISSION

14. All correspondence, applications, and affidavits must be directed to: The Secretary of the Commission [Insert Secretary's email and postal address]

DATED at Sci Bono Johannesburg on this 19 day of September 2025.

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases.

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NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

TO: MS MABANDLA BRIGITTE

EMAIL: ivine@bogwanaburn.com;

aneesa@bogwanaburns.com

INTRODUCTION AND ESTABLISHMENT OF THE COMMISSION

1. On 29 May 2025, the President of the Republic of South Africa issued Proclamation Notice No. 264 of 2025, establishing the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("the Commission").

2. The Commission was appointed in terms of section 84(2)(f) of the Constitution, 1996. The Honourable Madam Justice S. Khampepe serves as Chairperson, with the Honourable Mr Justice F. D. Kgomo and Adv A. Gabriel SC as members.

3. In terms of its mandate, the Commission is required to inquire into, make findings, report on, and make recommendations concerning allegations that, since 2003, efforts or attempts were made to influence, pressure, or otherwise improperly prevent the South

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African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

4. Among the parties identified as having a substantial interest in these proceedings are:

   a. The applicants in the matter of L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245, North Gauteng High Court, Pretoria); and

   b. The families of victims in TRC cases who have a substantial interest in the matters under inquiry.

NOTICE IN TERMS OF RULE 3.3

5. This notice is issued in terms of Rule 3.3 of the Rules of the Commission, read with the Regulations made under Government Notice R.278 of 2025.

6. The Commission's Evidence Leaders intend to present the evidence of one or more applicants in the Calata case, and any person who in the opinion of the Evidence Leaders possesses information that relates to the paragraph **Error! Reference source not found.** allegations against you and is relevant to the Commission's work.

7. The specific date and venue for the hearing at which such evidence will be presented will be communicated to you in due course.

8. Below is an extract from the Calata matter's founding affidavit, with corresponding paragraph numbering, which implicate, or may implicate, you in allegations regarding efforts or attempts to halt or suppress the investigation or prosecution of TRC matters. Further details of the Calata proceedings, including the said affidavit, are available on the Commission's website at www.trc-inquiry.org.za.

"PARTICULARS OF IMPLICATION

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 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.*

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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.*

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 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).*

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.*

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).*

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 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 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.

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.*

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.*

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. 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.*

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:*

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 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.*

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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.

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."*

YOUR RIGHTS AND OBLIGATIONS

9. You are entitled to attend the hearing at which the evidence relating to the above allegations, and any other that may be led against you, is presented. You may be represented by a legal practitioner of your choice.

10. Rule 3.4 requires that, within fourteen (14) calendar days of this notice, you submit a statement in the form of an affidavit responding to the allegations. Your affidavit must specify which parts of the evidence are disputed or denied, and set out the grounds for such dispute or denial.

11. If you wish to—

    a. give evidence yourself;

    b. call any witness in your defence; or

    c. cross-examine the witness whose evidence implicates you,

    you must apply in writing to the Commission for leave to do so within fourteen (14) calendar days of this notice, accompanied by your affidavit.

12. You may also apply for leave to make written and/or oral submissions regarding the findings or conclusions that the Chairperson should draw from the evidence relating to you.

COMMUNICATION WITH THE COMMISSION

13. All correspondence, applications, and affidavits must be directed to: The Secretary of the Commission at secretary@trc-inquiry.co.za

DATED at **Sci-Bono Discovery centre** Johannesburg on this 19 day of September 2025.

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases

NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

TO: DIDIZA THOKO

EMAIL: didizathoko@gmail.com

INTRODUCTION AND ESTABLISHMENT OF THE COMMISSION

1. On 29 May 2025, the President of the Republic of South Africa issued Proclamation Notice No. 264 of 2025, establishing the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("the Commission").

2. The Commission was appointed in terms of section 84(2)(f) of the Constitution, 1996. The Honourable Madam Justice S. Khampepe serves as Chairperson, with the Honourable Mr Justice F. D. Kgomo and Adv A. Gabriel SC as members.

3. In terms of its mandate, the Commission is required to inquire into, make findings, report on, and make recommendations concerning allegations that, since 2003, efforts or attempts were made to influence, pressure, or otherwise improperly

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prevent the South African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

4. Among the parties identified as having a substantial interest in these proceedings are:

   a. The applicants in the matter of L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245, North Gauteng High Court, Pretoria); and

   b. The families of victims in TRC cases who have a substantial interest in the matters under inquiry.

NOTICE IN TERMS OF RULE 3.3

5. This notice is issued in terms of Rule 3.3 of the Rules of the Commission, read with the Regulations made under Government Notice R.278 of 2025.

6. The Commission's Evidence Leaders intend to present the evidence of one or more applicants in the Calata case, and any person who in the opinion of the Evidence Leaders possesses information that relates to the paragraph **Error!**

Reference source not found. allegations against you and is relevant to the Commission's work.

7. The specific date and venue for the hearing at which such evidence will be presented will be communicated to you in due course.

8. Below is an extract from the Calata matter's founding affidavit, with corresponding paragraph numbering, which implicate, or may implicate, you in allegations regarding efforts or attempts to halt or suppress the investigation or prosecution of TRC matters. Further details of the Calata proceedings, including the said affidavit, are available on the Commission's website at www.trc-inquiry.org.za.

"PARTICULARS OF IMPLICATION

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 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*

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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.*

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*

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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 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)."*

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DATED at **SCI-BONO DISCOVERY CENTRE** Johannesburg on this 19 day of September 2025.

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases:

"SC5"

NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

TO: KASRILS RONNIE

EMAIL: rkastrils@gmail.com

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efforts or attempts were made to influence, pressure, or otherwise improperly prevent the South African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

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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

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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*

DR

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.*

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**.*

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*

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*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.*

381. *According to an interview conducted by Bubenzer with former SADF General Jan Geldenhuys (**Geldenhuys**) in Pretoria on 10 May 2006,*

DR

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.*

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 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

DR

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.

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.

DR

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*

DR

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.

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:*

DR

"... 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 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.*

DR

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."*

YOUR RIGHTS AND OBLIGATIONS

9. You are entitled to attend the hearing at which the evidence relating to the above allegations, and any other that may be led against you, is presented. You may be represented by a legal practitioner of your choice.

10. Rule 3.4 requires that, within fourteen (14) calendar days of this notice, you submit a statement in the form of an affidavit responding to the allegations. Your affidavit must specify which parts of the evidence are disputed or denied, and set out the grounds for such dispute or denial.

11. If you wish to—

    a. give evidence yourself;

    b. call any witness in your defence; or

    c. cross-examine the witness whose evidence implicates you,

    you must apply in writing to the Commission for leave to do so within fourteen (14) calendar days of this notice, accompanied by your affidavit.

DR

12. You may also apply for leave to make written and/or oral submissions regarding the findings or conclusions that the Chairperson should draw from the evidence relating to you.

COMMUNICATION WITH THE COMMISSION

13. All correspondence, applications, and affidavits must be directed to: The Secretary of the Commission at secretary@trc-inquiry.co.za.

DATED at **SCI-BONO DISCOVERY CENTRE** Johannesburg on this 8th day of October 2025.

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases.

DR

"SC6"

Thu 2025/10/09 14:36

AF

amina frense <aminafrense1@gmail.com>

Fwd: Notice in terms of rule 3.3 // Ronnie Kasrills

o Secretary; Investigations; Document Manager

You replied to this message on 2025/10/13 14:46.

image002.png
197 KB

TRC CASES INQUIRY RULES 29.08.2025 (2).pdf
522 KB

NOTICE IN TERMS OF RULE 3.3 RONNIE KASRILS.pdf
374 KB

Dear Adv Thokoa,
This is to confirm receipt of your mail, and to:
1. inform you that my computer is presently not functioning properly, so would you kindly copy further mail to my wife at <aminafrense1@gmail.com> I am hoping my computer will be repaired in due course.
2. I am due to undergo an eye operation on 14 October, which will likely incapacitate my reading ability for a week ie. until 21 October. In view of this could you please extend my full response to the questions you have raised to 31 October? At present I had to read your communication on my mobile phone, at considerable strain to my eyes.

I will of course be cooperating with your inquiry to the best of my ability,.

Thank you,

RONALD (Ronnie) KASRILS

--------- Forwarded message --------
From: **Ronnie Kasrils** <rkasrils@gmail.com>
Date: Thu, 9 Oct 2025 at 14:08
Subject: Fwd: Notice in terms of rule 3.3 // Ronnie Kasrills
To: Amina Frense <aminafrense1@gmail.com>

-------- Forwarded message --------
From: **Executive Assistant** <executive.assistant@trc-inquiry.org.za>

kmns
Attorneys Notaries & Conveyancers

43 Wierda Road West | Wierda Valley | Sandton | 2196
t: 011 462 5589 | f: 086 561 7741 | Docex 48 Rosebank | PO Box 781276 | Sandton | 2146 | info@kmnsinc.co.za | www.kmnsinc.co.za

THE SECRETARY OF THE COMMISSION
JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

EMAILS: secretary@trc-inquiry.org.za / mongezi@ntanga.co.za

ATTENTION: ADV THOKOA

Your reference	**Our reference**	**Date**
	Mr. Kwinana/Mr. Ncube	02 October 2025

Dear Adv Thokoa,

RE: NOTICE IN TERMS OF RULE 3.3 JACOB ZUMA

1. We act on behalf of Former President Jacob Zuma ("**our client**" or "**President Zuma**") in this matter.

2. Our client has brought to our attention, the correspondence and accompanying Notice issued in terms of the Rules of the current Khampepe Commission. We are instructed to respond as follows:-

   2.1. Our client intends to apply his mind to the contents of the abovementioned documents received and to respond thereto upon obtaining the necessary legal advice.

   2.2. However due to issues of his current health condition and imminent overseas travelling plans, our client will be unable to meet the 14 day period referred to in Rule 3.4 and/or paragraphs 10 and 11 of the Notice.

   2.3. More specifically our client is scheduled to leave South Africa on 2 October 2025 and to return on or about 19 October 2025.

   2.4. On our calculation the 14 day period referred to above expires on 10 October 2025, i.e during the period of our client's absence from the country.

2.5. Needless to say, to date he has not been in a position to have any meaningful consultations with his legal representatives. This is also partly due to the fact that he has not been furnished with the annexures to the affidavit in which he is allegedly implicated. We also hold instructions to make the necessary enquiry as to whether the state will provide any legal support to our client in view of the fact that you have approached him in his official capacity as a former head of state.

2.6. Accordingly President Zuma seeks an extension of the deadline to a minimum of 10 days after his return to South Africa or 31 October 2025 to consider his position and furnish a detailed response, if so advised.

2.7. As matters currently stand it is not totally clear in what exact way President Zuma is allegedly implicated in the matters under investigation.

2.8. In the meantime kindly furnish us with the missing annexures, which may shed some more light on the relevant issues.

2.9. All our client's rights are fully reserved.

2.10. Should there be any further developments in the intervening period, we will duly communicate them to you.

3. In view of all of the above we request that you convey the contents of this letter to whomsoever it may concern on your side and revert to us with the response, at your earliest convenience.

4. We trust that the above is in order and look forward to hearing from you.

Yours faithfully,

KMNS INC.
per: THABO KWINANA

boqwana burns.
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The Secretary
Truth and Reconciliation Commission

EMAIL: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/Aneesa
Your Ref:
Date: 06 October 2025
Email: irvine@boqwanaburns.com
aneesa@boqwanaburns.com

Dear Sir / Madam

RE: NOTICE IN TERMS OF RULE 3.3 – MR THABO MBEKI, MS BRIGITTE MABANDLA AND MS THOKO DIDIZA

We refer to our email dated 2 October 2025 and would like to request and update you on the following:

1. We have been informed that a proposed witness list and order of appearance before the Commission have been finalised. Please furnish us with a copy of same.

2. We made a formal request for private legal funding from the President on the 3rd October 2025 and hope to receive a positive reply soonest, in order to consult with our clients to:

   2.1 prepare a written statement in the form of an Affidavit to respond to the allegations,

   2.2 consider the need to give oral evidence at the Inquiry,

   2.3 consider if we intend to call witnesses in our defence; and

2.4 consider filing a request to for leave to cross-examine witnesses who implicate our clients.

3. Our clients have an extremely busy schedule and need to make urgent arrangements to comply and not frustrate the functions of this Commission and shall appreciate it if we could be considered to partake in setting time periods and further practicalities for the leading of evidence insofar as our clients rights are concerned as per paragraph 3.3 of the Commission Rules.

4. Please confirm that the Rules of the Commission are indeed those promulgated under Notice 285/2025 and on the 29th August 2025. If not, please let us have your Rules.

5. Please furnish us with your website, where we can obtain all the relevant information of the Commission.

6. We will make these arrangements upon receipt of the President's positive reply to our request for State funding for our legal fees.

7. Please advise if the writer can arrange to meet with you face-to-face to attend to these issues urgently and the ensure that the Commission's work is not delayed.

Yours faithfully

BOQWANA BURNS INC.

DR

"SC9"

Tue 2025/10/14 11:49

RK

Ronnie Kasrils <rkasrils@gmail.com>

Re: Notice in terms of rule 3.3 // Ronnie Kasrills

To ✓ Secretary

Cc ○ Investigations; ○ Document Manager

ⓘ You forwarded this message on 2025/10/29 20:59.

Dear Adv. Thokoa,

Thank you very much for your response to my letters.

I have a specific query, which relates to the meeting referred to in the Notice you sent me at 261, where Adv Pikoli "was summoned to a meeting of the subcommittee JCPS...on Post TRC matters...23 August 2007...attended by several cabinet ministers" including me.

To be able to respond to what took place at this meeting, eighteen years ago, I would need to examine the minutes of that meeting. Are you able to furnish me with a copy of those minutes?

Thank you. (I am off for the medical procedure I referred to).

Ronnie Kasrils

boqwana burns.
www.boqwanaburns.com

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The Secretary
The Truth and Reconciliation Commission

PER EMAIL: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
Date: 14 October 2025
Email: irvine@boqwanaburns.com
lutho@boqwanaburns.com
thembelihle@boqwanaburns.com
aneesa@boqwanaburns.com

Dear Sir

RE: NOTICE IN TERMS OF RULE 3.3

1. We refer to our correspondence dated 06 October 2025, regarding the participation of Former President Mr Thabo Mbeki and former Ministers, Ms Brigette Mabandla and Ms Thoko Didiza in the Commission.

2. We further refer to your response dated 08 October 2025. Kindly note that we are currently considering the contents of your response and taking instructions. We shall respond to same in due course.

3. We further refer to your email correspondence to former Minister, Mr Ronald Kasrils dated 09 October 2025, wherein the Commission advised that it had identified evidence that may implicate him in respect of matters under investigation in the Commission.

4. We wish to place on record that we shall also be representing Mr. Kasrils in the Commission. Mr. Kasrils has indicated that he will be undergoing a medical procedure during this week. He will thus only be able to consult with the legal team after 21 October 2025. We thus reiterate his earlier request for more time to consider and respond to the Rule 3.3 notice, as he will need to consult with the legal team to prepare his responses.

5. We look forward to your positive responses.

Yours faithfully

Boqwana Burns Inc.

"SC11"

DR

Fri 2025/10/17 17:18

LD

Lutho Dzedze <lutho@boqwanaburns.com>

RE: PRE-INQUIRY MEETING CONFIRMATION

Secretary

Thembelihle Vika

You forwarded this message on 2025/12/22 12:11.

Dear Sir/ Madam

This email serves as confirmation that the legal team representing Former President Mbeki and Former Ministers Mabandla, Kasrils and Didiza shall attend be attending the Pre-Inquiry Meeting scheduled for the 27 October 2025.

In attendance shall be:

1. Mr. Max Boqwana: max@boqwanaburns.com.
2. Mr. Irvine Armoed: irvine@boqwanaburns.com.
3. Mr. Lutho Dzedze: lutho@boqwanaburns.com.
4. Ms Thembelihle Vika: thembelihle@boqwanaburns.com
5. Adv Hamilton Maenetje SC: maenetje@duma.nokwe.co.za
6. Adv Phumzile Sokhela: sokhela@group621.co.za
7. Adv Nyoko Muvangua: nyoko@group621.co.za
8. Dr Khulekani Moyo: kh.moyo@gmail.com

Kindly confirm receipt.

Kind regards,

Lutho Dzedze
Associate

boqwana burns.

Microsoft Teams

boqwana burns.
www.boqwanaburns.com

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Also @ King William's Town,
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The Secretary
The Truth and Reconciliation Commission

PER EMAIL: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
Date: 21 October 2025
Email: irvine@boqwanaburns.com
lutho@boqwanaburns.com
thembelihle@boqwanaburns.com
aneesa@boqwanaburns.com

Dear Sir

RE: NOTICE IN TERMS OF RULE 3.3 - CHARLES NQAKULA

1. We refer to your email correspondence to former Minister, Mr Charles Nqakula dated 20 October 2025, wherein the Commission advised that it had identified evidence that may implicate him in respect of matters under investigation in the Commission.

2. We wish to place on record that our law firm will be representing Mr. Nqakula in the Commission, along with Former President Mbeki and Former Ministers Mabandla, Didiza and Kasrils. Our client will respond accordingly to your Rule 3.3 Notice; we are arranging a consultation in order to prepare his responses.

We hope the above is in order.

Yours faithfully

Boqwana Burns Inc.

DR

NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

TO: CHARLERS NQAKULA

EMAIL: cnqakula@parliament.go.za

INTRODUCTION AND ESTABLISHMENT OF THE COMMISSION

1. On 29 May 2025, the President of the Republic of South Africa issued Proclamation Notice No. 264 of 2025, establishing the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("the Commission").

2. The Commission was appointed in terms of section 84(2)(f) of the Constitution, 1996. The Honourable Madam Justice S. Khampepe serves as Chairperson, with the Honourable Mr Justice F. D. Kgomo and Adv A. Gabriel SC as members.

3. In terms of its mandate, the Commission is required to inquire into, make findings, report on, and make recommendations concerning allegations that, since 2003, efforts or attempts were made to influence, pressure, or otherwise improperly

DR

prevent the South African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

4. Among the parties identified as having a substantial interest in these proceedings are:

   a. The applicants in the matter of L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245, North Gauteng High Court, Pretoria); and

   b. The families of victims in TRC cases who have a substantial interest in the matters under inquiry.

NOTICE IN TERMS OF RULE 3.3

5. This notice is issued in terms of Rule 3.3 of the Rules of the Commission, read with the Regulations made under Government Notice R.278 of 2025.

DR

6. The Commission's Evidence Leaders intend to present the evidence of one or more applicants in the Calata case, and any person who in the opinion of the Evidence Leaders possesses information that relates to the paragraph **Error! Reference source not found.** allegations against you and is relevant to the Commission's work.

7. The specific date and venue for the hearing at which such evidence will be presented will be communicated to you in due course.

8. The paragraph **Error! Reference source not found.** evidence, being the extract of the Calata matter's founding affidavit, with corresponding paragraph numbering, implicates, or may implicate, you in allegations regarding efforts or attempts to halt or suppress the investigation or prosecution of TRC matters. Further details of the Calata proceedings, including the said affidavit, are available on the Commission's website at www.trc-inquiry.org.za.

PARTICULARS OF IMPLICATION

DR

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 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.

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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.

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.

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> I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to postTRC 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
>
> 3
>
> 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 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

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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

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(**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)

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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 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

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believed that Chikane was not interested in a prosecution. However, Ackermann advised that Chikane had left the matter in the hands of the NPA.

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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.

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*

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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:

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

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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.

7

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**.

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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.**

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

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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 highranking 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.

381. According to an interview conducted by Bubenzer with former SADF General Jan Geldenhuys (**Geldenhuys**) in Pretoria on 10 May 2006, consultations

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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.

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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.

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

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Justice 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

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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.

> 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.

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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).

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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 disclosure required – but the government appeared only willing to offer an amnesty based on full disclosure to be decided on a caseby-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.

YOUR RIGHTS AND OBLIGATIONS

9. You are entitled to attend the hearing at which the evidence relating to the above allegations, and any other that may be led against you, is presented. You may be represented by a legal practitioner of your choice.

10. Rule 3.4 requires that, within fourteen (14) calendar days of this notice, you submit a statement in the form of an affidavit responding to the allegations. Your affidavit must specify which parts of the evidence are disputed or denied, and set out the grounds for such dispute or denial.

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11. If you wish to—

    a. give evidence yourself;

    b. call any witness in your defence; or

    c. cross-examine the witness whose evidence implicates you,

    you must apply in writing to the Commission for leave to do so within fourteen (14) calendar days of this notice, accompanied by your affidavit.

12. You may also apply for leave to make written and/or oral submissions regarding the findings or conclusions that the Chairperson should draw from the evidence relating to you.

COMMUNICATION WITH THE COMMISSION

13. All correspondence, applications, and affidavits must be directed to: The Secretary of the Commission [Insert Secretary's email and postal address]

DATED at **Sci – Bono Discovery Centre**, Johannesburg on this 10th day of October 2025.

DR

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases.

DR

"SC14"

boqwana burns.
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The Secretary:

The Judicial Commission of Inquiry into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases

Per e-mail: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
Date: 24 October 2025
Email: irvine@boqwanaburns.com
lutho@boqwanaburns.com
thembelihle@boqwanaburns.com
aneesa@boqwanaburns.com

Dear Sir

RE: NOTICES IN TERMS OF RULE 3.3 – REQUEST FOR DOCUMENTS

1. As you are aware, we act for the following interested parties before the Judicial Commission of Inquiry into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases ("**the Commission**"):

1.1 Former President, Mr Thabo Mbeki;

1.2 Former Minister of Justice and Constitutional Development, Ms Brigitte Mabandla;

1.3 Former Minister for Intelligence Services, Mr Ronald Kasrils;

1.4 Former Minister of Security and Safety, Mr Charles Nqakula; and

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1.5 Former Acting Minister of Justice and Constitutional Development, and current Speaker of the National Assembly, Mrs Thoko Didiza.

2. On 9th September; 8th October and 10th October 2025, the Commission served notices in terms of Rule 3.3 of the Rules of the Commission on the Former President and Ministers ("**the notices**").

2.1 The notices set out allegations of political interference in the investigation and prosecution of Truth and Reconciliation Commission cases ("**the TRC cases**") against the Former President and the Ministers.

2.2 The TRC cases seem to refer to cases that had been referred by the TRC to the National Prosecuting Authority ("**NPA**") for prosecution where amnesty had not been granted to perpetrators by the TRC.[1]

2.3 The allegations contained in the notices were extracted by the Commission from the founding affidavit in the matter of *L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245)* which is before the Gauteng Division of the High Court, Pretoria ("**the Calata application**").

3. As a result of the extraction of allegations from the affidavit, it is not always clear what the extent of the complaint is against the Former President and Ministers.[2]

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[1] Calata Founding Affidavit (FA) at pp001-48 – 001-54 from para 95-111.
[2] See for instance Rule 3.3 notice issued to the Former President, extracted paras 289 onwards where the special dispensation for political pardons is discussed. Rule 3.3. notice issued to Former Minister Nqakula para 234.

Moreover, save for the annexures to the founding affidavit in the Calata application, the notices do not attach pertinent documents that relate to some of the allegations against the Former President and Ministers.

4. Significantly, the notices did not attach any minutes and other records of meetings that were allegedly held by:

4.1 Ministers with the NPA's Former National Director of Public Prosecutions, Mr Vusi Pikoli (or his officials) in 2006,[3] 2007;[4] and

4.2 A delegation of the South African Defence Force Generals with, inter alia, the Former President,[5] and the Former Minister of Security and Safety.[6]

5. The notices also do not attach the dockets that are described in the extracted paragraph 397 of the Former President's notice as the "dockets for the prosecution of the top ANC members, including President Mbeki."

6. Soon after the Rule 3.3 notices were received, the Former President and Ministers asked the Commission and were allowed more time to file statements in response to the allegations against them.[7] The President and Ministers appreciate the

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[3] Rule 3.3 notice issued to the Former President, Former Ministers Nqakula and Mabandla, and Former Acting Minister Didiza, extracted para 224-227.
[4] Rule 3.3 notice issued to the Former Minister Mabandla, extracted para 247, 254, 262-264; Rule 3.3 notice issued to the Former Minister Kasrils, extracted para 262-264; Rule 3.3 notice issued to the Former President, extracted para 264 and subparas;
[5] Rule 3.3 notice issued to the Former President, extracted para 379 and subparas, extracted para 379-386.
[6] Rule 3.3 notice issued to the Former Ministers Kasrils, extracted para 384.
[7] The correspondence detailing the requests and responses can be made available on request.

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indulgence and are working in earnest (assisted by their legal team) to produce the statements as soon as possible.

7. In order to ensure that the statements address the complaints in full and given that the Former President and Ministers exited their roles in the Executive almost two decades ago, we ask that the Commission provide us with any pertinent documents that may assist with crystalising the extent of the complaints against the Former President and Ministers – in particular, but without any limitation, those identified above. For example, where reference has been made to meetings or documents (as noted in paras 4 and5 above), if the Commission has the relevant documents, we ask that the documents be made available to us as soon as possible. If not, but the Commission has information on where the documents are located, indication of whether the Commission is obtaining the documents from such sources, and to provide them to our clients in due course.

8. We would also appreciate any contemporaneous records that the Commission may have, sourced from relevant Departments/Offices and/or Parliament and/or proceedings that help to shed light on the allegations contained in the notices.

9. We look forward to your response.

DR

Yours faithfully

Boqwana Burns Inc.

DR

"SC 15"

Tue 2025/10/28 18:56

LD

Lutho Dzedze <lutho@boqwanaburns.com>

RE: REQUEST TO THE CORRESPONDENCE - WEBBER WENTZEL

To Secretary; Evidence Leaders; Investigations; Evidence Leaders

Dear Counsel

We refer to the email below and the attached letter from Webber Wentzel dated 29 September 2025.

Wherein in paragraph 8 they state that they have provided the Commission with digital links of the statements of their above-mentioned witnesses.

We are aware that in the Pre-Hearing meeting it was decided that all relevant documents would be shared on the Commissions website, which we understand might take some time.

We thus humbly request for the statement of Adv Vusi Pikoli while the Commission Team is still busy with the migration of documents to the website.

Yours faithfully

Lutho Dzedze
Associate

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DR

"SC16"

Tue 2025/10/28 19:33

LD

Lutho Dzedze <lutho@boqwanaburns.com>

RE: Filing of lists of witnesses and submissions on implicated person by Calata and twenty-five others

Secretary

ear Advocate

/e confirm receipt with thanks.

egards

utho

rom: Secretary <secretary@trc-inquiry.org.za>
ent: Tuesday, 28 October 2025 19:14
o: Lutho Dzedze <lutho@boqwanaburns.com>
c: Evidence Leaders <evidence.leaders@trc-inquiry.org.za>; Investigations <investigations@trc-inquiry.org.za>
ubject: FW: Filing of lists of witnesses and submissions on implicated person by Calata and twenty-five others
nportance: High

ear Sir/Madam,

Ve acknowledge receipt of your email. Please find herewith, the link to the documents as well as documents in PDF, for your attention. Should you require more information, please do not hesitate to contact me.

hope you find the above in order.

ind Regards,

Adv Mphothu Thokoa
Secretary
TRC CASES INQUIRY
+27 80 122 9052

DR

"SC17"

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The Secretary:

The Judicial Commission of Inquiry into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases

Per e-mail: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
Date: 03 November 2025
Email: irvine@boqwanaburns.com
lutho@boqwanaburns.com
thembelihle@boqwanaburns.com
aneesa@boqwanaburns.com

Dear Sir

RE: NOTICES IN TERMS OF RULE 3.3 – REQUEST FOR DOCUMENTS

1. We refer to the above matter, our letter dated 24 October 2025, and your subsequent correspondence addressed to former President Mbeki and former Minister Mabandla dated 29 October 2025. We refer to Mr Mbeki and Mrs Mabandla as "**our clients**" in this letter.

2. In your latest letter, the Commission requests that our clients provide information concerning any decisions, discussions or policies relating to the investigation and prosecution of Truth and Reconciliation Commission ("**TRC**") cases. You further request that they provide any documents to which they had access during their

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tenure in government – including memoranda, correspondence, meeting minutes, and other records relevant to TRC matters referred for investigation or prosecution

3. Our clients have been out of government service for nearly two decades. All official documents and records in their possession at the time were left with their respective departments upon their departure. It has never been open to them to retain or remove government documents into private custody. This is precisely why, in our letter of 24 October 2025, we requested from the Commission copies of the information and materials relied upon in issuing the Rule 3.3 notices, such as the minutes of meetings or other documentary sources that formed the basis of the Commission's decision to issue Rule 3.3 notices.

4. While the Commission undertook to revert to us regarding that request, no such response has been received. Instead, the Commission has issued further correspondence to our clients seeking the very same documents and information that we, on their behalf, have already asked the Commission to provide. Respectfully, it should have been clear from our prior correspondence that our clients do not possess any documents or records capable of assisting the Commission in this regard.

5. We also refer to the Commission's letter of 29 October 2025 to Mrs Mabandla, in which the Commission acknowledges that it intended, but failed, to dispatch its Request for Information letter to her on 15 October 2025. The Commission further concedes that, as a result of this administrative error, Mrs Mabandla's name was

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erroneously included among those Ministers alleged to have failed to cooperate with the Commission's request for information. The Commission's apology for this oversight, and its stated intention to issue a corrective media statement, are noted.

6. However, the letter referred to as the "original" request remains undated. If it pre-dates our 24 October 2025 correspondence, it is unclear why the Commission did not reference it in its reply to our earlier request. This omission adds to our clients' concern regarding the procedural handling of this matter.

7. Our clients remain willing to cooperate fully with the Commission and to assist its work to the extent possible. However, the current approach has rendered meaningful engagement difficult.

8. Lastly, we request that the Commission provide us with a copy of:

   8.1 The public statement that referred to Mrs Mabandla's alleged non-cooperation; and

   8.2 The corrective media statement which the Commission indicated it would issue to rectify the error.

9. We look forward to your response.

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Yours faithfully

Boqwana Burns Inc.

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The Secretary:

The Judicial Commission of Inquiry into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases

Per e-mail: secretary@trc-inquiry.org.za

Our Ref: Mr I Armoed/ Aneesa
Your Ref:
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Dear Madam

RE: WITNESS STATEMENTS IMPLICATING OUR CLIENTS

1. We refer to our letters to the TRC Commission of Inquiry ("the Commission") dated 03 November 2025 and 07 November 2025; wherein we requested that the Commission provide us with witness statements and documents of the Calata Group of Witnesses that will be relied on by the Commission.

2. In response to our request of 07 November 2025, you advised that our concerns will be forwarded to Webber Wentzel, the attorneys of record for the Calata Group of Witnesses for their response. We once again wish to put on record that we find this approach undesirable as the Evidence Leaders seems to have outsourced the responsibility to some group of witnesses. We reiterate that we

are responsive to the Commission and Evidence Leaders and not Webber Wentzel.

3. We further refer to our Mr Boqwana's virtual meeting with the Commission's Chief Evidence Leader, Adv Ishmeal Semenya SC, where he requested for the filing of the witness statements to be made on or before the 12 January 2026. This was also discussed with our Counsel and below is our response to both of the above points.

4. As directed by the Commission, we proceeded with the request. In response to our request, Webber Wentzel did not provide witness statements, rather it:

4.1. provided a list of their witnesses; and

4.2. reference to various paragraphs from affidavits filed in the High Court for purposes of the litigation before that Court ("Calata litigation"), that they would be relying upon.

5. It must be placed on record that this approach is unhelpful in preparing our clients' statements for the Commission; as we simply do not know the case we must answer in relation to our clients. Treating paragraph references from different proceedings as a substitute for coherent witness statements is, at best, an untenable approach and makes it difficult for clients to be convinced of their participation in this matter. For example:

5.1 Webber Wentzel has advised that Mr Lukhanyo Calata intends to rely on his entire founding affidavit in the Calata litigation. You will appreciate that we are familiar with that affidavit, given that our clients sought to intervene in the High Court proceedings. Our understanding is that that Affidavit seeks to justify a different relief than what the Commission seeks to achieve. So, the Affidavit is wholly inadequate.

5.2 It is the Commission that requires our client's attendance and must have on its own satisfied itself of the basis for our client's appearance. To this end we need the Commission's own questions and specific issues that our client are required to address.

5.3 In relation to Mr Michael Schimdt, we are advised that the Commission will rely on paragraphs 382 to 394 of the Calata founding affidavit and Annexure FA59. For clients to be required to answer on the opinions expressed in books is most undesirable. We have nevertheless looked at relevant extracts, with reference to specified paragraphs:

> *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 Niel 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 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. Kogi, 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 Kogi. 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.

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.....

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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 Kogi 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.

390 At the ANC's 51st national conference in December 2002 in Stellenbosch, a discussion of guidelines for a broad national amnesty,

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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 Nuremburg 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 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.

6. It is not clear if the Commission or the Evidence Leaders have scrutinised this and determine its veracity and then questions to be answered by clients.

7. The Commission will appreciate that our clients have been out of government for nearly twenty years. The extract referred to above, together with others, makes reference to various meetings, written submissions, and detailed proposals. Yet none of these documents, including meeting minutes, have been provided to us, despite our repeated requests.

8. Our clients remain willing to assist the Commission. However, for us to meet the Evidence Leaders' deadline of 12 January 2026, we require specific questions to each of our clients. This is precisely why, from the outset, we requested written statements from the Commission together with the relevant documents in the custody of government. You will agree that it is neither desirable nor fair for our clients to be expected to guess the case they must meet; such an approach is highly prejudicial.

9. In light of the above, we must again insist on receiving written statements from the Commission, together with supporting documents, setting out clearly the case our clients are required to answer.

10. To this end we wish to restate our request, that ***you provide us with specific questions/issues/concerns/information that the Commission seek to be addressed by clients, individually and collectively.*** For instance, allegations against Ms Didiza relates to a meeting that allegedly took place at the late Minister Zola Skweyiya's house. We require the minute of this meeting. This will assist us to provide the statement on behalf of Ms Didiza.

11. For avoidance of confusion and misunderstanding we request that the Commission and Evidence Leaders direct any correspondence with regard to this matter to ourselves and place any request including that of dates in writing.

Yours faithfully

Boqwana Burns Inc.

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