(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

REGISTRAR OF THE HIGH COURT
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2018 -10- 18
T. G. MALELE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

NOTICE OF MOTION

TAKE NOTICE that the aforementioned Applicant intends to make application to this Honourable Court for an order in the following terms:

1. A declarator order that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is

BALJU PRETORIA SENTRAAL
478 PRETORIA 0001
2018 -10- 18
SHERIFF PRETORIA CENTRAL

envisaged in section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

2. A declarator order that the criminal proceedings instituted against the Applicant constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(3) of the Constitution read with section 342A of the Criminal Procedure Act, Act 51 of 1977.

3. That the Applicant is granted a permanent stay on the charge of murder in the criminal proceedings against Applicant relating to the death of the late Ahem Essop Timol on or about the 27th of October 1971.

4. That the First and/or Second Respondents are prohibited from proceeding with the criminal prosecution against the Applicant on a charge of murder relating to the death of Ahem Essop Timol.

5. That the First and/or Second Respondents are ordered to withdraw the criminal proceedings against the Applicant relating to the death of Ahmed Essop Timol.

6. That the Respondent(s) is/are ordered to pay the costs of this application only in the event of them and/or anyone of them oppose this application and in such instance only against the Respondent(s) who oppose/opposes this application.

7. Further and/or alternative relief.

PLEASE TAKE NOTE that the affidavit of **JOAO RODRIGUES,** annexed hereunto, together with annexures will be used in support of this application.

AND FURTHER TAKE NOTICE that the Applicant appoints the offices of BEN MINNAAR ATTORNEY, 190 Melt Marais Street, Wonderboom AH X1, Wonderboom, as its attorneys of record in this matter and at which address it will accept notice and service of all process in these proceedings.

AND TAKE NOTICE FURTHER that if you intend opposing this application you are required:

(a) To notify the Applicant's attorney in writing, within 1 (one) month of service of the application upon you.

(b) Within 15 (fifteen) days after you have given notice of your intention to oppose the application, to file your answering affidavit, if any.

(c) And further that you are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on 5 April at 10.

DATED at PRETORIA on this 18th day of OCTOBER 2018

BEN MINNAAR ATTORNEYS
ATTORNEYS FOR THE APPLICANT

190 MELT MARAIS STREET
WONDERBOOM AH X1
WONDERBOOM
PRETORIA

REF: BM 01/10/18

TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
FIRST RESPONDENT
123 WESTLAKE AVENUE
HEARTLEY WEAVIND
SILVERTON
PRETORIA

(THE SHERIFF)

RECEIVED COPY HEREOF:

DATE:

TIME:

_____

257 of the CPA was a typographical error and that they do not rely on section 257 of the CPA:

> *"The State does not intend to rely on section 257 of the Criminal Procedure Act 51 of 1977. The insertion of the words "section 257" is a typographical error. The count of murder on the indictment should read as follows:*
>
> *1. Murder, read with section 51(1) of the Criminal Procedure Act, 51 of 1977."*

14.

I am advised that this approach by the State is correct and is probably based on the fact that the State realised that this offence, created in terms of section 257 of the CPA, even if committed, has prescribed in terms of section 18 of the CPA.

15.

I am advised and respectfully submit that the above situation lies at the heart of the Respondents conduct at this stage. The Honourable Judge

presiding the re-opened inquest proceedings emphatically found that I was not involved in the death of the deceased but that my involvement only related to the *ex post facto* creation of a false version to explain the death. (This would probably have constituted an offence in terms of section 257 of the CPA: Accessory after the fact and not the offence of murder.)

16.

First Respondent was therefor faced with a situation that the offence that I could have been charged with, (based on the findings of the Judge presiding the re-opened inquest proceedings), had prescribed. This then probably motivated the First Respondent's decision to charge me on a count of murder, against all available facts and evidence and the mentioned findings, in order to evade the prescription issue.

17.

At the outset I wish to state the following:

17.1. I deny that I at any stage assaulted and/or tortured the deceased and/or that I was ever present when the deceased was allegedly assaulted and/or tortured.

17.2. I deny that I at any stage interrogated the deceased and/or that I ever participated in the interrogation of the deceased.

17.3. I emphatically deny that I caused the death of the deceased, either as alleged or at all.

18.

In the above regard I wish to inform the Honourable Court that I never participated in the interrogation of any detainee whilst I was a member of the Security Branch of the Security Police. Although I was regarded as a member of the Security Police on ad administrative basis, I was at all times only an administrative clerk involved with salary and financial issues of members of the Security Branch. I was stationed at the Head Quarters of the Security Branch in Pretoria and would only attend to offices of the Security Branches relating to administrative issues like salary and/or payment enquiries and/or issues. I had no knowledge

whatsoever of investigations of the Security Branch Units or members and never participated in the execution of their operational duties and/or functions. The Security Branch worked on a very strict need to know basis and it would have been regarded as a very serious breach of security should I have involved myself in any operational issues and/or should anybody have allowed me to participate in operational matters. This would include divulging any information relating to investigations and/or operations or interrogations to me. I challenge the First Respondent to disclose to the Honourable Court any evidence that they have to gainsay the above. They certainly have not disclosed any such material as part of the Police docket and/or information made available to me, nor was any such evidence presented in the inquest in 2017.

BACKGROUND FACTS:

19.

I will now provide the Honourable Court with a brief summary of the facts that lead to the death of the deceased and the charges against me. (All these facts do not fall within my personal knowledge but I have obtained them from the information made available to me by the First Respondent):

19.1. The deceased and one Salim Essop ("Essop") were arrested on the 22nd of October 1971 at a roadblock in Coronationville. When searching the vehicle that they were travelling in the Police found pamphlets of the then banned SACP in the boot of the vehicle. The deceased was apparently a member of the then banned SACP at that stage.

19.2. The deceased was held at the offices of the Security Branch of the South African Police at John Vorster Square where he was interrogated and allegedly tortured.

19.3. On the 27th of October 1971 the deceased died as a result of injuries suffered when he fell from the 10th floor of the offices of the Security Branch at John Vorster Square.

19.4. An inquest was held in 1972 following the death of the deceased. At the end of that inquest the Presiding Magistrate concluded that the deceased had committed suicide and no person was responsible for his death.

19.5. The family of the deceased did not accept this finding and subsequently approached, on a number of occasions, *inter alia,* the First Respondent to reconsider the situation.

19.6. The First Respondent eventually, and after many years after being requested to reconsider the issue, made recommendations to the Second Respondent for the re-opening of the inquest of the deceased in terms of section 17A of the Inquest Act.

19.7. It should be mentioned that the Truth and Reconciliation Commission ("TRC") also investigated the death of the deceased. I am not at this stage in possession of the TRC report on the death of the deceased but can inform the Honourable Court that the First Respondent made a statement of the investigating officer in this case, Captain Benjamin Nel (deposed to on the 23rd of June 2017) available to me relating to this issue. In the statement he stated that he, as part of his investigation into the Timol matter, studied the TRC report on the death of the deceased.

19.8. In the above regard I can further inform the Honourable Court that I was indeed approached by an official of the TRC during 1996 informing me that he was investigating the death of the deceased as part of his involvement with the TRC. He arranged a meeting with me and indeed interviewed me at my offices at Sanpark, Pretoria where I was employed at that stage. Although I have no independent memory of the identity of this investigator it now appears that it was one Mr Piers Ashley Pigou. I informed Mr Pigou that I was not able at that stage, without having had the opportunity to jog my memory from my statement and/or evidence at the initial inquest during 1972 to assist him. He made it clear that he did not believe that the finding of suicide made during the first inquest was correct.

19.9. I can further inform the Honourable Court that an affidavit deposed to by Pigou had been submitted to the Presiding Judge in the re-opened inquest proceedings confirming the above.

19.10. A part of a transcript of proceedings before the TRC relating to their investigation into the death of the deceased was indeed

handed in as an exhibit to the Court during the re-opened inquest proceedings.

19.11. It was only in 2017 (more than 20 years later) that I was informed that the inquest into the death of the deceased had been re-opened and that I will be recalled to testify in the proceedings.

19.12. I agreed to do so and indeed testified during August 2017 before the Honourable Mothle J.

19.13. The inquest proceedings were finalised on the 24th of August 2017 and the Honourable Mothle J delivered his findings on the 12th of October 2018. A copy of the judgment containing the findings is annexed hereto as **Annexure "JR3".**

19.14. Subsequent to the ruling referred to above the First Respondent decided to charge me on *inter alia* a count of premeditated murder. I was arrested on these charges on the 30th of July 2018 and brought before the Regional Court in Johannesburg.

19.15. The case was transferred to this Honourable Court and I appeared in this Honourable Court for the first time on the 18th of September 2018. A copy of the charge sheet that was served on me, together with the summary of substantial facts, have already been annexed hereto as Annexure "JR1".

19.16. The prosecution team on behalf of the First Respondent already made available to my legal team the case docket and all information relevant to the envisaged trial. I can inform the Honourable Court that the case docket and relevant information is extremely voluminous and consist of inn excess of 10 thousand pages. The evidential material made available obviously dates back to material from 1971/1972. Basically the only material of recent origin relates to medical evidence from pathologists, with reference to the injuries and death of the deceased and expert evidence relating to the probable trajectory of the body falling from the 10th floor and/or roof of the building to the ground.

19.17. My legal team filed a request for further particulars in terms of section 87 of the CPA on the 1st of October 2018. A copy of the

request for further particulars is annexed hereto as **Annexure "JR4"**.

19.18. The First Respondent replied to the request for further particulars on the 5th of October 2018. A copy of this reply to the request for further particulars is annexed hereto as **Annexure "JR5".**

19.19. My legal team advised me that the reply to my request for further particulars did not comply with the requirements set out in the CPA and the Law relating to further particulars. I was therefore advised that a notice to compel the First Respondent to provide further and/or better particulars should be served on the First Respondent. A copy of this application to compel the First Respondent to provide better and/or further particulars was filed on the First Respondent on the 12th of October 2018. A copy of the notice in terms of section 85 read with section 87 of the CPA is annexed hereto as **Annexure "JR6".**

19.20. A formal pre-trial was held between the legal teams on the 12th of October 2018. A copy of the minutes of such meeting is annexed hereto as **Annexure "JR7".**

19.21. On the next appearance in Court on the 15th of October 2018 the case was postponed to the 22nd of October 2018. My legal team undertook to finalise this application and have it issued by 19 October 2018.

20.

I am advised that the trial against me, if it proceeds, will be a very long trial. I am advised that the duration of the trial was estimated by the prosecution at a pre-trial conference between the legal teams to be at least 6 months.

UNFAIR AND/OR IMPROPER MOTIVE:

21.

I am advised that I am entitled to a fair trial that will include a trial that is instituted and conducted in a procedurally fair manner and is not instituted and/or prosecuted with an unfair, improper or unlawful motive.

22.

In the above regard I am advised that this fundamental right was part of our law prior to the Constitutional era but is now entrenched in section 35(3) of the Bill of Rights in the Constitution.

23.

In this case the First Respondent recommended to the Second Respondent, in terms of section 17A of the Inquest Act, to request the Judge President of this Division of the High Court to designate a Judge of the Supreme Court of South Africa to re-open the inquest.

24.

This recommendation followed various requests by family member(s) of the deceased that the circumstances relating to his death should be reconsidered by the First Respondent.

25.

I am advised that an inquest and/or the re-opening of an inquest is only competent in terms of the Inquest Act under circumstances where the Institution of Criminal Proceedings is not envisaged. I am advised that section 5(1) of the Inquest Act is relevant in this regard.

26.

I am further advised that an inquest should not be ordered or conducted where a criminal prosecution is already instituted and/or is to be instituted in connection with the death of a person. In the event that it comes to the knowledge of the judicial officer who presides the inquest proceedings that criminal proceedings have been or are to be instituted relating to the death of the relevant deceased, he or she *SHALL* stop such inquest proceedings. I refer the Honourable Court to section 21(2) of the Inquest Act in this regard.

27.

The objective facts in this case are that the High Court conducted a very thorough and detailed inquest in the re-opened proceedings over a lengthy period. It then concluded in its findings that I was not involved in causing the death of the deceased. I will refer to the specific findings hereinafter.

28.

The First Respondent thereafter decided to institute a criminal prosecution against me on a charge of premeditated murder, directly contrary to the findings by the Presiding Judge in the re-opened proceedings.

29.

I have no hesitation to submit to the Honourable Court that First Respondent had no further material evidential material, that was not presented to Court during the re-opened inquest proceedings, available when deciding to charge me on the count of murder. All the evidential material available was presented to the Court during the inquest

proceedings and was available at the time that the decision to re-open the inquest proceedings was taken.

30.

The above allegations were indeed confirmed by First Respondent in a response to a request for further particulars in terms of section 87 of the CPA referred to above. The request for further particulars has already been annexed to this affidavit as Annexure **"JR4".** The reply to the request for further particulars has also already been annexed hereto as Annexure **"JR5".** I wish to refer the Honourable Court specifically to the following:

30.1. In the reply to the question whether all evidential material and documentation had been provided to the defence the response was the following:

> *"The State has provided all documentation and exhibits in its possession. Confirmation of same was received."*

30.2. In the formal pre-trial between the parties on the 12th of October 2018 the prosecution team again confirmed that all statements, documentation and evidential material had already been made available to the defence.

31.

I am advised that it is a fundamental principle of our criminal justice system that a prosecution can only be instituted on a specific charge against an accused person if there is, as a starting point, a reasonable prospect of a successful prosecution i.e. a reasonable prospect of a conviction. The formal Prosecution Policy Directives issued by the National Director of Public Prosecutions in terms of section 179(5)(b) of the Constitution read with section 21 of the National Prosecuting Authority Act, Act 32 of 1998 ("NPA Act") provides as follows in this regard:

> *"In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide* ***a reasonable prospect of a successful prosecution****. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued."*

(My emphasis)

And

"The process by which charges are selected must be compatible with the interests of justice.

Prosecutors must decide upon, and draw up charges based on, available evidence, which evidence-

- *Adequately reflects the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;*
- *Provides the court with an appropriate basis for sentence; and*
- *Enables the case to be presented in a clear and simple way.*

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the available evidence and where such charges will significantly enhance the likelihood of a conviction of an accused person or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided, because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.
(My emphasis)

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused person to plead guilty to some of the charges. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one."

32.

As mentioned I have been advised that the Prosecution Policy Directives referred to above, has been formulated by the National Director of Public Prosecutions in terms of section 21 of the NPA Act which provides as follows:

"21 Prosecution policy and issuing of policy directives

(1) The National Director shall, in accordance with section 179 (5)(a) and (b) and any other relevant section of the Constitution-

(a) with the concurrence of the Minister and after consulting the directors, determine prosecution policy; and

(b) issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law."

33.

Section 179(5)(a) of the Constitution provides as follows:

"179 ***Prosecuting authority***

(1) ...

(2) ...

(3) ...

(4) ...

(5) The National Director of Public Prosecutions -

(a) must determine, with the concurrence of the Cabinet member responsible for the

administration of justice, and after consulting the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) ...

(d) ..."

34.

I am advised that the Constitution further specifically provides that National Legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice. I refer the Honourable Court to section 179(4) of the Constitution in this regard.

35.

When considering the findings of the Court in the re-opened inquest it is of course necessary to have regard to the fact that the onus in inquest proceedings is lower than in criminal and/or civil cases. The legal requirements for the admissibility of evidential material are also

significantly lower. A finding will be based on the question whether there is *prima facie* evidence implicating a person as being responsible for the death of the deceased. The findings of the Court in the inquest is therefor significant in that it entails that the Court found that there was not even *prima facie* evidence implicating me in the murder (insofar as it is to be found that the deceased was indeed murdered).

36.

I am advised and respectfully submit that it is inherently unfair and infringes my fundamental rights to a fair trial to charge me on a count of murder after the lapse of more than 47 years and under circumstances where a High Court, after a very detailed investigation and evaluation of all relevant evidence in this regard, found that I was not involved in or even present at the time of the murder of the deceased.

37.

In the alternative I submit that Respondents' request for the re-opening of the inquest was inherently unfair and unlawful if they, at that stage, with all the relevant facts available to them, already concluded that they would prosecute me or were in a position to take such decision if they properly

applied their minds. In this regard I am advised that I did not have the right to remain silent during the re-opened inquest proceedings as I would have had at a trial. By using this process the Respondents effectively destroyed my right to remain silent as is provided for in section 35(3)(h) of the Constitution.

38.

I am advised that although the Prosecution on a count of murder does not prescribe in terms of section 18 of the CPA, the proceedings on such count should still be fair and instituted within a reasonable time.

39.

In the above regard it will be submitted on my behalf that these proceedings clearly infringe the basic fundamental right that I have in terms of the Constitution.

40.

As mentioned the circumstances relating to the death of the deceased was already officially investigated during 1996 by the TRC. There is clearly no reason that the First Respondent could not and should not

have proceeded with criminal proceedings against me should they have held the view that a *prima facie* case existed against me.

41.

I am seriously prejudiced by the fact that these proceedings are now instituted against me some 47 years later and can refer the Honourable Court to *inter alia* the following:

41.1. It appears that a very significant and material dispute exists in regard to the circumstances under which the deceased fell to his death. Almost all persons that were involved in the interrogation of the deceased have passed on. It seems to me that the decision by the First Respondent to charge me is not based on the case that they have against me but based on the fact that I am one of the few persons involved with the Security Police at that stage that still is alive. The persons who were involved in the interrogation of the deceased are no longer alive and I will find it impossible to properly defend myself.

41.2. The above include the unavailability of all the medical experts who participated in the post-mortem examination of the body of the deceased. They all passed away. I am advised that the findings of the post-mortem will be of crucial importance during any trial relating to the death of the deceased.

41.3. The extremely long time delay also caused serious impairments on the memories of all possible witnesses, including myself.

41.4. Many of the crucial records pertaining to the incident and/or relevant to the incident have been destroyed in the meantime.

41.5. As will be explained in more detail hereinafter the expected long trial will also have a serious negative impact on my fragile health.

42.

I base my allegation that the First Respondent has an unfair and/or improper and unlawful motive for the prosecution against me on the charges as formulated in the indictment, more in particular the first count of murder, on the following:

42.1. The proceedings were presided by the Honourable Mothle J of this Division.

42.2. As already set out hereinbefore the inquest into the death of the deceased was formally re-opened by the High Court (Gauteng Division, Pretoria) on the 26th of June 2017 in terms of section 17A of the Inquests Act, Act 58 of 1959 ("the Inquests Act").

42.3. The initial inquest was held in 1972 following the death of the deceased on the 27th of October 1971.

42.4. The purpose of the re-opening of the inquest was stated to be the investigation of the circumstances leading to the death of the deceased in the light of further evidence that has been uncovered after the initial inquest.

42.5. The deceased's nephew, one Mr Cajee, approached the First Respondent during 2003 in order to reconsider the position. The First Respondent made recommendations to the Second

Respondent for the re-opening of the inquest in terms of section 17A of the Inquests Act.

42.6. It is interesting to note that the re-opening of this inquest in a High Court is the first of its kind by a High Court and presided by a Judge of the High Court.[1]

42.7. The High Court commenced hearing evidence in the re-opened inquest on the 26th of June 2017.

42.8. The Court dealt in immense detail with all relevant aspects relating to the death of the deceased and heard evidence over many days. The evidence was eventually concluded on the 24th of August 2017.

42.9. I can further mention that, apart from the representatives of the First Respondent (senior and junior counsel), the family of the deceased was also represented by senior and junior counsel and fully participated in the proceedings.

---

[1] See: Par 6 of the judgment in the High Court following the completion of the re-opened Inquest which will be annexed hereinafter

42.10. I can inform the Honourable Court that I was also called upon to testify during the proceedings and I was cross-examined by both the representatives of the First Respondent as well as the representatives acting on behalf of the family of the deceased.

42.11. Following the conclusion of evidence representatives of all parties involved submitted detailed and lengthy written submissions to the Presiding Judge.

42.12. After considering the vast body of evidential material put before the Court a very detailed and lengthy judgment consisting of 129 typed pages was delivered in the inquest on the 12th of October 2017.

42.13. The following material findings were made by the Court that are relevant to this application:

> *"320.4 On 27 October 1972, Timol's interrogation was conducted by Gloy and Van Niekerk. At the time Timol fell, he was under the care of at least Gloy and Van Niekerk."*

And

"320.8 *Three independent witnesses put the time of Timol's fall as mid-morning on 27 October 1971. This is in direct contrast to Rodrigues' evidence that Timol fell between 15H45 and 16H00. This Court accepts that Timol fell in the mid-morning and that Rodrigues, if ever he was in room 1026 later in the afternoon, was brought there to legitimise the cover up narrative."*

and

"320.12 *There is prima facie evidence implicating Gloy van Van Niekerk as the police officers who were interrogating Timol when he was pushed to fall to his death. Rodriques, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact of that murder, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. A recommendation is made to have him investigated and prosecuted for these offences."*

(My emphasis)

42.14. It is of significance that the above finding by the Court was consistent with the submissions made on behalf of the First Respondent in their written submissions to the Court after the conclusion of the hearing. They made the following submission in this regard:

> "... *Joao Roderiques perpetuated the cover up for instance that Timol looked shocked when he heard that Quenton Jacobson and two others were identified. There is no way that this person could not have seen the injuries. He did not want to play open cards with the court and his act or omission prima facie amount to an offence on the part of Joao Roderiques be it accessory after the fact or as co conspirator but prima facie amounting to an offence. Thus the Security Police is responsible for his death. He was meant to be held at the cells at John Vorster against the regulations they chose to hold him at the office to cover up their assaults and torture. This must be referred to the National Prosecuting Authority.*"

43.

It is therefor significant that the findings of the Court in the inquest was to the effect:

43.1. That the deceased was interrogated by Gloy and Van Niekerk as the Police Officers in control of the deceased at the time when he was pushed to fall to his death.

43.2. My only involvement was that I participated in the cover up to conceal the crime of murder as an accessory after the fact of the murder.

43.3. That the deceased fell in the mid-morning and that I, if I ever was in the room from which the deceased fell, was only brought there in the afternoon to legitimise the cover up of the narrative that the deceased committed suicide.

43.4. The charge of murder in count 1 is therefore directly in contrast with the findings of the Court in the judgment relating to the inquest.

UNDUE DELAY:

44.

I am advised that section 35(3)(d) of the Constitution entrenches an accused person's right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay.

45.

I am further advised that the further fundamental requirement for a fair trial provided for in section 35(3)(i) of the Constitution is the right to adduce and challenge evidence. I am advised that this presupposes that a trial should be instituted and concluded at a time that will enable an accused person to properly and effectively adduce and challenge evidence.

46.

The objective facts in this case are of course that I have only been charged more than 47 years after the death of the deceased.

47.

I wish to inform the Honourable Court that I at all relevant times co-operated with the First Respondent and/or the investigating team in this matter. As mentioned above I resided at the same address for the past 54 years and tracing me could never have been any problem for the First Respondent or the investigating team. I already referred the Honourable Court to the fact that the TRC had no difficulty in approaching me in 1996 relating to this incident.

48.

Apart from denying any involvement in the causing of the death of the deceased at all relevant stages I never did anything to evade justice and/or caused a delay to the proceedings. I agreed to testify at the re-opened inquest proceedings when requested to do so and also handed myself over to the investigating team when I was informed that the First Respondent decided to arrest and charge me. I challenge the First Respondent to provide the Honourable Court with any facts that gainsay my averment that I did not delay the proceedings in any manner whatsoever.

49.

I submit that it is clear from the facts relevant to this issue that the First and/or Second Respondents failed to act in a diligent manner in coming to a decision to institute a prosecution against me. I refer to the following facts:

49.1. As mentioned above the Truth and Reconciliation Commission already formally investigated the death of the deceased during 1996. Mr Imtiaz Ahmed Cajee ("Cajee"), the nephew of the deceased, testified during the re-opened inquest proceedings that his grandmother testified before the TRC in April 1996. This testimony, relating to the death of the deceased was widely covered, not only locally but also internationally, by the media.

49.2. Cajee further testified that he pursued the interrogators of the deceased, Captains Gloy and Van Niekerk, in order to obtain information relating to the death of the deceased.

49.3. Very important is that Cajee also testified that he approached the National Director of Public Prosecutions in 2003 indicating that there was sufficient evidence pointing to a murder of the deceased:

> *"... Knowing very well that none of them applied for amnesty or where ever subpoenaed at the Truth and Reconciliation commission in 1996 and hence I sent formal correspondence to the then National Director of Public Prosecutions, Mr Bulilane Nuka, urging him to follow up on this matter and most importantly reminding him that many of those security branch officers were alive, M'Lord. I indicated that there was sufficient evidence pointing to the fact that my uncle was murdered."*
>
> (My emphasis)

49.4. Both Gloy and Van Niekerk were alive and well at that stage.

49.5. Cajee further testified that he received a response from the office of the National Director of Public Prosecutions to the effect that the

investigations produced negative results. He testified that he was very disappointed:

> *"Yes, that is correct. Mr Kadjee how did you feel after receiving such a response? --- M'Lord, I was very disappointed as I though that the response of the National Prosecution Authority was cavalier and very uncaring and it deeply disturbed me because this was a perfect opportunity as this security branch officers were alive, that they could shed more light as to what had transpired to my beloved uncle."*

49.6. Cajee further, with reference to the NDPP of the time, Advocate Vusi Pekoli and the Head of Priority Crimes Litigation Unit, Advocate Ackermann SC, stated that cases of this nature were deliberately suppressed. He further conveyed that the reason why he and his family consistently sought to re-open the inquest into the death of the deceased was that they had never believed that the deceased committed suicide as was found in the first inquest. They believed that the finding was a cover up and they were very

adamant that it was imperative that the findings should be rectified to reflect that the deceased did not commit suicide but that he was murdered in Police detention.

49.7. Cajee further testified that they launched a private investigation led by one Mr Frank Dutton in January 2016. They then had a meeting with the then NDPP, Advocate Shawn Abrahams, on the 19th of January 2016 where they presented their new evidence to Advocate Abrahams. It was, however, only on the 26th of October 2016 that Advocate Abrahams announced that he supported their application for the re-opening of the inquest.

49.8. As already mentioned, the inquest was concluded during August 2017 and the judgment was delivered on the 12th of October 2017.

49.9. The First Respondent apparently only decided approximately a year later to institute a prosecution against me. I was informed in this regard in July 2018.

50.

I submit that there can be no doubt that the exceptional long delay has serious effects on my fundamental rights to a fair trial as referred to above. Apart from the fact that the trial will not begin and/or be concluded without unreasonable delay, my right to adduce and challenge evidence has been seriously jeopardised by the delay. Basically all material witnesses have passed away and I will not be in a position to consult with these witnesses and/or to adduce evidence. In particular I can refer to the medical evidence relating to the question whether the deceased was assaulted and tortured and whether he was able to move at the time prior to his death and/or whether he was incapacitated as a result of injuries already sustained prior to his fall from the tenth floor of the building.

RIGHT TO ADDUCE AND CHALLENGE EVIDENCE:

51.

I have to inform the Honourable Court that the extreme delay in commencing with the prosecution materially affected my right to adduce evidence and/or to challenge evidence against me. This will seriously

prejudice my right to a fair trial to the extent that I will have no fair trial should the proceedings be proceeded with.

52.

I submit that it is necessary to evaluate the charge of murder against me and the facts that the First Respondent indicated that they would rely on to persuade the Trial Court that I acted with a common purpose with other members of the South African Police services to commit the alleged murder. I refer to the following:

52.1. In the formulation of the charge the First Respondent alleged that I, together with Van Niekerk and Gloy separately and/or together in the execution of the furtherance of a common purpose unlawfully and intentionally killed the deceased.

52.2. In the summary of substantial facts the First Respondent alleged that I together with Gloy and Van Niekerk tortured and assaulted the deceased. It is further alleged that we thereafter either pushed the deceased out of the window of room 1026 and/or threw the

deceased down from and/or rolled the deceased from the roof of John Vorster Square Police Station on the 27th of October 1971.

53.

In the request for further particulars the following questions were *inter alia* posed on my behalf:

53.1. First Respondent was requested to indicate whether I manifested my participation in the alleged common purpose with the other perpetrators by myself performing any act of association with the conduct of the others.

53.2. Precisely what act(s), if any, did I allegedly perform in the furtherance of the common purpose relied on.

53.3. What act(s) the other alleged perpetrators allegedly performed in the furtherance of the common purpose relied on.

54.

The First Respondent refused to answer any of these questions and only stated that their case is based on circumstantial evidence and that the issue of common purpose will be cleared by evidence.

55.

With reference to the allegations that I tortured and assaulted the deceased and thereafter pushed him from the window of room 1026 and/or from the roof of the John Vorster Square Police Station the following questions were *inter alia* posed on my behalf:

55.1. What act(s) of assault and/or torture did I allegedly commit?

55.2. When did I allegedly participated in these act(s) of torture and/of assault?

55.3. What injuries to the deceased in these act(s) of torture and/or assault did I allegedly cause?

55.4. When exactly was I allegedly present when these act(s) of torture and/or assault was/were committed?

55.5. What precisely was my participation allegedly in these act(s) that were committed?

56.

The First Respondent also refused to answer these questions and only responded:

> *"As to how the assault on the deceased occurred, is a matter of evidence and will be addressed by oral evidence including medical and other expert evidence."*

57.

The practical result therefore that I am confronted with the situation where I, as an approximately 80 year old person, hampered by a seriously fading memory, has to answer and defend myself against allegations of participating 47 years ago in assaults and torture of the deceased over a period of six days where the First Respondent refused to supply me with

any of the following information (either in the charge sheet or in further particulars):

57.1. When I allegedly participated in these unlawful conduct.

57.2. What my alleged role was relating to these unlawful activities?

57.3. What act(s) of assault and/or torture did I allegedly commit on the deceased?

58.

In the above regard I have to again emphasise the fact that in the evidential material provided by the First Respondent there is no suggestion of any allegations to the effect that I at any stage participated in the assault or torture of the deceased.

59.

I deny that I was present at John Vorster Square where the deceased was held over these days on any of these days apart from the date when the deceased in fact passed away. At this stage it will, however, be

impossible for me, without any records available, to reconstruct my movements and/or to provide the Trial Court with information relating to my movements in order to corroborate my denial that I was at any stage present at John Vorster Square when these acts were allegedly committed.

PREJUDICE AND CAUSES FOR PREJUDICE:

60.

I submit that it is clear that on a conspectus of all the facts that the First Respondent is responsible for the infringement of my fundamental rights in this case. I refer to the following:

60.1. The First Respondent is clearly responsible for the undue and excessive delay to begin with the prosecution.

60.2. The First Respondent is by implication responsible for the consequential loss of evidentiary material as a result of the undue delay.

60.3. The First Respondent is therefore primarily responsible for the irreparable trial prejudice that I will suffer if the prosecution proceeds.

60.4. It is also clear that the undue delay was caused by the dereliction of duty by members of the First Respondent. As mentioned above the TRC already in 1996 investigated the matter and the deceased's mother testified to the effect that the deceased did not commit suicide as was alleged. The nephew of the deceased further approached the National Director of Public Prosecutions personally in 2003 (more than 15 years ago) and indicated to the First Respondent that he had evidence available to the effect that the deceased was indeed murdered.

61.

In the above regard I submit that I am now, together with the family of the deceased, a victim of the First Respondent's culpable conduct.

62.

In the above regard it is also clear that the delay was not caused by the resource limitations and/or so-called systemic delay. At the very least the cause for the delay and the prejudice caused are clearly the culpable and reckless inactivity on the part of the First Respondent.

63.

I submit that there can be no doubt that the conduct of the First Respondent will inevitably and irremediably taint the overall fairness of the trial and will irreparably prejudice me in the conduct of my defence. As mentioned at this stage basically all the material witnesses passed away and/or disappeared and the memory of available witnesses, including my own memory, faded significantly because of the passage of time.

64.

The further prejudice that I will suffer if the trial proceeds is caused by the deliberate or reckless conduct by the First Respondent in that:

64.1. They intend to proceed with the trial against me on a charge of murder under circumstances where there is no evidence available to the effect that I was involved in the murder of the deceased even if it has to be accepted that the deceased had been murdered.

64.2. The decision to prosecute me on a charge of murder is directly contrary to the findings by the High Court in the re-opened inquest proceedings to the effect that I was not involved and/or even present at the time of the death of the deceased.

64.3. The First Respondent refused to provide me with adequate information relating to the charge against me and/or the basis for their decision to prosecute me on a charge of murder contrary to the findings of the High Court in the inquest.

65.

I will further suffer serious prejudice to my health should this trial proceed. As indicated above I am living in Pretoria and will have to travel to Johannesburg every day for the trial and be present in Court for a rather lengthy time. At this stage my health is not very good. Apart from my

age I can inform the Honourable Court that I further suffer from the following ailments:

65.1. Diabetes;

65.2. I have a heart condition and a pacemaker had to be implanted in my chest to assist my heart.

65.3. I find it extremely difficult to walk and have to use a crutch due to serious problems with my left knee and hip.

65.4. I become tired very easily and find it impossible to keep up with daily household tasks.

65.5. I have a very serious problem with a fading memory.

66.

I therefore submit that this trial will cause a serious health risk for me should it be proceeded with.

CONCLUSION:

67.

I respectfully submit that I have made out a proper case for the relief sought and beg the Honourable Court for an order in terms of the notice of motion.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 17 day of OCTOBER 2018 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

MAWELEWELE TR
(W/O) 06102637

COMMISSIONER OF OATHS

FULL NAMES: THAMAVHOPANI ROBERT MAWELEWELE
BUSINESS ADDRESS: 17TH AVENUE SS
AREA: PRETORIA
DESIGNATION: MAWELEWELE TR
(W/O) 06102637

SOUTH AFRICAN POLICE SERVICE
HUMAN RESOURCE MANAGEMENT
2018 -10- 17
PRETORIA MOOT
SOUTH AFRICAN POLICE SERVICE

Annexure "JR1" (62)

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

The Director of Public Prosecutions for the Gauteng Local Division, Johannesburg who prosecutes for and on behalf of the State, hereby informs the Honourable Court that:

JOAO ANASTACIO RODERIGUES

An 80 year old male, residing at 835 11th Avenue, Wonderboom South, Pretoria

(hereinafter referred to as the accused)

is guilty of the crimes of:

1 **MURDER, READ WITH SECTION 257 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

2 **DEFEATING. AND/OR OBSTRUCTING THE ADMINISTRATION OF JUSTICE, READ WITH SECTION 256 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

COUNT 1: MURDER

THAT the Accused is guilty of the crime of Murder

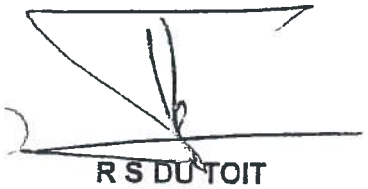
IN THAT on or about 27 October 1971, and at or near Johannesburg Central Police Station, (John Vorster Square, as it was then known), in the district of Johannesburg Central, the accused, together with inter alia Johannes Zacharia van Niekerk and Johannes Hendrik Gloy, separately and/or together in the execution or the furtherance of a common purpose did unlawfully and intentionally kill **AHMED ESSOP TIMOL**, a 29 year old adult male.

COUNT 2: DEFEATING AND/OR OBSTRUCTING THE ADMINISTRATION OF JUSTICE

THAT the Accused is guilty of the crime of Defeating and/or obstructing the administration of justice

IN THAT during the period 26 October 2016 to 12 October 2017, and at or near the High Court of South Africa, sitting in Johannesburg, the accused did unlawfully and with intent to defeat and/or obstruct the course of justice, commit an act to wit, by furnishing false information to the members of the South African Police and/or the court in the 2017 re-opened inquest proceedings, which led them and or the said court to believe that **AHMED ESSOP TIMOL** had committed suicide when in fact he knew that **AHMED ESSOP TIMOL** had not committed suicide, which act defeated or obstructed the administration of justice.

Wherefore upon due proof and conviction, the said Acting Director of Public Prosecutions prays for sentence against the accused according to law.



R S DU TOIT

DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

GAUTENG LOCAL DIVISION, JOHANNESBURG

SUMMARY OF SUBSTANTIAL FACTS

1 On the evening of 22 October 1971, a Ford Anglia bearing registration TU 22315, driven by Mr Salim Essop (Essop) a third year medical student was intercepted at a roadblock, on Fuel Road, Coronationville. Mr Ahmed Essop Timol (the deceased), a teacher was a passenger in the vehicle.

2 The roadblock set up on 22 October 1971 at approximately 22H40, was manned by amongst others but not limited to, members of the then South African Police, uniform branch members, Sergeant Leonard Kleyns (Kleyns), Constable Adam Alexandra Thinnies (Thinnies) and the Station Commander of Newlands police station, Major Kloppers. The abovementioned vehicle was stopped at the roadblock.

3 After searching the boot of the vehicle, both the deceased and Essop were arrested for allegedly being in possession of prohibited pamphlets and documents of banned political organisations namely the South African Communist Party (SACP) and the African National Congress (ANC).

4 Both the deceased and Essop were transferred in custody to Newlands Police station and further detained for contravening the provisions of section 6 of the Terrorism Act, Act 83 of 1967.

5 The Security Branch was a branch of the South African Police whose function, amongst others, was to gather intelligence so as to assess the threats to the State in the then Apartheid South Africa. Apartheid was a system of institutionalised racial segregation and discrimination that was in existence from 1948.

6 Members of the security branch at John Vorster Square police station, including senior members, were informed of the arrests of both the deceased and Essop.

7 At Newlands Police station, Essop and the deceased were separated from each other.

8 Soon thereafter, and during the early parts of the morning of 23 October 1971, other senior members of the security branch at John Vorster Square, including and not limited to Captain Dirker(Dirker) and Colonel Greyling (Greyling) arrived at Newlands police station.

9 Essop was interrogated and repeatedly assaulted by members of the security branch. After the assault, Essop was handcuffed, placed in an unmarked police vehicle and driven by Greyling and another police official, to the offices of the South African Police, John Vorster Square.

10 During the early parts of the morning of 23 October 1971, the deceased was also transported to John Vorster Square police station, by Dirker and Kleyns.

11 Lieutenant Colonel Willem van Wyk (van Wyk) from the security branch headquarters in Pretoria, was also informed of the arrest of Essop and the deceased on the morning of 23 October 1971. He arrived at John Vorster Square police station at 03H15.

12 During his period of detention from 23 October 1971 until 26 October 1971, Essop was tortured and severely assaulted by members of the security branch, at John Vorster Square Police Station.

13 On 26 October 1971, Essop was hospitalised in a comatose state, as a result of assault and torture on him by members of the security branch.

14 From the time of his detention on 22 October 1971, until his death on 27 October 1971, the deceased was still in police detention, in room 1026, and subjected to continuous interrogation and torture by the security branch.

15 On 27 October 1971, the deceased was still in room 1026, on the tenth floor of John Vorster Square Police Station, never having ever been detained in a cell at any stage of his detention at John Vorster Square.

16 At the time of his death, the deceased was under the care of the accused and Captains Johannes Hendrik Gloy (Gloy) and Johannes Zacharias van Niekerk (Van Niekerk) who each had a legal duty of care over detainees by virtue of the office they held and their appointment as police officers.

17 All three police officials, Gloy, van Niekerk and the accused were based at the security branch headquarters at Compol Building, Pretoria. Gloy and van Niekerk arrived at John Vorster Square on the morning of 23 October 1971 at 06H00, on instructions of van Wyk.

18 The accused arrived at John Vorster Square police station on 27 October 1971. The accused, Gloy and van Niekerk tortured and assaulted the deceased. Prior to his death, and whilst in their custody and under their care, the deceased sustained multiple bruises and fractures including and not limited to inter alia the nasal bone, left orbital ramus, right inferior orbital ramus, fractures of the left and upper jaw, an isolated depressed skull fracture, extensive contusions on the right leg, and a dislocated left angle.

19 Subsequently, they thereafter either pushed him out of the window of room 1026 and/ or threw the deceased down from and/ or rolled the deceased from the roof of John Vorster Square Police Station on 27 October 1971.

20 The deceased died at the scene of the crime on 27 October 1971. The cause of death was **Massive head (brain) and chest (vital centre damage and compromised respiration) injuries.**

21 After the demise of the deceased, the accused and his cohorts alleged that the deceased committed suicide by jumping from the window of the tenth floor (room 1026) of John Vorster Square Police Station.

22 The State will allege that the accused at all relevant times committed the offence in count one above in the execution of a common purpose. Precisely when, where and how it was formed, and/or who all the parties thereto were, are at present unknown to the State. The State does, however allege that the said common purpose was in existence from at least shortly before and for the duration of the commission of the crime.

LIST OF WITNESSES

1 Advocate George Bizos, SC
Legal Resource Centre
Johannesburg

2 Dr Salim Essop
Leeds, United Kingdom

3 Dr Dilshad Jetham
Johannesburg

4 Professor Kantilal Naik
University of Witwatersrand
Johannesburg

5 Mr Ernest Alexander Matthis
Cathkin Park
Kwazulu Natal

6 Dr Essop Goolam Pahad
Johannesburg

7 Mr Ronnie Kasrils
Pretoria

8 Ms Stephanie Kemp
Kensington
Johannesburg

9 Dr S Holland
Department of Forensic Medicine and Pathology
University of Witwatersrand
Johannesburg

10 Mr Edward Ramolefe
Johannesburg Magistrate Court
Johannesburg

11 Mr Mohammed Timol
Victory Park
Johannesburg

12 Mr Paul Francis Erasmus
George

13 Professor Steven Naidoo
Umhlanga
Kwazulu-Natal

14 Mr Frank Kennan Dutton
Durban
Kwazulu Natal

15 Mr T Moodley
The Innovation Hub
Pretoria

16 Professor Kenneth David Boffard
Department of Surgery, University of Witwatersrand
Johannesburg

17 Mr Ali Thokan
Johannesburg

18 Mr Imtiaz Ahmed Cajee
Pretoria

19 Professor Don Foster
University of Cape Town

20 Mrs Shantavothie Tweedie
Johannesburg

21 Dr Snuki Zikakalala
Johannesburg

22 Mr Abdulay Jassat
Johannesburg

23 Mr Peter Sexford Magubane
Johannesburg

24 Mr Nassim Pahad
Houghton
Johannesburg

34 Mr Hanif Mohamed Vally
Johannesburg

35 Mr Pramanathan Naidoo
Johannesburg

36 Mr Ismail Momoniat
Johannesburg

37 Mr Colin Woodall Savage
Johannesburg

38 Advocate Raymond Christopher Macadam
NPA
Pretoria

39 Mr Kevin Martin
Johannesburg

40 Ms Zahira Adams
National Archives
Pretoria

41 Ms Madeleine Fullard
NPA
Pretoria

42 Captain JM Kruger
LCRC Johannesburg
Johannesburg

43 Captain F Mathipa
Directorate: Priority Crimes Investigation (HAWKS)
Pretoria

44 Captain Ben Nel
Directorate Priority Crimes Investigation (HAWKS)
Pretoria

45 Sgt Freddy Khoza
DPCI
Pretoria

46 Sgt B Dlamini
DPCI
Pretoria

47 Constable J Ubisi
DPCI
Pretoria

48 Warrant Officer Neville Els
Pretoria

49 Ms Marcia Shreuder
Webber Wentzel Attorneys
Sandton

50 Zahira Adams-Ngoepe
National Archives Repository
Department of Arts and Culture

51 Mr Collin Woodall Savage
19A tenth street
Linden

52 Captain JM Kruger
LCRC
Johannesburg

53 Cst S Kubayi
LCRC
Johannesburg

54 General ED Groenewald
SAPS
Legal Services

55 Ms Geraldine Frieslaar
South African History Archives
Pretoria

56 Ms Mutondi Muothe Mulaudzi
Legal Resource Centre
Johannesburg

Annexure "JR 2" (18)

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: _____

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

NOTICE IN TERMS OF RULE 16A OF UNIFORM COURT RULES

Applicant hereby gives notice in terms of Rule 16A of the Uniform Court Rules that he intends raising Constitutional issues in the abovementioned application against the Respondents.

TAKE NOTICE that the Constitutional issues relates to the fairness of a criminal proceedings as provided for in section 35(3) of the Constitution, Act 108 of 1996.

It is the Applicant's case that the criminal proceedings against him constitute unfair proceedings on *inter alia* the following grounds:

1. The proceedings will be procedurally unfair and has not been instituted and/or prosecuted with a fair and/or lawful motive.

2. The proceedings did not commence and/or will not be concluded within a reasonable time as is provided for in section 35(3)(d) of the Constitution.

3. The Applicant's right to properly adduce and challenge evidence effectively as is envisaged in section 35(3)(i) of the Constitution will be infringed.

DATED at PRETORIA on this _____ day of OCTOBER 2018

BEN MINNAAR ATTORNEY
ATTORNEYS FOR THE APPLICANT

TEL:
FAX:
REF:

TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
FIRST RESPONDENT
123 WESTLAKE AVENUE
HEARTLEY WEAVIND
SILVERTON
PRETORIA

(THE SHERIFF)

RECEIVED COPY HEREOF:

DATE:

TIME:

_____

AND TO: **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
SECOND RESPONDENT
C/O THE STATE ATTORNEY
SALU BUILDING
255 FRANCIS BAARD STREET
CORNER THABO SEHUME STREET
PRETORIA

(THE SHERIFF)

RECEIVED COPY HEREOF:

DATE:

TIME:

_____

AND TO: **THE MINISTER OF POLICE**
THIRD RESPONDENT
C/O THE STATE ATTORNEY
SALU BUILDING
255 FRANCIS BAARD STREET
CORNER THABO SEHUME STREET
PRETORIA

(THE SHERIFF)

RECEIVED COPY HEREOF:

DATE:

TIME:

_____

Annexure "JR 3" F2

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE SIGNATURE

CASE NUMBER: IQ01/2017

In the matter of:

THE RE-OPENED INQUEST INTO THE DEATH OF
AHMED ESSOP TIMOL

JUDGMENT

MOTHLE J

INTRODUCTION

1. The 1972 inquest into the death of AHMED ESSOP TIMOL ("*Timol*") was formally re-opened by the High Court on 26 June 2017, in terms of section 17A of the Inquests Act 58 of 1959 *("the Act")*. The 1972 inquest was held following Timol's death in 1971. The purpose of re-opening the inquest is to investigate the circumstances leading to the death of Timol in 1971, in light of further evidence that has been uncovered.

2. It is a matter of record from the 1972 inquest that the incident which resulted in Timol's death occurred on 27 October 1971, at which time Timol died while held in custody by members of the Security Branch of the South African Police *("Security Branch")*. The then Attorney-General, Johannesburg, declined to prosecute. Consequently an inquest into the death of Timol was held in Johannesburg, under case reference number 2361/71 from April to June 1972 *("the 1972 inquest")*, before Senior Magistrate M De Villiers ("*the magistrate*") assisted by Professor Simpson *("Prof. Simpson")* a medical doctor, as assessor.

3. At the end of that inquest the magistrate concluded and found In essence that Timol had committed suicide and no person alive was responsible for his death. The family of Timol did not accept this finding, and for a period of approximately 43 years had to live with the magistrate's decision.

4. With the assistance of the Human Rights Foundation and eminent legal counsel[1], Timol's nephew, Mr Imitiaz Cajee *("Cajee")* obtained further evidence relating to the death of Timol, which enabled them to

---

1 Advocate George Bizos SC of the Johannesburg Bar.

approach the National Director of Public Prosecutions ("*NDPP*") with information that was not placed before or considered by the magistrate conducting the inquest in 1972. The NDPP made a recommendation to the Minister of Justice and Correctional Services for the re-opening of the inquest in terms of section 17A of the Act.

5. Acting in terms of this section of the Act, the Minister forwarded the recommendation from the NDPP to the Judge President of the Gauteng Division of the High Court of South Africa, who in turn designated a Judge to re-open the inquest.[2]

6. The re-opening of this inquest in the High Court of South Africa is the first of its kind[3] by a Superior Court and presided by a Judge of the High Court.[4]

7. It is apposite to state up front that this 2017 re-opened inquest started off with a limp. Firstly, the inquest relates to an incident which occurred 46 years ago. As it turns out, out of about thirty members of the Security Branch of the South African Police involved in the arrest, detentions as well as the investigation of the case concerning Timol's death, only three were found still alive. Two of the three former police officers who testified during the hearing of oral evidence in 1972, were served with subpoenas to testify again in the 2017 inquest and were in attendance during the proceedings.

8. Secondly, the records of the 1972 inquest are incomplete. At the commencement of the 2017 proceedings it was drawn to the attention

---

2 Judge President D Mlambo of the Gauteng Division designated the writer of this judgment Judge S.P. Mothle, to re-open and preside over the inquest proceedings.

3 Counsel for the NDPP who was the evidence leader, confirmed that this re-opening was the first of its kind in South Africa.

4 Inquests are ordinarily presided over by magistrates, although the Act defines the "Judicial Officer" as including District and Regional Magistrates as well as a Judge of the Superior Court.

of the Court that the record of proceedings of the 1972 inquest runs up to 1,157 pages, ending with the 77 page judgment by the magistrate. The Court only received portions of this vital record which starts from page 653 up to the end. Mysteriously missing from the record are pages 1 to 652, which consists mainly of the oral evidence of the police witnesses, the originals or copies of the relevant photographs and other exhibits.

9. The Court received copies of the sworn statements (affidavits) of the police witnesses. However, in the case of Mr Joao Rodrigues's[5] 4 page affidavit, page 3 thereof has also mysteriously disappeared. This missing page 3 provided details as to how in Rodrigues's version, Timol fell from the 10th floor of John Vorster Square building. The version in the missing page of Rodrigues's affidavit was narrated in summary by the magistrate in his judgment, which is part of the records that survived the mysterious disappearance of documents. The 2017 re-opened inquest thus had to rely on the magistrate's summary as well as the oral evidence of Rodrigues delivered in person in 2017 proceedings, to appraise itself of the contents of the missing page 3 of his affidavit.

10. This monumental task of re-opening the 1972 inquest was largely simplified by the evidence of witnesses who testified orally in Court. The Court is indebted to these witnesses as well as those who submitted affidavits. In particular, this Court recognises the courage with which the witnesses, who are former detainees, were able to share with this Court and through this Court, the public, as to how they had to endure abuse, humiliation and torture at the hands of the Security Branch. Their contribution has been of tremendous assistance to this proceedings.

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5 A member of the Security Branch and main witness for the police.

11. The Court also expresses its gratitude to the legal representatives of the NPA, the family of Timol and the former members of the Security Branch. Their participation and contribution throughout this inquest was also valuable to this Court. Advocate George Bizos SC is the only lawyer who participated in both the 1972 inquest and the 2017 re-opened inquest, 46 years later. This Court is indebted to him and all experts for their contribution.

12. It is through the persistent effort of Mr Imitiaz Cajee that this historic sitting of the re-opened inquest occurred. His efforts should be emulated as an example of how citizens have to assert their rights.

THE INQUESTS ACT 58 OF 1959.

13. Inquests proceedings are regulated by the Act. The purpose of holding an inquest is to investigate the circumstances of death apparently occurring from other than natural causes and where the prosecutor had declined to prosecute. It is therefore an inquisitorial *cum* investigation process.

14. In ***Timol v The Magistrate of Johannesburg***[6]**,** the Court had this to say about inquests:

> "*Nevertheless, the inquest must be so thorough that the public and interested parties are satisfied that there has been a full and fair investigation into the circumstances of death.*"

15. The Appeal Court in ***Marais NO v Tiley***[7] echoed the sentiments of ***Timol v The Magistrate supra*** as follows:

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6 1972 (2) SA 28 (T). This reported decision arises out of the 1972 inquest, where the Timol family brought an interlocutory application against the magistrate and prosecutor, for an order compelling them to make available all documents of the inquest. The Court granted the order sought.

7 1990 (2) SA 899 (A) at 901F-902A-B

"...The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences and so that persons responsible for such deaths may, as far as possible, be brought to justice..."

16. Recently In ***Freedom Under Law v NDPP***[8] this Division of the High Court also had this to say about the purpose of an inquest:
"[72] An inquest is an investigatory process held in terms of the Inquests Act which is directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. Section 16(2) of the Inquests Act requires a magistrate conducting an inquest to investigate and record his findings as to the identity of the deceased person, the date and cause (or likely cause) of his death and whether the death was brought about by any act or omission that prima facie amounts to an offence on the part of any person. The presiding officer is not called on to make any determinative finding as to culpability."

17. Section 17A (1) of the Act was inserted into the original text as an amendment by section 1 of Act 145 of 1992. It provides thus:
"The Minister may, on the recommendation of the Attorney General concerned, at any time after the determination of an inquest and if it deems it necessary in the interest of justice, request a Judge President of a provincial division of the Supreme Court of South Africa to re-open that inquest, whereupon the Judge thus designated shall re-open such inquest."[9]

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8 Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP)

9 Please note that the words "*the Attorney General*" and "*a provincial division of the Supreme Court of South Africa*" in this section refer to the National Director of Public Prosecutions and a provincial Division of the High Court of South Africa respectively, as restructured and re-named in terms of the provisions of the Constitution of the Republic of South Africa, 1996.

18. Section 1 of the Act defines *"judicial officer" as "a judge of the Supreme Court of South Africa, a regional magistrate or a magistrate."* In practice, the inquests in South Africa are presided over by a regional magistrate or magistrate. Judges get involved when there is an appeal or review of the inquest findings made by the judicial officer in the magistrate court. However, in regard to the re-opened inquests, section 17A provides specifically for the designation of a Judge to preside over a re-opened inquest.

19. The Act draws a subtle distinction between the re-opening of an inquest in terms of section 17 (2) and in terms of section 17A. Under sections 17 (2) and (3), an inquest is re-opened at the request of the Attorney General[10] (presently Director of Public Prosecutions), directed to the judicial officer *who presided over an inquest*, to take further evidence generally or in respect of a particular matter. In practice it would ordinarily be before a regional magistrate or magistrate who made the finding. This process is designed to focus on taking further evidence following an initial finding of the inquest Court.

20. In regard to the section 17A re-opening, the Director of Public Prosecutions makes a recommendation to the Minister for the re-opening of the initial inquest, by a designated Judge, who is also empowered *mutatis mutandis* to take further evidence generally or in respect of a specific matter as in section 17 (2). Thus section 17A of the Act empowers the Judge presiding to exercise the provisions of section 17 (2) and to take further evidence generally or in respect of any matter, in effect for the purposes of the reconsideration of the entire evidence including *on the existing record*. Most importantly,

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[10] South Africa had an Attorney General for each of the provincial and local divisions of the then Supreme Court. In terms of Section 43 of the National Prosecuting Authority Act 32 of 1998, a person holding the position of Attorney- General shall be deemed to be appointed as director in terms of the NPA Act.

Section 17A (3) (b) obligates the Judge to record any finding that differs from a finding of the initial inquest as referred to in section 16(2), as well as the respect in which it differs.

21. Section 17A (3) (a) empowers the presiding Judge to cause any person who has already given evidence in the inquest to be subpoenaed to give evidence in the re-opened inquest. The witnesses are for the Court not the parties participating. It is not the purpose of an inquest to resolve a dispute between parties, even though there may be a tendency by participating parties to protect or promote their interests. The judicial officer should thus guard against inadvertently being drawn to approach the proceedings as would be the case in resolving a dispute between such parties. The proceedings are thus not adversarial but rather inquisitorial.

22. The inquest proceedings should not be conducted like criminal trials. However, they are more aligned to criminal proceedings than civil proceedings. Section 8 (2) of the Act provides that the laws governing criminal trials shall *mutatis mutandis* apply to securing the attendance of witnesses at an inquest, their examination, the recording of their evidence, the payment of their allowances and the production of documents or material.

23. There is also the added factor in that the presiding judicial officer must, consistent with the Bill of Rights in the Constitution, draw to the attention of witnesses who may be at risk of possible prosecution, of their rights against self-incrimination and procurement of legal representation, prior to testifying. The evidence leader will be from the prosecution and the presiding Judge may appoint assessors. It is in consideration of these factors that while an inquest is not a criminal

trial, the inquest court should be constituted more in line with criminal proceedings[11] than civil proceedings.

24. The order of the presentation of the evidence is determined by the presiding judicial officer and mostly depends on the availability of witnesses at a given time. Ordinarily the proceedings would commence with formal opening statements, first by the presiding judicial officer and thereafter by participating parties. In the scheme of things, the investigating officer who gathered documentary and other evidence would be the ideal witness to start with, followed by eye witnesses if any. The investigating officer should be led by the evidence leader from the prosecution.

25. The Inquest Act empowers the presiding officer to call for and receive affidavits. Where necessary, he/she may decide to hear oral evidence. In this regard, the presiding judicial officer is empowered to summon witnesses to appear in person at the inquest proceedings in order to testify.

26. At the end of the proceedings and in terms of section 16 of the Act, the presiding judicial officer is required to record a finding upon the inquest as to the identity of the deceased person; the cause or likely cause of death; the date of death and whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person. Should the presiding judicial officer be unable to record any such finding, she or he is required to record that fact.

27. Finally, the re-opened inquest is neither an appeal nor a review of the initial inquest. In both these instances, a court is confined to the

[11] In practice, Judges in the High Court presiding in criminal trials wear red robes as opposed to regular black robes.

record of the initial inquest and only empowered to admit new evidence when a case has been made out for such. The re-opened inquest requires a reconsideration of the entire evidence considered by the initial inquest as well as the evidence that was available at the time of death, which for one or other reason was not or could not be considered during the initial inquest proceedings, and has become available. This is the information that would justify a re-opening

28. I now turn to deal with the background to the facts concerning the arrest and detention of Timol.

BACKGROUND

29. According to the evidence of his brother Mohammed and friend Professor Salim Essop *("Essop")*, Timol was born in the small town of Breyten in what is now Mpumalanga on 3 November 1941. He was the eldest son of Hajee Yusuf Ahmed Timol and Hawa Ismail Dinder. Timol was one of the six children in the family. In 1949, the family moved to Roodepoort on the west rand near Johannesburg. In 1955, the family moved back to the town of Balfour, in Mpumalanga where Timol's father opened a shop. Timol went to school in Standerton, Mpumalanga as there was no school in Balfour at the time. He completed his high school education at the Johannesburg Indian High School. Once more, the family moved back to Roodepoort in 1956 where the father opened a trading store. The family struggled to survive to the extent that Timol had to leave school and be employed as a clerk at a bookkeeper's office in Johannesburg. He later obtained a scholarship to pursue a teaching course at the Johannesburg Training Institute for Indian Teachers. It is at that school that between 1962 and 1963 he served as Vice Chairperson of the Students Representative Council.

30. He completed his teacher's diploma in 1963 and was posted to the Roodepoort Indian School. As a teacher he was reported to have been well loved and respected by colleagues and students and a popular teacher at school. On 26 December 1966, Timol went to the Hajj (the pilgrimage to Mecca), where he proceeded via Cairo, Egypt, to settle in London and obtain a teaching post there. It was at this time that he was joined by his younger brother Mohammed. While in London, Timol was recruited to join the South African Communist Party which operated underground in exile. He was trained in conducting underground work and dissemination of information, including through letter bombs. He returned to South Africa in February 1970 and resumed his teaching post at the Roodepoort Indian School. His brother Mohammed testified that he had an inclination that he (Timol) was returning to South Africa to be involved in the struggle against apartheid. He had been trained and prepared to serve in the struggle against apartheid by Dr Yusuf Dadoo. Dr Dadoo, who was based in exile in Europe, was the National Chairman of the South African Communist Party ("*SACP*") as well as the Vice Chairman of the Revolutionary Council of the African National Congress *("ANC")*. The SACP and the ANC were banned organisations at that time.

31. It was further common cause that during this time, Timol established an SACP underground unit in South Africa. One of the members of the underground unit was Essop, then a third-year student at the Medical School of the University of Witwatersrand ("*Wits*"). He now holds a Doctoral degree in Philosophy.

32. Essop, who was regularly in the company of Timol, testified in the 2017 re-opened inquest that on the night of the 22 October 1971 at

about 23H00 pm at night, he was driving a motor vehicle, Ford Anglia with registration numbers TU 22315 on Fuel Road in Coronationville. He was with Timol. They encountered a road block which directed them to stop. The road block was manned by Sergeant Leonard Gysbert Kleyn *("Kleyn")* and Const. Adam Alexander Cecil Thinnies *("Thinnies")*, both members of the South African Police stationed at Newlands Police Station in Johannesburg. After asking routine questions as to where the two passengers in the vehicle were travelling to, the police indicated they wanted to search the boot. In the boot the police found pamphlets of the banned SACP. Essop and Timol were arrested and taken to Newlands Police Station together with the impounded vehicle and the documents found in the boot.

33. At the Newlands Police Station. Sergeant Kleyn phoned Warrant Officer Neville Els ("Els") who was a member of the South African Police, attached to the Security Branch at John Vorster Square. He was on stand-by duty that evening. Kleyn informed him of the arrest. Timol was locked up in a cell and Essop was put on a bench awaiting the arrival of Els. On arrival, Els took charge of the documents and pamphlets found in the boot. He then phoned senior officials of the Security Branch who later also arrived at the police station. These were Captain Dirker followed by Colonel Greyling *("Greyling")*. Captain Dirker took Timol to the Security Branch offices at John Vorster Square and Essop was transported by Greyling to the same offices.

34. Essop, whose evidence of their arrest is by and large corroborated by Kleyns, Els and Thinnies, testified further that he was first taken to the office of Greyling on the 9th floor of the Security Branch offices at John Vorster Square, where he was interrogated and tortured. Apart from having seen Timol for the last time when they were separated at

Newlands Police Station, Essop testified that sometime during his detention, he was standing in the strong room when through the open door, he could see a person looking very much like Timol being escorted by two police officials, having a hood on his head and walking slowly with great difficulty. Police officers held him by both hands on either side of the body. That was the last glimpse of Timol that Essop had.

35. It was only in March 1972, when he first appeared in court that Essop became aware that Timol died in detention on the 27 October 1971. The evidence before the 1972 inquest confirmed the identity of Timol as well as the date of death.

36. Consequent to the arrest of Timol and Essop on the night of 22 October 1971, the Security Branch went on a raid the following day and arrested 20 other persons whom they presumed to be linked to Timol. Among them who testified in the 2017 re-opened inquest, was Mr Kantilal Naik *("Naik")* (currently a retired professor of mathematics), Timol's brother Mr Mohammed Timol *('Mohammed"),* arrested in Durban and Ms Dilshad Jetham *("Jetham"),* presently a medical doctor and cardiologist. Like Timol and Essop, these former detainees and others, with exception of Mohammed who was in Durban, were also detained and interrogated during that same weekend at the same place, John Vorster Square, at about the time Timol met his death.

Security legislation in 1971.

37. Before turning to the evidence presented in both inquests, it is necessary to state, as the evidence presented before the 2017 re-opened inquest showed, that there were detainees who died in detention before Timol and many others thereafter. Thus, in order to

facilitate an understanding of the context within which the events unfolded at that time, it is apposite to succinctly examine the pivotal role played by the security laws in force in the apartheid South Africa.

38. It is a well-known practice internationally that governments of the day are constitutionally or by legislation obligated to protect the state against foreign and domestic threats. Legislation in place would generally establish security structures whose functions would be, amongst others, to gather intelligence so as to assess the threats to the state and where necessary, take pro-active action to prevent attacks on the State.[12]

39. The apartheid government took measures to deal with the activists opposed to the apartheid system; this much is clear from Rodrigues' evidence.[13] These measures entailed enactment of pieces of legislation to authorise various law enforcement agents to suppress dissent to the segregation laws. The implementation of these measures resulted in the detentions of scores of people.[14] These pieces of legislation included.

a. ***The 1950 Suppression of Communism Act*** [15] which outlawed the "*Communist Party of South Africa*" and prohibited organisations from pursuing communist ideas and objectives. Subsequent to the declaration of the Communist Party of South Africa to be an unlawful organisation, the SACP took its place. It too was banned

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12 Some of these security units would be established by rogue governments to disempower political opponents during political power contestations.

13. Joao Rodrigues is a former member of the Security Branch linked to the death of Timol. During the presentation of his oral evidence in Court, he repeatedly described the situation that prevailed at that time as "*oorlog*", (war).

14 People arrested and held in terms of various security-related legislation were referred to as detainees.

15 Act 44 of 1950

until February 1992, when together with other organisations which were prohibited, it was unbanned. It is still in existence;

b. ***The General Law Amendment Act***[16] which authorised police to detain without warrant any person suspected of politically motivated crime for up to ninety days without access to a lawyer, doctor or any family or visitors (*incommunicado*)[17]. On expiry of the ninety days many detainees had their period of detention extended by a further ninety days. Subsequent thereto, the ***Criminal Procedure Amendment Act No. 96 of 1965*** lengthened the span of detention to 180 days which remained renewable;

c. ***The Terrorism Act*** [18] whose purpose was to prohibit terroristic activities. The Act defined terrorism as anything that might endanger the maintenance of law and order. It is this act, which in terms of Section 6 thereof, authorised detention of persons for a period of 60 days which was renewable, for purposes of interrogation without trial. These powers were conferred on police officers of the rank of Lieutenant-Colonel and above. It is during detention under this particular section that South Africa saw the torture and death of many detainees as well as the torture of many more others who survived. It is further under this particular section in terms of which the detainees, including Timol, were detained indefinitely *and incommunicado*. Only the Commissioner, subject to directions from the Minister, was authorised to order a release of such detainee "*when satisfied that he has satisfactorily replied to all questions at the said interrogation or that no useful purpose will be served by his further detention*".

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16 Act 37 of 1963.

17 A colloquial term used to explain the condition where the detainee is unable to communicate with any civilian or any civilian being unable to communicate with the detainee.

18 Act 83 of 1967.

d. ***The 1982 Internal Security Act***[19]***,*** this Act was later amended by the ***1991 Internal Security and Intimidation Amendment Act***[20]***.*** This Act repealed the Terrorism Act but retained most of the provisions of that Act, including the provisions of section 6 referred to above. Section 6 of the Terrorism Act was restated with minor changes as section 29 of the Internal Security Act. It also introduced several kinds of detention including preventative detention without interrogation in terms of section 10 and detention in terms of section 50, which authorised detention for fourteen days.

40. The Internal Security Act of 1982 was repealed following the adoption of the Constitution, 1996, which ushered in a new democratic order with a Bill of Rights. Chapter 11 of the Constitution, in particular section 198(d), places national security under the authority of Parliament and the National Executive, with the Courts retaining the jurisdiction to pronounce on the constitutionality or legality of both the statutes and conduct of officials authorised to act in terms thereof.

41. Timol, people associated to him and many other detainees were held in terms of the provisions of section 6 of the Terrorism Act. In order to appreciate the extent of the unfettered powers granted to the police under this section, it is necessary to quote the full text of the section. It reads thus:

> "*6(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in Section 1 of the Police Act, 1958 (Act 7 of 1958), of or above the rank of Lieutenant Colonel may, if he has reason to believe that any person who happens to be at any place in the Republic, is a terrorist or is withholding from South African Police any information relating to*

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19 Act 74 of 1982
20 Act 138 of 1991

terrorists or to offences under this Act, arrest such person or cause him to be arrested, without warrant and detain or cause such person to be detained for interrogation at such place in the Republic and subject to such conditions as the Commissioner may, subject to the directions of the Minister, from time to time determine, until the Commissioner orders his release when satisfied that he has satisfactorily replied to all questions at the third interrogation or that no useful purpose will be served by his further detention, or until his release is ordered in terms of sub-section (4).

6(2) *The Commissioner shall, as soon as possible after the arrest of any detainee, advice the Minister of his name and the place where he is being detained, and shall furnish the Minister once a month with the reasons why any detainee shall not be released.*

6(3) *Any detainee may at any time make representations in writing to the Minister relating to his detention or release.*

6(4) *The Minister may at any time order the release of any detainee.*

6(5) *No court of law shall pronounce upon the validity of any actions taken under this section, or order the release of any detainee.*

6(6) *No person other than the Minister or an officer in that service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainee.*

6(7) *If circumstances so permit, a detainee shall be visited in private by a Magistrate at least once a fortnight."*

42. This section was an affront to various human rights values such as the rights prohibiting arbitrary arrest, detention, torture, denial of due process, political activism or advocacy, freedoms of movement, association and expression. Most importantly, it indirectly placed the lives of detainees wholly in the hand of the interrogators. As the evidence demonstrates, some of these lives were lost, including that of Timol. Section 6 prohibited civilian accesses to the detainee and excluded the jurisdiction of the Courts to inquire into the conditions under which a detainee was held and interrogated.

43. The only right the detainee had was to write to the Minister for his release. Given the circumstances of secrecy under which detainees were held, it is doubtful whether detainees were informed of this right, let alone being assisted to exercise it. Consequently, and as the evidence in these and other inquests demonstrate, this drastic legislation became a tool in the hands of some members of the Security Branch, not only to torture but also to kill detainees with impunity.

44. The 2017 inquest proceedings heard evidence that apart from the death of several detainees in detention, some of those that were released from detentions or released from prison after serving sentence, were subjected to a different form of detention. They were served with banning orders which effectively meant self-monitored detention.[21] The banning orders would entail house arrest, restriction on the number of people the banned person might associate with or be in the company of at any given time and restriction on attending or participating in any gathering.

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[21] Sections 8 and 9 of the Suppression of Communism Act.

45. The effect of security legislation did not end there. It permitted the Security Branch to repeatedly enter, without a warrant, the work place and residence of a detainee, to ransack the premises, search and seize documents and anything they deemed to be an instrument used for terroristic activities[22]. In the process, they would threaten and question on the spot, parents, siblings and relatives of the detainee present in the residence. In short, the harassment of the family of the detainee, and after his/her release, they would continue the harassment in the form of repeated visits, partly to isolate the released detainee and his/her family from friends and neighbours. Such harassment would often become unbearable to an extent that the person who had been detained would choose to leave South Africa and go into exile.

46. The evidence presented, reveals that the family of Timol, like many other families, was subjected to all these experiences; the arrest, detention and subsequent death of Timol in detention; the arrest, detention and torture of his brother Mohammed; the harassment of their parents and family members during the detention of both Timol and Mohammed, through numerous visits to their home; the banning order with all the restrictions served on Mohammed upon his release; and Mohammed eventually having to leave South Africa and go into exile. All of these incidents as stated above were the consequence of various provisions of the security legislation operations at that time, in particular the Terrorism Act and Suppression of Communism Act.

47. The evidence further reveals the role of some carefully selected prosecutors, magistrates and medical doctors who were complicit in the declaration of the so-called war against those opposed to the apartheid order. These persons betrayed and demeaned their

[22] Section 7 (3) of the Suppression of Communism Act.

respective oaths of office by participating in inquests proceedings that became a sham; concealing the atrocities committed by the Security Branch and ensuring that the judicial system finds ***"No one to Blame"***.[23]

48. Since the advent of democracy in South Africa, there has been progress in dealing with the past security legislation. The security laws that were at the centre of the atrocities committed on detainees ended with the demise of the apartheid order. The Security Branch no longer exists. Parliament, constituted in terms of the 1994 Democratic dispensation, enacted the ***Protection of the Constitutional Democracy against Terrorist and Related Activities, Act 33 of 2004.*** This statute provides for measures to prevent and combat terrorism and related activities as well as other measures to enable the security forces to investigate any activities which may result in crimes against the State. It provides for supervised detention and recognises the jurisdiction of the courts to intervene where necessary. This new security legislation repeals the last vestige of the apartheid security laws, namely, the ***Internal Security Act of 1982.***

49. Having witnessed and experienced the atrocious events which led to the Second World War, the international community in 1948 took measures to ensure that people all over the world should be protected by a set of human rights values, against incidents of arbitrary arrests, detention and torture. ***Article 5 of the Universal Declaration of Human Rights, adopted by the United Nation General Assembly on 10 December 1948, resolution 217 A (III)*** provides:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"

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[23] The evidence of Advocate George Bizos SC, who appeared as a legal representative in many such inquests. ***No one to Blame*** is the title of his book which was submitted as evidence in court. His evidence on the role of some magistrates and doctors complicit in the sham is corroborated by Paul Erasmus, a former member of the Security Branch, who also testified in the 2017 re-opened inquest.

50. The African Countries adopted a similar declaration called **Article of 5 the African Charter On Human and Peoples' Rights, Adopted on on 27 June 1981. It reads:**

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his[24] legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"

51. South Africa followed in 1996 with the enactment of ***section 35 (2) of of the Constitution of the Republic of South Africa, 1996*** *thus:*

"Everyone who is detained, including every sentenced prisoner, has the right-

(a) To be informed promptly of the reason for being detained;

(b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) To have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) To challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expens, of adequate accommodation, nutrition, reading material and medical treatment and;

(f) To communicate with, and be visited by, that person's-

(i) Spouse or partner;

(ii) Next of kin;

(iii) Chosen religious counsellor; and

(iv) Chosen medical practioner."

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[24] I take it that "his" also includes" her".

52. I now turn to deal with the summary of the evidence of 1972 and 2017 inquests.

THE 1972 INQUEST PROCEEDINGS

53. The 1972 inquest proceedings before the magistrate commenced in April and ended in June 1972. The witnesses who testified in that inquest were the arresting officers; about 14 members of the Security Branch of different ranks ranging from Constable to Colonel, who might at one stage or another, have interrogated Timol, Essop and other detainees during the same weekend as Timol at John Vorster Square; about 6 police officials from ranks of Warrant Officer to Major General, attached to the Criminal Investigation Department, who investigated the death of Timol; Timol's parents, Yusuf and Hawa Timol; one Mr M Kahn a funeral undertaker; a journalist Mr Swart; 2 assistant curators at the state mortuary as well as 4 medical officials being Dr V D Kemp, District Surgeon Johannesburg, Dr N J Schepers Senior State Pathologist, Dr H Koch the pathologist who testified on behalf of the police and Dr J Gluckman, the pathologist for the Timol family.

54. In regard to the interrogation of Timol, the approximately 20 police officers who filed affidavits for the 1972 inquest, deposed to the same version, namely that Timol was never assaulted or subjected to any form of ill treatment while in detention. The version they put forward is that on the 27 October 1971, Joao Anastacio Rodrigues *("Rodrigues")*, a sergeant attached to the Security Branch who travelled from the Compol Building offices of the Security Branch in Pretoria, to John Vorster Square to deliver salary cheques for Captain Johannes Hendrik Gloy *("Gloy")* and Captain Johannes Zacharias

Van Niekerk *("Van Niekerk")*. The two Captains were interrogating Timol at that time. The time was approximately 3.40 pm (15h40).

55. Rodrigues, who also testified in the 2017 re-opened inquest, presented his version as follows: He found the two captains sitting with Timol in room 1026 at the John Vorster Building. While they were sitting with Timol, an unidentified member of the Security Branch called Mr X, came through the door and said to the other two officials that a breakthrough had been made in identifying some people whose names appeared in one of the documents confiscated from Timol's room. The version goes further to state that Timol got into a fright and the two police officials requested Rodrigues to guard Timol while they followed Mr X out of the room.

56. It was while he was sitting with Timol that Timol requested to go to a toilet and they both stood up. It is at this point that there are different versions from the evidence of police officers as recorded by the Magistrate.

57. One version by Major-General Christoffel Andries Buys *("Buys")*[25], supported by Goy and Van Niekerk, is that Timol stood up, went to the door and as Rodrigues was standing up to follow him, he then suddenly turned and went to the window which he opened and jumped out. Rodrigues could not stop Timol because he was obstructed by the table between them as well as the chairs which were on both sides of the left and right of the table and stumbled on the one on the left trying to stop Timol.

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[25] Buys was head of the Criminal Investigation Department (CID) and head of investigation into the death of Timol. He testified on what he alleges Rodrigues told him, which Rodrigues denied at trial.

58. The second version by Rodrigues is that Timol stood up, indicated that he wanted to go to the toilet, and immediately went to the window, opened it, and jumped out as Rodrigues was struggling to overcome the table and the chair on the left as obstacles, to reach Timol.

59. The third version also by Rodrigues is that as Timol stood up, he also stood up and moved to the left to come around the table. While he was pushing the chair on which Van Niekerk was sitting, under the table, at that time he saw Timol going towards the window. Rodrigues moved to the right to go around the table between them and he stumbled and fell as he was obstructed by the chair on which he had been sitting. At that moment, he was on the floor, unable to reach Timol, when he witnessed how Timol opened the window and jumped to his death.

60. The police, in spite of the contradictions, testified in support of Rodrigues and broadly stood by this version. They either denied that they had ever assaulted or inflicted any injuries on Timol, or testified that they did not see any injuries on his body.

61. In the absence of that portion of the record of proceedings dealing with the evidence by the police, the 2017 re-opened inquest was deprived of the benefit of the record of police officers' evidence in chief, cross-examination and re-examination. Consequently, the 2017 re-opened inquest was constrained to deal with the version as deposed to in the sworn statements by each of the police officials and summarised by the magistrate in his judgment.

62. There was also the evidence of Timol's parents. This evidence relates to the various trips undertaken on different dates by different

police officials from the Security Branch, who went to search and confiscate materials, articles and documents from Timol's room while he was held in detention. At some point during one of the visits, there was an altercation between Timol's mother and a member of the Security Branch. Bizos who testified in the 2017 re-opened Inquest, described this incident in his affidavit as follows:

"90. *Ms Hawa Timol (Ms Timol) testified at the inquest that on 26 October 1971 two Security Branch members arrived at her home to look for a book. She asked this policeman, 'where is my son, please I want to see my son'. One police member then said: 'You cannot see your son anymore'. She then asked him: 'Why, Sir, I am so sad, you are ....' The police member in question then allegedly said: 'He must get a hiding'. Then she asked him: 'Why, Sir, you beat my son and I did not beat my son.' He then answered: 'You did not beat him that is why we are now beating him.' Then she said: 'You say that you are giving my son a hiding, you must listen well, Sir, if somebody gives your son a hiding, his mother will also be sad. You must not give my son a hiding.'*

91. *Warrant Officer Van Rensburg, one of the Security Branch officers who visited the Timol home to retrieve a book, gave a different account of the conversation. He related it as follows: Ms Timol asks: 'I want to see my son'. He answered: 'You cannot see him'. Ms Timol: 'Why did you capture him?' Answer: 'He was naughty'. Ms Timol: 'My child was never naughty; I never gave him a hiding.' Answer: 'Listen, old mother, a child must get a hiding. If you gave him a hiding then he would not have been crying now.'*

92. *Needless to say the Magistrate rejected Ms Timol's version as unconvincing. It was not unusual for the courts to prefer the evidence of the Security Branch members."*

63. The surviving record of the 1972 Inquest has the evidence of the medical doctors and the post-mortem report.

64. The record of proceedings reflects how considerable time was spent in dealing with the evidence of the medical doctors in regard to what appeared to be evidence of injuries on the body of Timol, which were not consistent with his fall from the 10th floor of the John Vorster Square Building. These were the injuries that appeared to have been sustained by Timol before his death, *ante mortem.* Bizos had this to say about the evidence relating to the post mortem on the body of Timol:

"81. *Gluckman had noticed numerous injuries which were not fresh. He explained that histologists could date the injuries by the length of the macrophage cells. The healing process comes about as healthy cells make themselves longer in order to devour or replace the injured cells. By measuring the length of the macrophages cells, you could determine whether the injury was inflicted more than two, four, six, eight, ten or twelve days before death.*

82. *The scientific evidence showed that the injuries on Timol's body were probably inflicted while he was in custody. Three pathologists testified: the State pathologist, Dr Schepers, Dr Gluckman for the family, and Prof Koch for the police. The main difference of opinion related to the timing of pre-death injuries, which Drs Schepers and Gluckman opined that the injuries were inflicted within 4 to 6 days prior to the fall, (during the first or*

second day of detention) while Prof Koch opined that the injuries were sustained 5 to 8 days prior to the fall (before Timol's arrest and detention).

83. It should be noted that Koch was the same person who said that he had examined Essop after his admission to hospital and that there were no injuries, as alleged by the detainee's father, Mr Ismail Essop. His failure to mention the sixteen injuries that Dr Kemp had noted on Essop was disingenuous, to say the least."

65. Koch's posture did not assist the court either. His view was not objective as would be expected of an expert. He virtually placed all the *ante-mortem* injuries well before Timol's arrest, between 9 and 12 days. Bizos testified that Koch was roundly criticised by his colleagues for the sloppy manner in which he presented his analysis. The summary of joint examination of slides by Koch, Schepers, Gluckman and Shapiro which were conducted in the presence of the assessor, Simpson, yielded disagreement between Koch on the one side and the rest of the other doctors on the other.

66. Bizos testified that in the application brought by Mr Ismail Essop on behalf of his son Essop, Koch failed to mention 16 injuries that Kemp had noted on Essop. According to Bizos, Koch was disingenuous to the court. He had this to say about him:

"*it was obvious that Dr Koch had lied under oath when he stated that he had not seen any injuries. He attempted to explain himself by claiming that he was not asked by the lawyer to say whether there were injuries on Essop, but merely to deal with the question whether or not Essop had the specific injuries described by his father in his original affidavit. Koch had said that the injuries he saw differed from those described by Mr Ismail Essop. It was also argued that disclosing the injuries would reveal*

information about the detainee. This was prohibited by the Terrorism Act unless those holding him consented. The judges hearing the application did not adversely comment on Koch's lack of candour or the correctness or otherwise of his alarming interpretation of the Terrorism Act."

67. The Magistrate, in a seventy seven page judgment, summarised the evidence of each of the police who testified in some detail, which summary proved to be helpful to the 2017 re-opened inquest. The judgment also dealt with the medical evidence as well as that of the police involved in the investigation of Timol's death. He dismissed out of hand the evidence by Timol's mother, in regard to the verbal altercation she had with the police at her home. In essence the Magistrate reached conclusions that came under attack in the 2017 re-opened inquest. Firstly he dismissed the submission that murder was involved as absurd because Timol was a valuable find to the Security Branch who desperately wanted to keep him. Secondly he also dismissed the theory that Timol fell by accident as being absurd. He concluded that Timol must have jumped out of the window on his own accord. Thirdly, the magistrate decided on the basis of the medical evidence that some of the injuries found on Timol's body are not consistent with the fall. The abrasions could have been between 4 and 8 days old and the bruises between one and seven days old. He further concluded that Timol was in custody for 4 days and seven hours prior to his death. Fourthly, he opined in relation to the *ante mortem* injuries that the nearest one could come to an explanation is that the injuries were sustained in a 'brawl' where he was pushed around and possibly fell. Fifth, even though Timol was interrogated for long hours, the magistrate found that he was treated in a civilised and humane way. There was therefore no basis to find any form of torture or mistreatment. Sixth, the magistrate also accepted that the evidence before him indicated beyond reasonable doubt that the deceased committed suicide. Seventh, he accepted that Timol was a communist

and a prominent member of the communist party in South Africa. Timol was therefore conversant with all orders to SACP members including one which said: "*Rather commit suicide than betray the organisation.*"

68. At the end of the 1972 inquest, the magistrate made the following findings in terms of section 16 of the Act:

> "*(a) The identity of the deceased is Ahmed Essop Timol, an Asian male, 29 years old, born South African, teacher by profession.*
>
> *(b) Date of death: 27 October 1971.*
>
> *(c) Cause or probable cause of death: the deceased died because of serious brain damage and loss of blood sustained when he jumped out of a window of room 1026 at John Vorster Square and fell to the ground on the southern side of the building. He committed suicide.*
>
> *(d) No living person is responsible for his death.*"

69. I will deal with the magistrate's conclusions and findings on the evidence as it was then, within the context of the 2017 re-opened inquest evidence to which I now turn.

THE 2017 INQUEST PROCEEDINGS

Summary of evidence

Captain Nel

70. Captain Benjamin Nel *("Nel")* of the South African Police Service is stationed at the unit: Crimes Against the State, Organised Crime and

Directorate for Priority Crime Investigation. The unit: Crimes Against the State is mandated to investigate cases relating to the Truth and Reconciliation Committee *("TRC").* Captain Nel is the investigating officer in this re-opened investigation and was tasked to accumulate the evidence and records of the 1972 inquest proceedings. He testified that he downloaded a copy of the inquest record from the University of Witwatersrand historical papers' website. He also contacted the South African National Archives who confirmed that the inquest records were not available. The archives supplied a document from the Department of Justice dated 13 June 1986 authorising the destruction of old inquest registers and files which included that of Timol. He also proceeded to Johannesburg Magistrate's Court where he was informed that the records were not available.

71. Captain Nel managed to trace from the archives of the South African Police, the whereabouts of police officials who were involved in the investigation of the Timol case and other people who were also involved in the inquest. He compiled a list of these police officials and could establish that only three of them were still alive. He further established that the undertaker, Mr and Mrs Timol, Drs Kemp, Schepers, Gluckman and Prof Koch are all deceased. He further found out that Senior Magistrate J J L De Villiers is also deceased.

72. He interviewed a number of witnesses as well as former members of the Security Branch of the South African Police to establish the methods of interrogation. Two of these former members were Mr Roelf Venter and William Smith whose applications served before the TRC hearings. He could further establish from Brigadier Wahl Du Toit that the South African Police Printing Mill was used to print documents that could be used as negative propaganda by the State

to frame its enemies. He also studied cases in the law reports relating to Timol, the book by Bizos titled "***No One to Blame***" as well as two other publications, one by Imtiaz Cajee titled "***Timol a Quest for Justice***" and the other by Don Foster, Dennis Davis and Diane Sandler titled "***Torture in South Africa***".

73. Captain Nel managed to obtain copies of newspaper reports that were in circulation at that time relating to the Timol and Essop detentions. He testified further that he found a total of 54 files of people who were arrested as a result of the arrest and interrogation of Timol and Essop from the archives. He also established that other than Timol and Essop, there were 20 other persons who had been detained and interrogated by the police as they were believed to form part of Timol's so-called main unit assisting the Communist Party of South Africa. The names of these persons appear in Captain Nel's affidavit and include those of Timol's brother Mohammed, Professor Kantilal Naik and Dr Dilshad Jetham. Their affidavits were also filed as part of the record as Exhibit "C".

74. Captain Nel further testified that in the course of his investigation he visited the John Vorster Square Building and in particular the offices where Timol, Essop and others were held and interrogated from Friday 22 October 1971 to Wednesday 27 October 1971, when Timol died. In particular, Captain Nel interviewed one of the surviving members of the Security Branch linked to the Timol case, Rodrigues who, as already stated alleged that he was in the room with Timol when he fell to his death. Rodrigues is one of the few members of the Security Branch linked to the Timol case, who are still alive.

75. Also of critical importance Captain Nel obtained a document with a title "*Inkululeko Freedom No 2*" dated February 1972, as part of the

records. The significance of this document will be dealt with later under evaluation.

Professor Salim Essop

76. Professor Salim Essop was born in Johannesburg on 21 May 1949. He testified as follows: He grew up in Roodepoort and in 1967 matriculated from the Roodepoort Indian School where Timol taught. On passing matric he enrolled for a medical degree at the University of Witwatersrand in 1968. It was on 22 October 1971 while travelling with Timol in a car that his medical studies were interrupted by his arrest and detention.

77. He met Timol as a student studying for his junior certificate (Standard 8) in 1965. Timol was his class teacher. Timol left South Africa in 1966, settling and working in London for a few years. During his stay in London, Timol associated with South African political exiles. Since he was committed to the anti-apartheid struggle, he accepted an offer of ANC and the SACP to return to South Africa to help resuscitate the underground structures and in particular arrange for the distribution of their political literature. Timol and Essop were living in the same area where they would often bump into each other on Marais Street in what he described as "*the lappies neighbourhood*". They struck up a friendship where Essop eventually got to participate in underground political activities together with Timol.

78. He joined Timol's unit whose task was to organise an underground infrastructure by setting up small groups, known as "*propaganda units*". Timol's main responsibility was to acquire, print and distribute literature for both the ANC and the SACP. Essop assisted Timol in the distribution of newsletters and pamphlets which possession was

in contravention of the law. He worked for nearly twenty months with Timol, disseminating ANC political leaflets through the post, acquiring printing, photographic and other equipment, and planning to set up a viable political underground structure inside the country. Timol had different mailing addresses at which he would receive correspondence and packages from London, often in tea, biscuit or chocolate packages. Even though he was assisting Timol, Essop never had any contact with anyone abroad and was never recruited and never attended any ANC or SACP meetings in South Africa. He and Timol worked closely together for approximately twenty months starting from February 1970 until his arrest in October 1971.

79. Upon their arrest, they were taken to Newlands Police Station and separated. Timol was taken away by two police officers while he was taken to the back of Newlands Police Station where there was a small two-storey building with a metal staircase. He was also escorted by two members of the Security Branch. He subsequently learned that these two police officers were Major J H Fourie and Colonel J Van Niekerk. His interrogation started right at the Newlands Police Station where he was asked questions about his travel with Timol and the assaults started. He was continually punched and slapped. The assault continued for about an hour. They then took him back to the police station reception area and handed him over to Colonel Piet Greyling *("Greyling")*.

80. Essop was then transported to the John Vorster Square building to the office of Greyling on the 9th floor. After making a few calls, Greyling left him with Sergeant Kleyn who assaulted him further. When Greyling returned, the beating stopped and Greyling sent Kleyn away. Greyling then forced him to hand over the house keys and make him produce maps of his room at his parents' house and locker

at Wits. He was thrust up and down and sideways causing his head to hit the floor several times. He testified that he was in pain as this torture continued for hours.

81. He was taken to an office on the 10th floor with a wooden door which, when opened, revealed a steel door, something akin to a safety door of a bank vault. He was then taken into a strong-room attached to that office which was in fact a vault. It is a room that measured 4 x 3 meters perimeter and 3 meters height without any windows except for two airbricks and the steel door that opens only from the outside. It is in this room that Essop was held from Friday, 22 October to Tuesday, 26 October, day and night subjected to hours and hours of torture. The only time he left that vault was when he was escorted to a bathroom that is situated hear the stairwell. On one occasion when he was washing in the bathroom, one officer took him to look out the window of the bathroom: "*He asked me if I had heard of an Indian man, Babla Saloogee, (who had, I knew, died in detention in 1964 after he was flung from a window of the 7th floor of Greys Building, Johannesburg, which was the old headquarters of the Security Branch). This officer also told me that I would fall to my death from 10th floor. I prayed silently that I would not be subjected to such a fate. I was taken back to the vault by the two officers.*"

82. Many security officers were involved in inflicting pain on him during the middle and final phases of the torture in the vault. These officers came in pairs and alternating. They applied numerous torture methods, including the following:

"(a) Placing a bag over my head and suffocating me;

(b) Applying electric shocks and stepped up voltage rate to my tongue and lower limbs thereby inflicting excruciating pain;

(c) *Delivering repeatedly the so-called 'mule kick' to my lower limbs and thus stiffening them to almost unbendable rods;*

(d) *Holding me by my ankles and dangling my body from the stairwell on the 10th floor whilst threatening to drop me to my death;*

(e) *Forcing me into unconscious state and thereafter throwing water or even urinating on me to revive me; and*

(f) *Subjecting me to continuous sleep deprivation to exhaust and disorientate me."*

83. At some stage during detention he was instructed to half-squat. He was ordered to sit on a chair near the wall but there was no chair. He was ordered to simulate sitting on a chair in a half-squat position. Two police officers stood alongside him one on the one side and the other on the other side. They started beating him up on the sides while he was in that squatting position which caused him to collapse to the floor several times. When that happened, they lifted him back to the "*sitting*" position and continued delivering the punches and the kicks. This treatment was called "*the mule kick*". At the end of that treatment he was ordered to tell them everything otherwise he would be subjected to the same treatment again.

84. Essop was taken to the bathroom to wash himself and on the way back he was taken first to the stairwell where he was reminded that there were ten floors down to the ground. He was made to look down the void in between the spiral stairwell. He was lifted and held dangling from the stairway on the void. He kept dangling away from the railing of the stairwell while being held by his ankles. He felt

dizzy, disoriented and despondent. After a while he was lifted up and taken back to the vault.

85. At some point during the interrogation, Essop cannot even recall what day it was, the vault door was left open while he was standing inside, he looked to his right and could see the passage as the door leading to the office in which the vault is situated was open. He testified thus:

> *"This is when I last caught a fleeting sight of Timol. He had a black hood placed over his head and was being dragged along by two Security Branch officers. I knew immediately that this was Timol as I was familiar with his physique and height. He was not able to walk normally and was being held up by security officers on either side of him who were holding onto the sides of his trunk. I got the impression that the Security Branch had 'worked on him' in the same manner as they had on me, perhaps with even greater savagery. I presume that they had taken Timol to the toilet and were walking him from the toilet, probably the same toilet that I was also taken to a few times to urinate and wash the blood off my body, and this may have been a reason they had taken Timol to the toilet. Although I could not be hundred percent certain, I believe that the day I saw Timol was Monday, 25th October 1971. Even today, when I reflect on my last sighting of him I feel a sense of overwhelming sadness knowing that the Security Branch probably singled him out for the most vicious and sadistic treatment."*

86. It was during interrogation that he collapsed and lost consciousness a few times. Greyling called a doctor to examine him. Essop recalls that this happened on the morning of Tuesday 26.

87. He has a hazy memory of what happened after Dr Kemp left the vault. He was later to learn that he was initially transported in an

unconscious state to the General Hospital in Johannesburg and thereafter to Hendrik Francois Verwoerd Hospital in Pretoria. He cannot testify as to why he was removed from the Johannesburg General Hospital to the H F Verwoerd Hospital in Pretoria.

88. From the hospital he was detained further in prison until his appearance in Court.

89. Essop's trial took place at the old Synagogue on Paul Kruger Street, Pretoria. On 31 October 1972, he was convicted and sentenced to five years imprisonment. After an unsuccessful application for leave to appeal, he was held at Leeuwkop Prison in Pretoria. He was later transported to Cape Town where he was taken by ferry to Robben Island to serve his five-year sentence. It was when on Robben Island that he met Nelson Mandela, Walter Sisulu, Govan Mbeki, Ahmed Kathrada, Mac Maharaj and others who were serving long or life sentences. When he was released from Robben Island after five years, he was served with a five year banning order and taken to his home in Roodepoort.

90. After serving more than three years of his banning order, he escaped from South Africa to go into exile and lived and worked in several countries before settling in the United Kingdom where he is currently based as a retired academic. He could only visit South Africa several times after 1994. He was never called to testify in the 1972 inquest into the death of Timol.

91. During the presentation of his evidence in the 2017 re-opened inquest, Essop interrupted his testimony on the afternoon of Tuesday, 27 June to lead the presiding Judge, legal representatives and representatives of the media on an inspection *in loco* on the 9th and 10th Floors as well as the roof at John Vorster Square Building.

Inspection in loco

92. On 27 June 2017 at 14H00, Essop led the court into the John Vorster Square Building. The inspection started off on the 9th floor where the office of Greyling had been located. There had been some slight adjustments to the structure of the offices over the years and in some respects it was not exactly as he had remembered it. However, the main parts of the building that featured in his evidence were still visible.

93. Firstly, the spiral stairs that start from the ground floor right up to the 10th floor, with a void at the centre thereof were still intact. When one looks down from the spiral stairs, the ground floor is clearly visible even though such exercise would leave those with phobia for heights feeling dizzy. From the 9th floor we moved to the 10th floor where in this instance, there had been little tampering with the office structures, the passages and the bathrooms. They came out exactly as he had described in his evidence, including office 1013 where he was held. The passages leading to the offices from the landing on the stairway had steel doors such as those one would find in a bank vault. These are opened by key to access the passage. There are offices on either side of the passage and internal walls built by an opaque glass wall from top halfway to the ground. The passage is about a metre and a half wide between the walls of the various offices on either side.

94. At the end of the passage-way there is another steel door similar to the one nearer the stairway. Next to the stairway landing there is a toilet which seems to be a feature on each floor including the 9th floor. Essop pointed out that the layout of the bathroom was not exactly the way it was during his detention. There were some slight changes.

But basically the structure was more or less the same and the measurements the same. As he entered the passage leading to office 1013, Essop made no mistake in identifying the office door as well as the office in which he was interrogated.

95. As one enters the office, there is a steel vault door to the right, opening to a small, approximately 12 square metre area vault with thick strong walls and no windows at all. The vault was as Essop had described. Higher up the walls there were two airbricks. At the time of our visit, there was a lot of stationery stored therein.

96. Essop led us into that vault and showed us the various positions in which he stood while he was being interrogated. One could not exactly see some of the walls as these were covered with boxes of stationery. However, the room was exactly as he had described it. He then pointed out a spot where he was at the time he had sight of the person he believed was Timol being carried, and walking slowly along the passage. I stood exactly on that spot as he demonstrated how he had a brief sight of Timol as he was carried with the steel door as well as the door leading to the office both open. He then simulated how Timol was carried and where I stood, I had a clear view of a person being carried on both sides as he moved on the corridor past the open door. The movement was slow and with an effort.

97. The entourage also inspected room 1026 were Timol was held. It turned out to be a very small room of 2½ to 3 x 4 metre. This, according to Rodrigues's version, is the room from where Timol fell down through the window. The particular window was still intact. The only difference in that room was the furniture as well as an external steel screen that has since been inserted along the wall of the entire building, which allows vision to the outside but would prevent any

object from falling through any of the windows of the building. It is in the shape of a steel ventilator. We then went to the adjacent room, room 1025 with almost the same measurement as room 1026, which has side a door leading to room 1024. Room 1024 also has a vault inside. On the other side of room 1026 was room 1027 which is near the walkway leading to toilets which are now described as men's toilets. They also have been renovated.

98. As the screening vent is now in place, it was not possible to have a clear sight of the spot on the ground where Timol landed. The entourage then went up the stairs through the top of the building on the outside where it was possible to see the spot where Timol fell, when one stands on top of the building just above the room 1026. The inspection went back to floor 10, where another witness Dr Jetham, who was held in either 1025 or 1027, (the offices were locked and we could not gain access), pointed out that she was interrogated therein after her arrest on Saturday, 23 October 1971. She then showed us the office that is next to the landing of the stairway on the 10th floor and near the bathroom structure. It was in relation to the bathroom structure that she was able to point out the office saying that where she was held was a few metres from the bathroom structure as she was taken there during the interrogation. She later testified that it was from that room that she could hear the screams which she no doubt believed were coming from Timol towards the direction of rooms 1026 and 1025.

99. From the 9th floor the entourage went back to the ground floor where we went to the spot exactly where Timol fell. After 45 years, there was little evidence to show that someone had fallen there. However, the spot is part of the garden landscape outside the building and has not changed very much. From then on we went to the ground floor

next to the parking where the cells are located. We could not access the cells as the officer in charge thereof was not available. We then ended the inspection *in loco* at about 16H00.

Adv George Bizos SC

100. Adv. George Bizos SC *("Bizos")* practised as a senior counsel at the Johannesburg Bar but is currently employed by the Legal Resources Centre in Johannesburg. He testified as follows: He was born in Greece on 14 November 1928 and became a resident of South Africa during 1941 at the age of thirteen years after fleeing the Nazi occupation of Greece. He joined the Bar in Johannesburg in 1954 and spent his career representing victims of apartheid violations. He has been a senior member of the Johannesburg Bar since 1978. In October 2004 he was made honorary life member of the Bar.

101. During the apartheid era, he acted as counsel in a wide range of cases that came before the court. These included criminal trials of activists and inquests into the deaths of people in detention, held under various South African security laws.

102. Bizos was one of the counsel who acted on behalf of both Timol and Essop in regard to their detention as well as for Timol's family during the 1972 inquest.

103. His evidence gave an overview of the various security laws which authorised police officials in particular those attached to the security branch of the South African Police, to detain people randomly during the era of apartheid. He referred to legislation such as the Suppression of Communism Act, 44 of 1950; the General Law Amendment Act, 37 of 1963; the Terrorism Act, 83 of 1967; the

Criminal Procedure Amendment Act, 96 of 1965; and the Internal Security Act, of 1982, which existed at that time. In his evidence he pointed out that the isolation of detainees allowed for their abuse and cover-up by the police of such abuse as the police were always the only witnesses. He testified:

> *"In my experience, over many years of appearing as counsel in these matters, policemen routinely perjured themselves to conceal the truth of abuse of detainees. My view has since been confirmed by the testimony of many policemen and security branch officers before the Truth and Reconciliation Commission's (TRC) Amnesty and Human Rights Violation Committees."*

104. Bizos recounted the number of deaths in police custody, of people detained in terms of security legislation, inquest proceedings being held in some of them. The inquest proceedings into the deaths of the detainees were usually heard by white senior magistrates who invariably accepted police explanations. These magistrates saw it as their duty to protect organs of the State, such as the police. The magistrates tended not to interrogate police versions that vigorously. By way of example, magistrates invariably never asked police the most obvious question: *"Why should the detainee commit suicide when he had the option of remaining silent under interrogation".*

105. The families and their lawyers had considerable difficulty in probing the deaths of the persons held in conditions of total secrecy.

> *"Almost without exception security branch members committed themselves to a conspiracy of silence. The detainees were not there to speak for themselves."*

106. The other difficulty which routinely faced counsel in inquest proceedings concerning the death of a detainee would be the manufacture of false evidence by police including the presentation of false testimony. There would be a blank secrecy imposed under

security laws which was invoked during an inquest to prevent critical evidence from being disclosed. As an example, Bizos refers to the fact that Essop, who was available during the inquest in Timol's case, was kept in custody throughout the Timol inquest effectively silencing him, and preventing his highly relevant evidence from being heard by the inquest court. The only inference that can be drawn from the deliberate concealing of Essop was to prevent his evidence of torture being heard by the inquest court.

107. He then proceeded to cite other examples. Where there were civil claims brought against police, these were settled out of court first to avoid any evidence coming through during court proceedings. It therefore emerged in TRC enquiries that police routinely employed deception at judicial proceedings. In this regard, Bizos refers to the inquest dealing with the deaths in detention of Mr Stanza Bobape as well as that of Mr Steven Biko[26]. Bizos further refers to the collusion that would take place between the police and prosecutors, who collaborated with police to undermine cases of victims and/or their families.

108. Bizos narrated how Timol and Essop were both detained by the Security Branch in terms of Section 6 of the Terrorism Act on 22 October 1971. The allegation at that stage was that Communist Party propaganda material had been found in the car boot that Essop was driving. On that occasion, as already been stated earlier in this judgment, Timol and Essop were travelling together in a car. He further testified that:

> *"A post-mortem examination of Timol's body discovered several pre-death injuries. Notwithstanding this, indisputable facts, the inquest*

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26 See Volume 5, Chapter 6 Findings and Conclusions, page 221, para 100, sub-para (p) Finding on the State and Unlawful Activities, TRC Publications.

into Timol's death found that 'No one was to blame for his death'. This finding mirrored the findings of many other deaths which occurred in detention throughout the apartheid era."

109. Bizos' further evidence as outlined in his affidavit, gives a background as to how he came to be involved with Advocate I A Maisels SC ("*Maisels*") to represent the family in the 1972 inquest. He described the version of the security branch policemen who claimed that at all times they treated both Timol and Essop with care and consideration, indeed to the point that they spent their own money to buy them food and drinks. He states that police officers denied that they had assaulted either of the two men, or that they had observed injuries on their person. The security branch members claimed that Essop was admitted to hospital because he was malingering.

110. Bizos further recalled how the application for an interdict against the torture of Essop came to be brought. He testified that on 28 October 1971, after news of Timol's death had become public, a nurse informed Mr Ismail Essop, the father of Essop, that his unconscious son had been admitted to a non-white section of the H F Verwoerd Hospital in Pretoria at 11H00 on 26 October 1971. He had severe injuries and was in a critical condition. She said that his presence there was being kept a secret. Essop's father rushed to the hospital but was denied access to his son who was under police guard. He, however, managed to confirm by standing on a bag outside and peeping through the small glass panel, that his son lay in a hospital bed.

111. Essop's father then consulted attorneys who briefed Bizos and Maisels to bring an urgent application to allow for access to see Essop. The urgent application came before Judge Cecil Margo of the Pretoria Supreme Court on 29 October 1971. Advocate Frikkie Eloff,

(who later became the Honourable Mr Justice Eloff and Judge President of the Supreme Court, Transvaal Provincial Division), appeared for the police and handed to the court an affidavit alleging that Essop was detained under Section 6 of the Treason Act, which prohibited access to him by anyone except the Minister or an officer of the State on official duty. There was also a short affidavit supplied by Dr Hieronymus Koch, the State pathologist who had examined Essop, disputing the injuries as observed by Mr Ismail Essop. Bizos continued:

> "*The police claim that Essop was suffering from hysteria. Judge Margo indicated during the course of argument that there was public disquiet and further that it would not be in the interests of justice for him to hold that the courts were powerless to assist the father's access to his comatose son – especially in circumstances where his friend Timol had, according to the Security Branch, committed suicide by jumping out of a window. He suggested that there should be discussions, in the hope that some access would be given to the father, and that an assurance or undertaking be provided by the police that Essop would not be ill-treated any further.*"

112. Eloff requested adjournment to consult the Prime Minister after which he came back and indicated that access to the detainee would not be allowed. Judge Margo then declined to grant access to Essop but pointed out that the matter required a thorough investigation before a final order would be made. Essop's counsel then requested to file further affidavits and the matter was postponed. The Deputy-Sheriff was prevented from even serving Essop with the court order. The order had to be delivered by the Registrar of the Court.

113. Attempts to approach the nurses for evidence did not yield any result as all nurses had been told not to tell anyone about Essop and

consequently could not make any statement on the matter. The police disclosed that they had had three neuro-surgeons examine Essop. Bizos recounted that one of them, Dr Louw, testifying in court, was cross-examined by Maisels who asked as follows:

> *"Dr Louw, did you see Mohammed Essop, our client's son?"*
> *"Yes."*
> *"Did he have any injuries?"*
> *"Lots, I can do no better than read the letter that was sent to me by Dr Dennis Vermont Kemp, the district surgeon, who listed sixteen injuries."*

114. This revelation led to Kemp, who was a district surgeon in Johannesburg, being summoned telephonically to come to court that very morning. The Judge ordered as such and Kemp came to testify. Dr Kemp had difficulties explaining to the court as to why he withheld or failed to disclose evidence of injuries on Essop. After hearing the matter, the Judge rejected the evidence of Colonel Greyling who was the Second Respondent in the application, denying that Essop was not assaulted. The Judge found that Essop was indeed assaulted and granted the interdict preventing any further assaults on him. In rejecting Greyling's version of events, the Judge described him as been less than honest and stopped short of declaring that he lied to the court.

Professor Kantilal Naik

115. Professor Kantilla Naik is a retired Professor of Applied Mathematics at the University of Witwatersrand. Naik testified as follows: He started lecturing at the university during 1970's and had retired just

two years ago. He testified that he knew Timol because the two of them lived in Roodepoort together and taught at Roodepoort Indian School. He taught science while Timol taught history and commercial subjects.

116. Naik was arrested on Saturday, 23 October 1971. The police demanded that he accompany them to the Roodepoort Indian School where they seized his typewriter. Later at 11H00 the same day the police came to the pharmacy where he was doing part-time work and took him to his home where they searched his room and told him that Timol had identified him as someone he was *trying* to recruit. He testified that he did not know that Timol was a communist and heard this from the police. He was then taken to John Vorster Square on the 10th floor and made to stand for many hours before they began assaulting him for information. He too had been detained under section 6 of the Terrorism Act.

117. Naik stated in his affidavit that he was not involved in any political activity. Throughout his detention he experienced assaults in the form of being punched several times and as he fell down they lifted him up and continued punching him. The Security Branch then applied what they called the helicopter method of torture on him. This they did by tying his hands with a rope and slipped the ends in front of his knees. Thereafter they then put him on a broom stick in between his elbow and knees. He was then suspended on the broom stick between two tables and two chairs. They then assaulted him in that position as they rotated him on the broom stick that was suspended between two tables or chairs. He suffered extreme pain and when they finally released him from that position, he had lost all mobility in his hands. His hands and wrists were completely numbed. He was deprived of any sleep and they only took him to a cell the next

morning (Sunday morning) where he was left for some time. He had been so tortured that he could not do even simple tasks such as washing himself. He was kept in solitary confinement.

118. On Monday 25 October they took him to a General Coetzee who later became Commissioner of Police. He was in the presence of the district surgeon, Kemp, who examined him in a lift. After that consultation Naik was then given physiotherapy and electrical treatment to repair the damage to the muscles in his hands. That treatment took almost three and a half months. From then the only time they took him up on the 10th floor was when they needed to question him or to apply the treatment of physiotherapy as well as electrical massaging. The members of the Security Branch who tortured him were later removed during the remaining period of detention. Naik recalls telling a magistrate about his injuries during the latter's visit. The magistrate sent some people to take statements and he was later taken to Newlands Police Station to lay a charge. On return to John Vorster Square, members of the Security Branch were not impressed and made threats to him to withdraw the charges.

119. Naik was held at John Vorster Square for six months. He is of opinion that the reason why he was held so long was that the police wanted to make sure that his hands were healed before he could be released. During the period of six months, however, he was held in solitary confinement where he was not allowed contact with anybody, including legal counsel. It was during this period that he came to hear of the passing of Timol.

120. He also complained about the food as he told them that he was a vegetarian and this also made the police angry. The Police became aggressive and they verbally abused him. During his interrogation, he

was told that they are rounding up Indians who were the backbone of the struggle against apartheid. The police told him that the Indians were trying to make Africans politically aware and for that reason they need to be taught a lesson. He was referred to as a communist.

121. After four and a half months he was told that he will be released but will be used as a State witness against certain people. In this regard, the Security Branch wanted assurance from him by way of an affidavit, which he was pressured to sign, that he would not reveal the torture that they had inflicted upon him nor even tell his wife. The police even warned him about divulging what transpired during his detention, to the media. He was forced to make several statements to the police.

122. By the time he was released, the police had instilled an enormous amount of fear in him. He was afraid to talk to people and many became suspicious of him. They held the view that since he had been released from detention, he might be an informer of the Security Branch. That, he testified, was the worst kind of torture that he endured. The police fed on this perception by spreading false rumours that he was their informer and that his colleagues should be very careful of him.

123. Naik denies that he was an informer for the Security Branch. He points out that if that had been the case, his life would have been easier and the several passport applications which he made would not have been rejected. He would not have been overlooked for promotion at work and would have easily secured better paying work with significantly more benefits.

124. Prior to his detention; he had support from the community, which support changed after his detention. It hurt him. Naik recounted that 3 days after his detention, his daughter was born and people did not readily come to the assistance of the family because they did not want to be implicated. This ostracism continued several years after his release. He was subjected to harsher conditions as people in the community did not trust him. At some point, a neighbour claimed that he was an informer for the Security Branch. He was even told that the police should have thrown him out of the 10th floor of John Vorster Square Building instead of Timol. This view was reinforced by the fact that even after his release, the Security Branch kept visiting and harassing him and his family.

Mohammed Timol

125. Mohammed Timol is the brother to Ahmed Timol. He commenced his evidence by informing the inquest how he related to his brother as they grew up, with the age gap between them being seven to eight years. Of importance, he painted a picture to the inquest as to who Timol the person was, as he knew him. He further narrated the history of Timol and how he grew up with Timol and saw him leaving the country and on his return participating in political activities. Timol had received training under the leadership of Dr Yusuf Dadoo, who in exile served as the National Chairman of the South African Communist Party as well as Vice Chair of the Revolutionary Council of the African National Congress. The details of this part of the evidence appear under the heading "*Background*" in this judgment.

126. Mohammed also joined the struggle against apartheid. He had followed Timol to London where he was also trained under the auspices of the ANC and the SACP, to distribute leaflets by way of

leaflet bombs. After his training in London and before he returned, he met Dr Dadoo who gave him a message to his brother Timol, that they had not heard from him for sometime. He requested him to convey to Timol a message that he should inform them that he had not been detained and was safe.

127. On his return to South Africa he was fetched by Timol from the airport. He delivered the message to Timol. The very following day he was ordered by his mother to go and have a haircut. On his return from the barber, his mother informed him that members of the Security Branch had come to their home looking for him as they had previously done while he was away. Mohammed told Timol what happened when he returned from school. Timol advised him to go and see them. He testified that he went to the Security Branch offices in Roodepoort and on arrival he was told that in fact they were looking for Timol and not him. He conveyed that message and he says he could see that Timol was worried. On 17 October, Timol informed him that they were both under surveillance and suggested to him that he should go to Durban. The following day on the 18th, Mohammed left for Durban. That was the last time he saw Timol alive. When he last saw Timol, the latter was in good health with no injuries.

128. On 25 October at about 08H30 while he was staying with students in a flat at Himalaya Heights in Warwick Street in Durban, he was woken up by six Security Branch officers who stood by his bedside. The police aggressively enquired if he was Mohammed Timol and thereafter arrested him. One of the police was Lt. Naicker, a member of the Security Branch. The only person who knew that he was in Durban was Timol who had probably told the police. After taking him to the offices of the Security Branch, the police informed him that they

have also detained his brother, Timol. Thus began the interrogation and torture.

129. During the interrogation he was made to stand on a brick and to hold up two telephone directories for hours. He was repeatedly beaten up whenever he became unsteady on the bricks or lowered the directories to rest his arms. At all times he was in the company of Security Branch officers and was never left alone. He was then taken to Berea Police Station where he was locked up. The next morning he was taken to Fischer Street, for interrogation again. The beatings continued, including being made to sit on an imaginary chair. The interrogation continued until Wednesday evening when they abruptly stopped. Everything went quiet and he was taken to his cell in the Berea Police Station.

130. The following morning on Thursday 28, three Security Branch officers gave him a paper and pen and instructed him to tell the truth otherwise he would rot in jail. He did not write anything on the paper. On the same day in the evening, Lt. Wessels came in and told him that Timol had died. When he asked him how he died Wessels informed him that he was not aware what happened as they were still waiting for more information from Pretoria.

131. On Friday 29 October as he was been driven back to the offices of the Security Branch, he read on a headline poster "*Death Plunge, Vorster speaks*". This caused him to recall how Babla Salojee, who had been interrogated by a Security Branch officer, Rooi Rus Swanepoel, and had plunged to his death at Grey's Building. As they exited the lift at the building of the Security Branch, one of the officers expressed his condolences to him for the death of his brother. Later that day he was taken back to Berea Police Station where he spent

the entire weekend. For a few more days after the weekend, he was taken back and forth to the Security Branch offices at Fischer Street and at one point was forced to sign a statement on what he had told them during the interrogation. After that, he was taken back to police station Berea where they never came back for him again.

132. On 30 November 1971, Naicker and Wessels woke him up and informed him that he was being taken to Johannesburg. He was allowed to wash his face and gather his things. He was driven to Johannesburg while handcuffed to a handle in the police car for the duration of the trip. They left Durban at 01H00 in the morning. On arrival in Johannesburg, which was the early morning hours of 1 December 1971, he was taken to John Vorster Square where he was locked up in a cell. He continued to be detained under Section 6 of the Terrorism Act. Each day he was taken outside for thirty minutes exercise. After a month he was given a Quran in its translated form and later the bible and Bhagavad Gita.

133. On 14 March 1971, Mohammed was taken to the office of Greyling who informed him that he was been released and he could go home. However, he was told that he had to go and see the CID investigating officer Major Fick who was tasked with the case relating to Timol's death. When Greyling asked him if he had complaints, he told Greyling about his assaults and beatings by the police officers, which evoked a response from Greyling "*with the uttering of expletives, telling him to get out of his office.*" He was then taken to Fick who asked him about Timol, whether he had any mental issues that would cause him to commit suicide. He denied this and told Fick that Timol was fit. Fick and another officer then took him home to Roodepoort.

134. After his release, Mohammed continued to participate as an activist in the struggle and was later detained under Section 10 of the Internal Security Act[27] on expiry of which he was released and handed a house arrest order which restricted his movement and banned him from participating in political activities for a period of five years and banned from receiving any visitors at his home or being seen in the company of more than one person at a time. He was also restricted from leaving his home during working days from 6 am and return by 7 pm. He was only allowed to leave his home on Saturdays from 8 in the morning until noon. Thereafter, he was expected to remain home for the rest of the weekend.

135. On 1 January 1978 he left South Africa without a passport and made his way to Swaziland. He became a full-time functionary of the ANC based in Mozambique and Zambia. He underwent military training under the auspices of the ANC and in April 1990 after the unbanning of the ANC, he was part of the delegation that went to Cape Town for the Groote Schuur talks with the apartheid government.

Dr Dilshad Jetham

136. Dr Dilshad Jetham *("Jetham")* is a Cardiologist practicing as a physician on a *pro bono* basis. She testified thus: At the time of her arrest she was 22 years old. She was a second year medical student at Wits. She and Essop attended Roodepoort Indian School and were contemporaries. Timol was older than her. She knew him as a family friend who later in Grade 10 became her history teacher. Her family and that of Timol lived a few blocks apart and she and Timol knew each other well.

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[27] Act 138 of 1991.

137. She was arrested late in the afternoon on Saturday, 23 October 1971 when she arrived home from university. She was taken to John Vorster Square and escorted to the 9th floor of the building. She was first taken to Greyling's office on the 9th floor where she was given a pen and paper to write her role in political activities. Each time, Greyling threw the paper in the waste basket and refused to accept what she wrote. She was then taken to an office on the 10th floor where her interrogation and torture began. She was interrogated and tortured by white male officers. She testified that where she was held, she could hear the "*Athaan*" (the Islamic call to prayer) from the Newtown Mosque nearby. It was this early morning call to prayer that helped her to keep track of the days during her interrogation. She described the period as being that of Ramadan (holy month of fasting, introspection and in prayer for Muslims). On sunset she needed to break her fast and was only given a glass of water to do so.

138. She was asked questions, made to stand and not allowed to go to the bathroom on request. The white male officers hurled insults at her and filled water up and made her drink so that she would have to relieve herself whilst fully clothed again and again. Later the police brought her a mop and a bucket and made her clean up her urine. She was made to stand on the bucket without shoes and to relieve herself in the bucket. She was deprived sleep and shouted at the whole day. She was interrogated by different sets of police including one Lt. Swanepoel. They accused her of being a communist and later they attached to her finger a device that electrocuted her. This electrocution was also repeated on her back with a higher voltage. That caused her to pass out.

139. She recognised Timol's screams emanating from another room which was not far from where she was interrogated. She had no idea in

which room Timol was being interrogated, but it was nearby. Timol's screams continued on Monday night. She recognised his voice. On Tuesday, 26 October late in the afternoon she was taken down for a cold shower, and she changed into clothes that her family sent to her. She continued to hear screams from the other rooms as she was slapped across the face. At some point she passed out and was woken up in spite of her exhaustion and the assaults.

140. The interrogation continued. She heard Timol screaming and begging for them to stop, even crying at some point. It was the whole night and at dawn the screams suddenly stopped. There was dead silence. She then saw frantic activity on the 10th floor with officers scurrying around madly. Things appeared to have changed. She recalls that this incident occurred at dawn because it coincided with the call to prayer she could hear coming from the Mosque.

141. At around 06H00 in the morning on 27 October she was moved to a cell on another floor on the same building. She was held in the cells and given a tablet which caused her to hallucinate. She was later taken to the 10th floor where she met one officer named Pitout who demanded that she make a statement in return for immunity. She was intimidated into making the statement to testify against Essop and Amina Desai. On her release she denied the statement at trial and later the police continued to intimidate her through repeated visits even at University.

Mr Ernest Matthis

142. Mr Ernest Matthis *("Matthis")* is a retired advocate who practiced as such during 1971. He testified as follows: On 27 October 1971 he was at the John Vorster Square offices in Johannesburg, preparing to

prosecute a case together with a colleague, a senior counsel. While they were in the office room, he saw through the window, a body of a person falling downwards. He then rushed to the window and looked down and saw the body lying on the ground where it had landed. He then looked up to see where the body was falling from and he saw that all the windows were closed.

143. He then called Mr Harry Schwartz, a Member of Parliament at that time, to inform him about the incident. He later learned that the body was that of Timol. He and his colleague were working on either the 4th or 6th floor of the building when he saw the person falling, facing away from the building. When he informed Mr Schwartz about the incident, Swartz told him that this announcement would cause some consternation in government ranks. He did not see any police rushing to the body or any ambulance being called. He does not remember at what time he saw the person fall, however if he were to take a guess it would have been in the morning.

Mr Paul Erasmus

144. Paul Francois Erasmus *("Erasmus")* is a former member and Warrant Officer of the Security Branch of the South Africa Police. He testified thus: He joined the South African Police in 1975 in order to avoid conscription. Two years later in 1977 he was deployed to the Security Branch. His task at the Security Branch was to produce propaganda material that would counter the organisations and activists opposed to apartheid.

145. He forged signatures of prominent people, prepared and issued pamphlets carrying messages aiming at discrediting leaders of the anti-apartheid organisations. He was involved in the bombing of

buildings of anti-apartheid organisations including that of the Congress of the South African Trade Unions ("*COSATU*").

146. He witnessed detainees being tortured where different methods of torture were used. These methods included administering electric shocks, assaulting detainees and subjecting them to sleep deprivation. The sleep deprivation was the first method after a detainee was arrested so as to break the detainee by subjecting such detainee to long hours, sometimes even three days without sleeping. This would be achieved by sending interrogators, mostly in pairs on a rotational basis. At some point he too was roped in to assist in this practice.

147. Police got away with criminal activity including death in detention, with the aid of what he termed "*resident sweepers*". In this regard, he identified a Brigadier Grobler assisted by Gloy (who at that time had been promoted to Lt Colonel), together working as a unit. This unit assisted members of the Security Branch to escape liability for their criminal acts, by removing or sweeping away evidence implicating them. Whenever the police were accused of torture, the sweepers were brought in to conceal the evidence to the extent that very few police were in fact charged.

148. Some magistrates, sometimes state pathologists and prosecutors played along and ensured that the culprits escaped justice. This protection of criminal activity on the part of the Security Branch also entailed holding mock trials where witnesses would be coached and made to rehearse evidence. Some of the police would then be asked to role play advocates questioning these witnesses to enable them to avoid being adversely cross-examined.

149. After the death of Neil Aggett, *("Aggett")*, he was called in to assist in manufacturing evidence that would support a false version that Aggett committed suicide. He and another police officer went to Aggett's home where he broke in, being under the impression that there was no one. It was while he was in the house looking for any evidence that they could use to support the version of suicide that the family helper came in and accosted him. The fact that he was caught became public and he was called in for reprimand by the police.

150. Later he was called in by the Sweeper Unit, where he was informed that he should accept responsibility for a minor offence of trespassing in which instance it has been arranged that he would be levied a fine of R200.00. They would take care of it. He was then sent to court in Cape Town to stand trial. On arrival all other charges were dropped and the magistrate imposed a fine of R200.00 for trespassing. The fine of R200.00 for trespassing was paid by the police from a secret fund.

151. He also participated in the bugging of the telephone of Bizos, issued pamphlets discrediting Mrs Winnie Mandela and pamphlets misleading people about leaders of the Alexander Action Committee, including their prominent member, Mr Mayekiso.

152. He testified before the Truth and Reconciliation Commission (TRC) to reveal the illegal activities of the Security Branch and his role therein.

Ms Stephanie Kemp

153. Stephanie Kemp *("Kemp")* is a former detainee and exiled political activist. She testified as follows: She was arrested by the Security Branch and held in detention where she was assaulted and her head

slammed on the floor until she became unconscious. She was accused of being a member of the South African Communist Party and committing deeds of terror. She eventually fled to the United Kingdom where she continued her work with the underground structures of the South African Communist Party. She never met Timol in person but knew of him and coordinated communication with him when he was back in South Africa as leader of an underground SACP cell. The communication was routed via friends in London with encrypted messages.

154. Kemp emphatically denied that members of the SACP were instructed to commit suicide once they find themselves in incarceration. She also identified inconsistencies in the content of Inkululeko / Freedom No 2 pamphlet dated 2 February 1972. She pointed out that the reference to "*Communist Party of South Africa*" was a give-away in that her party was known as the South African Communist Party. The language used in the pamphlet was not consistent with the language that they would use as members of the Communist Party. No member of the Communist Party would make reference to names of people in correspondence. Reference to prominent people such as Adv. I Maisels, George Bizos and Soggot would not have been used. Besides, these were not members of the South African Communist Party at that time.

Professor Kenneth Bollard

155. Professor Kenneth Bollard. *("Boffard")* is a Professor Emeritus and Honorary Consultant Surgeon, Department of Surgery at Wits. He is also a Trauma Director at Milpark Hospital Trauma Centre, Wits. He has served as a visiting Professor at various international institutions. He is an expert witness who was called to testify, having

studied the autopsy report of Schepers. In his opinion, it was not correct practice and procedure for the police to remove the body which had sustained serious injuries after falling from the 10th floor of a building. The ambulance and para-medics should have been summoned. He agreed under examination that the mere removal of the body might contribute towards the demise of a patient who had sustained such injuries. In his opinion, the police should have put the body to lie on the side so as to promote breathing.

Mr Essop Pahad

156. Mr Essop Pahad *("Pahad")* is a former Minister in the Office of the President and cabinet member in the Government of the Republic of South Africa. He testified thus: He grew up in a family that was involved in politics. He left the country and went to settle in London in exile. He was staying in London when Timol and later Mohamed Timol came to stay with them. He informed the Court that he is the person who actually recruited Timol as a member of the South African Communist Party then operating underground in London. He also arranged for Timol to undergo further training in the Soviet Union and then back to London. He also introduced Timol to other members of the SACP in order for Timol to get political education.

157. Pahad denied that members of the SACP were advised to commit suicide in case of arrest and detention. On the contrary, he testified that members were trained to endure torture in the first forty eight hours of arrest before they can release names of other people associated with them. That would have then granted those people time to go into hiding and evade arrest.

158. Pahad further denied that the last paragraphs under the heading "*Stand Firm*" were part of the document with the title *"Inkululeko Freedom dated February 1972 Issue No. 2"*. Like Stefanie Kemp, Pahad pointed out the obvious mistakes that appear in the concluding paragraphs under that heading of "*Stand Firm*". He denied that that would have been a message by the SACP. He stated that one of the obvious mistakes is the mentioning of names of individuals as well as reference to the party at the end as the Communist Party of South Africa. He pointed out that the Communist Party of South Africa was disbanded in the 1950's when it was banned in South Africa. At the time Timol was in London and came to be in South Africa later, the name of the party was and had always been the South African Communist Party.

Dr Shakeera Holland

159. Dr Shakeera Holland *("Holland")* is a Senior Specialist in the Department of Forensic Medicine and Pathology at the University of Witwatersrand. She has local and international qualifications and experience. She testified thus: She reviewed the post mortem report on the body of Timol which had been performed by Dr Schepers, a Senior State Pathologist. She pointed out that the report mentions and correctly so that the cause of death was multiple injuries. She then identified the injuries on the body of Timol which occurred as a direct result of the fall. The impact on the body on the surface on which it landed and on the body by any intervening surfaces that collided with the body as it fell; transmitted forces extending from the areas of impact; and the acceleration/deceleration and rotational forces that acted on the body during the fall as a result of gravitational force.

160. Holland identified a number of wounds that could not be attributed to the fall from the height. There were multiple external wounds which show scab fermentation indicating that the wounds were present before the fatal fall and were not caused by the fall. These included multiple abrasions with scab formation over the middle third of the right clavicular *(collar bone)* area; an abrasion with scab formation on the right scapula *(shoulder blade)*; A small abrasion with scab formation on the left lateral neck situated 3cm below the ear lobe; and a 2.5 cm x 4 mm abrasion with scab formation across the left forearm.

161. According to her evidence, the histological analysis showed that the wounds sampled were between four to six days old. She opined that according to analysis done by Dr Schepers, in at least five of the sections sampled from the various skin wounds, the findings were consistent with wounds of four to six days old. Dr Gluckman concurred with this finding.

162. Holland went on to list the injuries as observed and stated by Drs Schepers and Gluckman and concluded her medical opinion as follows:

a. She concurred with the cause of death as multiple injuries consistent with a fall from a height;

b. In her interpretation of the Inquest medico-legal report, there were injuries that were unlikely to have been sustained from the fall. The implication is that these injuries must have been present prior to the fall and were sustained during the time that the deceased was in police custody and they included:

- The multiple external wounds with scab formation. Histological analysis on these wounds indicated that there were many wounds that were sampled which were estimated to be four to six days old, confirming that these wounds were present before the fall from the height.

- The multiple bruises and facial fractures, including the nasal bone; left orbital ramus; right inferior orbital ramus; fractures of the right upper jaw, left upper jaw and left lower jaw, all of which did not appear to be related to the base of skull fracture sustained in the fall.

- The isolated depressed skull fracture which is a rare in a fall from a height.

- The tear of the soft tissues around the hyoid bone.

- The fracture of the first rib.

163. In her opinion, Holland concluded that some of these multiple injuries, in particular that on the 1st rib, indicated that force would have been applied to cause the injury. She opined further that these injuries present on the body of the deceased, which could not be ascribed to the fall from the height, indicate that the deceased sustained physical assault while in police custody prior to his death.

Professor Steve Naidoo

164. Professor Steve Naidoo *("Naidoo")* is an independently practising forensic pathologist with 34 years' experience in academic and practical forensic pathology. Naidoo has extensive qualifications

having served as an Associate Professor and Honorary Research fellow at a school of law. Unlike Holland who based her opinion on the medico-legal report, Naidoo studied the evidence of Rodrigues as summed up in the judgment and that of GJ Deysel of the Security Branch who removed the body after the fall. The doctor further noted that there were shortcomings in the original inquest report such as lack of x-rays of fractures, lack of drawings of skull fractures, lack of measurements of wounds except one lesion and generally, absence of detail on surface wounds and internal injuries.

165. Most importantly, Naidoo commented on the reliance on histology to make a determination of the age of wounds. He acknowledged that conventional histological wound age determination remains the basis of all wound age diagnostics. He however cautioned that the age estimation of wounds is never accurate as might be desired for any particular case.

166. Naidoo also differentiated between the pre-fall and fall related injuries. He concluded after listing the two categories that wounds number 8 to 35 on the translated version of the autopsy report were *ante-mortem* and thus could not have been caused by the fall from the building. More pointedly, Naidoo singled out the injuries on the calf of the deceased's right leg, exhibiting extensive bruising/contusions and dislocated left ankle and degree of bruising, as neither directly nor secondary to the fall. He further included in his observation that the depressed fracture at the left parietal bone fracture of the lower jaw and deep scalp bruising at the left occipital area, cannot all be attributed to the fall.

167. The doctor concluded as follows: that the deceased was alive at the time of the fall; that he struck the ground with his forehead and the

right shoulder/elbow/chest as the primary points of impact; that the right shoulder and elbow impact transmitted the force of that impact to the right side ribs, diaphragm and liver as well as left side rib; and that the deceased would have survived less than ten minutes after the fall.

Mr Don Foster

168. Mr Don Foster is an author of a publication with the title ***"Detention and Torture in South Africa, Psychological, Legal and Historical Studies."*** He co-authored the book with Dennis Davis and Diane Sandler. He testified about the research undertaken on this subject, which included the historical considerations, legal considerations, psychological investigations, the empirical study, the process of detention that is detainees' descriptions and finally, interpretations and recommendations. In the publication, the authors make reference in Appendix L, the statistics of official and unofficial number of detentions between 1974 and 1985. In Appendix M, the authors list the names of the persons who died in detention from September 1963 to 6 May 1985. Timol appears in that list as having died on 27 October 1971.

169. The publication has been useful in revealing the extent to which torture in detention and in particular deaths resulting from such torture have occurred in South Africa. The authors attribute this state of affairs among others to a legal framework which permitted such torture, in the form of various pieces of legislation that gave the police the authority, without legal scrutiny, to randomly detain and torture detainees. The publication also point out the fact that the police somehow avoided been held to account or prosecuted for these atrocities.

170. The list of persons who died in detention as stated in Appendix M amount to 64. The majority have died between 1976 and 1977.

Mr Frank Kennan Dutton

171. Mr Frank Kennan Dutton *("Dutton")* is a private investigator and a highly decorated and experienced retired police officer. He has investigated a number of cases involving police atrocities locally and abroad, including on behalf of the TRC. He was the first head of the Elite Scorpions Unit which was disbanded. He testified as follows: The Police Department was divided into three sections. The first section which consisted of the largest number of police was the uniformed police. This group was followed by the Criminal Investigation Department and the third being the Security Branch. He recounted how the Security Branch was a law unto themselves and corroborated Paul Erasmus in regard to the tendency to cover up unlawful conduct on the part of the Security Branch. The investigation into Timol's death was not objective and independent. Buys was appointed to investigate the death of Timol. Before his investigation started, he had already told the media that Timol had committed suicide. This, according to Dutton, was a demonstration that his mind was already made up and that he was not impartial in his investigation.

172. Dutton further mentioned the following factors in support of his contention that it was a cover-up namely:

    a. There were no statements taken from members of the Security Branch who were on the 10th floor or other floors of the building who could have witnessed the incident, including black members of the Security Branch;

b. There was no investigation that would have led to a disciplinary enquiry for members of the Security Branch who failed to prevent the fall from the 10th floor of Timol.;

c. The body of Timol was removed rapidly from the scene without any forensic investigation including markings where the body fell and the photographs of the body in the position in which it was found;

d. There was no forensic investigation in an attempt to obtain evidence relating to possible blood samples in room 1026 as well as fingerprints and other evidence in 1026 and on its window; and

e. The failure by the Magistrate to recognise and accept that there were already instances of persons who died in police custody where police denied having assaulted the said victims.

173. Dutton further testified that in regard to Rodrigues, on whose version the magistrate relied, there were some unanswered questions about his conduct. Firstly, he was an administrative clerk who was not part of any interrogation team. However, on his version, the police concluded that he would be capable of standing guard on Timol whom the police regarded as "*a big fish*". Secondly, Rodrigues already had a record of a previous conviction of perjury to his name. Thirdly, his personal file records the date of his resignation from the police as two days after the delivery by the magistrate of his finding that there was no police person to blame. Fourthly, Rodrigues was handed a letter of commendation for exemplary services by the

Commissioner of Police. This, according to Dutton, who corroborated Paul Erasmus, was highly unusual and would occur in very exceptional circumstances. Commendation from the Commissioner was reserved for members of the Police Service who had distinguished themselves very well. There was no indication on Rodrigues' record that he deserved such accolade.

174. With reference to experiences gained from his work with the TRC, Dutton completed his evidence by reiterating that the version of the police as presented to the 1972 inquest was a cover-up.

Mr Tivesh Moodley

175. Mr Thivash Moodley is an Aeronautical Engineer with 19 years' experience in trajectory calculations in aerospace, defence and vehicle dynamics. He testified thus: He made calculations, using the existing data available and the eye witness account of Adv. Matthis to measure the trajectory of Timol's body in terms of its fall from the 10th floor to the ground shrubs in order to analyse whether the late Timol had jumped or was pushed or thrown from the 10th floor or was pushed or thrown from the roof of the building.

176. Moodley commenced his calculations by giving a detailed description of the window of room 1026 through which it is alleged by the police that Timol jumped. He describes the window as such:

"*The window that the late Mr Timol allegedly fell out of can be described as a steel window that opens at a 90 degree angle to the frame and had a hinge point approximately 27cm from the right upright edge of the window frame. The window pane had a rotating lever fitted to it that left the window pane to the window frame that resulted in the window opening clockwise from left to right. In the open position the window pane was kept open using an expanding*

lever that braced the pane against the frame so that the wind could not blow the window closed when it was opened."

177. The Court agrees that the description of the window above is exactly as the Court observed it during the inspection *in loco*. Moodley continued to state that given the position of the window, the dive option is not possible. He opined that it would not be possible to run, open the window and dive simultaneously. The dimensions of the window frame are 155cm x 71cm width. He concluded that that would be challenging. He then proceeded to make calculations based on the versions of witnesses including Rodrigues who testified that Timol jumped out of the window; police officer Deysel who testified having found the body of Timol lying perpendicular to the building with the head pointing towards the building and the legs towards the road in some shrubbery; Matthis avidence that he witnessed the body as it was falling, as well as the finding in the medical reports.

178. Moodley worked out six scenarios as follows:

a. *Scenario one:* where Timol is said to have jumped through the window, using two legs to generate force, feet first perpendicular to the building. In this scenario, Timol would have landed 13 meters from the building.

b. *Scenario two*: where Timol stepped through the window, feet first perpendicular to the face of the building. It is projected that he would have landed 4 meters from the building, with his head facing away from the building;

c. *Scenario three*: where Timol, being placed on the window sill in a sitting position and then pushed out of the window at the shoulders. This would have resulted in Timol somersaulting through the air and landing as Deysel describes, 3 meters from the building.

d. *Scenario four:* where Timol, being carried to the window, with his body facing the building, his legs carried out and then the rest of his body pushed out of the window, feet first so that his trajectory would result in him falling with this head pointing in a northerly direction and his body landing in the orientation described by Deysel. He would have landed 3.1 meters from the building.

e. *Scenario five*: where Timol is being thrown from the roof of the building with a horizontal motion with the torso parallel to the face of the building, typical of two people holding a body at the feet and hands and swinging it to launch it off the building. He would have landed 4 meters from the building; and

f. *Scenario six:* where Timol is being rolled from the roof of the building with the torso parallel to the face of the building and the body flying horizontally down past the building, typical of somebody who is incapacitated to stand on their own strength and was placed on the parapet wall of the roof and rolled/pushed off the side of the building. He would have landed 1,25 meters from the building.

179. Having taken the Court through the calculations, Moodley concluded as follows:

a. Using scenarios one and two, it is shown that if Timol jumped, he would have landed between 4.5 metres and 13 metres away from the building. This is based purely on his internal muscle condition thrusting him forward. In this instance, Timol would have most likely landed with his head in the direction of Commissioner Street. Using the witness' statements it is unlikely that Timol would have jumped;

b. Using scenarios three and four that predict how the body lands as per Deysel's statement, the instances indicate that the body, if pushed from the windowsill, either forward whilst the body was in a seated position on the windowsill or legs first and then the remainder of the body pushed out with the face and stomach towards the building, the body would have landed in the same vicinity and orientation described by Deysel; and

c. Using scenarios five and six, this predicts how the body falls and lands. As Matthis witness' account of trajectory, it means that Timol would have had to exit the window in the direction of the motorway with his body parallel to the building. Taking into account that the window pane opens from left to right, the window pane and glass would have prevented Timol from exiting in the orientation that Matthis saw him fall.

180. Moodley concluded his testimony by stating that based on his conclusions; scenarios 3 and 4 are the most likely scenarios where Timol was pushed. If Matthis's version is followed, with no open window when he looked up, the fall would be in line with scenarios 5 and 6, having being thrown from the roof top.

Mr Neville Els

181. Mr Neville Els is a former Warrant Officer attached to the Security Branch of the South African Police, specialising in explosive devices. He testified thus: He was on standby on Friday, 22 October 1971 when he was called to Newlands Police Station. On his arrival there, he was shown a box containing pamphlets of the South African Communist Party which were in the boot.

182. Prior to that he had been aware of the dissemination of banned pamphlets and literature through the use of an explosive device. His involvement in the case was in relation to that. He saw Timol and the other detainee shortly at Newlands Police Station before they were taken away by other members of the Security Branch. From then on he did not have any dealings with Timol.

183. Asked whether he knew anything about the assault on detainees, Els stated that he had only heard from the media that detainees were assaulted. He himself has never witnessed this. He was further shown police records which indicated that on the evening of Saturday 23 until Sunday morning, 24 October when Naik was subjected to torture through the "*helicopter method*", Els was one of the interrogators. His response to that evidence was that he could not recall. In fact, throughout his evidence, his response to questions was that he could not recall any of the instances put to him. It was later put to him that he could have been one of the interrogators of Timol as evidence showed that they changed teams during interrogation. He responded that he could not recall.

Mr Joao Anastacio Rodrigues

184. Rodrigues is a former Sergeant attached to the Security Branch of the South African Police and stationed at Compol Building in Pretoria. He had also testified during the 1972 inquest. In this court, he repeated the version which he stated to the 1972 inquest. The version was that he was requested by Captain Gloy to deliver their salary cheques while they were at John Vorster Square on the afternoon of the 27 October 1971. He testified that he went to John Vorster Square, and was escorted to the 10th floor where after waiting for a while he was then allowed to enter room 1026. In the room he found Captains Gloy and Van Niekerk in the company of a person who was facing Gloy and with his back to Els. He later learned that this person was Timol.

185. Prior to entering room 1026, he was requested by another male police officer who had a tray of three cups of coffee with him and asked that he should enter the room with those cups. The coffee mugs were meant for the three occupants in the room. While he was standing in the room next to the seated Timol who was not doing anything, an unidentified police officer came in and mentioned that they have identified and arrested some 3 people including Quentin, Martin and Henry. He, together with the two Captains, noticed that Timol was extremely shocked when he heard Mr X. He had a shocked look on his face and his eyes were big. He shook his head from side to side while looking at Gloy and Van Niekerk.

186. Gloy asked him to stay with Timol while he and Van Niekerk went out to check the information they had just received. He, Rodrigues, came around a table to sit opposite Timol. Not long after the two Captains had left the room, Timol requested him to go to the toilet and as they both stood up, Timol started moving to his left around the table while

Rodrigues was also moving to the left to push into the table the chair on which Van Niekerk was sitting. As he was doing this, he witnessed at the corner of his eye Timol rushing to the window, opened the window and jumped through it.

187. According to Rodrigues, before Timol could completely jump out of the window, he tried to stop him by moving in the direction where he was seated but stumbled on the chair on which he was sitting and fell on all fours. He could not stop Timol from jumping through the window. By the time he stood up Timol had jumped through the window and then he rushed and looked down below, he saw Timol's body on the ground. He then rushed onto the corridor screaming that someone jumped through the window. Other police officers came out of their offices on that floor and went back with him to look through the window. It was at that stage that one of the officers identified himself to him as Colonel Greyling. He went down with him to the ground floor through the lift where he saw some police officers feeling the pulse and he assisted to carry the body into the reception. He later learned that Timol had died.

188. Rodrigues, to everyone's surprise, added to his evidence an event that he admitted not to have disclosed to the magistrate during the inquest in 1972. He stated that during the time he was making a statement to Buys, the latter requested him to include in his statement an allegation that prior to Timol jumping through the window, he had wrestled with him. He refused to do so. He added that Gloy and Van Niekerk had also unsuccessfully approached him with a similar request prior to him making the statement. Consequently these officers together with others he could not remember were present in Court when he testified and he felt intimidated. For that reason, he

did not inform the magistrate about the attempt by the officers to get him to lie in his statement.

189. During questioning, Rodrigues conceded that he was offered protection after he testified on this version even though he was not aware of such protection. He further told the court that he had not been aware all these years that the then Commissioner of Police, General Joubert, had written a letter of commendation to him. He could not state why he was given a commendation. He conceded that it was a rare event and that such was reserved for police officers who have distinguished themselves in their career. He further conceded that he resigned from the police two days after the magistrate announced his findings on the inquest. He was angry with the police when he testified then because it was clear that his career would be finished, having refused the request from Buys, Gloy and Van Niekerk to add a lie to his statement.

190. Significantly, throughout his evidence, Rodrigues kept referring to the incident of the fall as "*ongeluk*" (accident).

191. Further during questioning, Rodrigues conceded that the last sentence in his sworn affidavit indicating that he did not assault Timol was not his idea but that of Buys. He consented to the inclusion of the sentence in his affidavit as suggested by Buys. The personal file of Rodrigues indicates that at the time he testified before the 1972 inquest, he already had a previous conviction of perjury, (making a contradictory false statement under oath.)

Mr Ali Thoken

192. Mr Ali Thoken is a businessman residing in Johannesburg. He testified as follows: On the morning of 27 October 1971, he was

filling his vehicle with petrol at the Dollars Filling Station opposite the south side of John Vorster Square. He was preparing to drive to Pretoria to sort out the issue of his business license. He heard a sound of a thud in the direction of the John Vorster Square Building. As he looked, he heard someone saying "*a man has fallen from the building*". He then moved across the street towards the direction of the sound and as he was approaching the middle of the street, he was told to go back by some plain-clothed member of the police who were by then standing around a body. He later learned that it was the body of Timol. Thokan informed the court that the incident he witnessed, occurred in the early morning of the 27 between 09H30 and 11H30. He emphasised that he was certain of the time because he would not have been there to prepare for a trip to Pretoria when it was in the afternoon. He knew that he would not find the government offices open in Pretoria in the afternoon. He was certain that it was in the morning. He was never called to testify in the 1972 inquest.

Mr Ronnie Kasrils

193. Ronnie Kasrils, a former Minister in the Government of the Republic of South Africa, testified as to the training that was received by the underground members of the SACP operating in South Africa. He testified as follows: He was in exile in London and was part of a group that trained new recruits into the SACP. He did not meet Timol personally, but he had heard of him and was of the view that he was trained by Hogson and Dr Yusuf Dadoo.

194. The new recruits who had to work underground were as part of their training, prepared how to deal with situations in case of arrests. They were instructed that during interrogation, they have to delay giving out

information particularly about other SACP members operating in South Africa. A detainee had to resist as much as possible, within twenty four or forty eight hours of their arrest, so as to allow other underground members linked to that cell to go into hiding. The trainers prepared the new recruits to hold out as much as possible even though as trainers, they conceded that sometimes it may be difficult to do so. The recruits were further trained to give out the obvious information that the police would have access to as part of delaying the process. He denied emphatically that members were taught to commit suicide when arrested. On the contrary, the SACP recruits who find themselves in detention were taught to accept the opportunity to stand trial when charged. This with the hope that he/she would be sent to prison, from where she/he could continue contributing to the struggle. It would therefore not be true that Timol was afraid of going to prison for twenty years as found by the magistrate. The new recruits were trained not to fear jail sentences.

Mr Abdullah Mohammed Adam

195. Mr Abdullah Mohammed Adam is a bookkeeper who was employed at Dollar's Filling Station opposite John Vorster Square in 1971. He testified as follows: On 27 October 1971, he was about to go on a tea break at 10H00 in the morning when his boss called him to go and check the commotion that was taking place across the street on the side of the John Vorster Square Building. He crossed the street and reached the pavement on the side of John Vorster Square. He saw a body of a person having lying on the shrubs with one of the shoes off his feet. He could not see clearer as his view was obscured by the shrubs. While he was there, the members of the police in plain clothes ordered him and the other passers-by to leave. He went back

across the street. When he got back into the filling station he told his boss what he had seen and went on to have his fresh tea.

196. Mr Adam was emphatic in his evidence that the incident he witnessed occurred in the mid morning between 10H00 and 10H15 because that is the time when he always had his tea. He denied that it was in the afternoon. He was able to remember the incident as he linked it with his tea break which has always been between 10H00 and 10H15 in the morning. He later learned from the newspaper reports and people speaking in the community that the person whose body he saw was Timol. He was never called to testify in the 1972 inquest.

Mr Imitiaz Cajee

197. Mr Imitiaz Cajee *("Cajee")* is Timol's nephew. Timol and his mother are brother and sister. He testified that he grew up in Mpumalanga and never knew Timol that much. He was told about Timol by his grandmother, Timol's mother, Hawa. It was Cajee who encouraged Timol's reluctant mother to testify at the Truth and Reconciliation Commission *("TRC")*. It was during that event that he vowed to devote much of his time to find out what actually happened to his uncle, Timol. He then communicated, with the assistance of non-government organisations, with the National Director of Public Prosecutions *("NPA")* who initially responded to his correspondence that the matter was closed as the investigators could not find anything.

198. Cajee persisted in his efforts until, with the assistance of other legal representatives, was able to persuade the Minister, through the NPA, to re-open the inquest.

199. Prior to the inquest being re-opened, he communicated through correspondence with the then retired Lieutenant Colonel Gloy in an attempt to find out what transpired to his uncle, Timol. At first Gloy responded to his enquiries by referring him to the 1972 inquest outcome. Later, however, Gloy refused to correspond further with him and even threatened to institute legal proceedings if he persisted in communicating with him.

200. Cajee committed himself to pursuing his investigation in order to know what could have happened to his uncle. In the process, he authored a book titled "***Timol – A Quest For Justice***". He was supported by the family and in particular his uncle Mohamed, TCR Commissioner Yasmin Sooka and later Adv. Howard Varney and Frank Dutton as well as Adv. George Bizos SC.

201. Cajee ended up his evidence by requesting the Court to make the following recommendations to the authorities, namely:

> "35.1 *The erection of a sculpture outside Johannesburg Central Police Headquarters which pays tribute to all political detainees who died in police detention during the apartheid-era, alternatively, or in addition, a memorial to uncle Ahmed could be erected at the impact side in the garden outside the south wing.*
>
> 35.2 *The conversion of the south wing of the 10th floor of Johannesburg Central Police Headquarters into a memorial enshrine for political detainees who were tortured or killed during apartheid. This could be in a form of a museum or educational centre, open to the public, which tracks the history of security detention and its abuses. In particular Room 1026*

and the other interrogation rooms should be faithfully restored to how they were in 1971.

35.3 *The energetic and vigorous investigation of outstanding apartheid-era cases before it is too late, which may involve the creation of a dedicated team of carefully selected investigators and prosecutors. All State entities should be required to supply all information at their disposal to this team.*

35.4 *All files pertaining to political detainees of the apartheid-era must be made easily accessible to the families seeking answers."*

202. The Court informed Cajee that in terms of the inquest Act, the powers of the Court are limited to determining amongst others things, the cause of death. It will certainly be outside the scope of the inquest to deal with the recommendations he had made except to mention them in this judgment as I do.

Seth Sons

203. Mr Seth Sons is a former member of the Security Branch attached to John Vorster Square. His office was on the 9th floor and he came to testify under subpoena, in the same way as Messrs Els and Rodrigues. He testified as follows: He was attached to the Security Branch of the South African Police at John Vorster Square. He was a leader of a unit of black members of the Security Branch. On a date he cannot recall in October 1971, he was requested by a superior officer, Captain Dirker to accompany him on an errand. He, together with Dirker and other Security Branch members drove out to Timol's home. On arrival there, he remained in the car and noticed some women who were standing on the veranda. He noticed some chicken

hanging on the veranda and blood flowing there. Dirker and others went into the house and later came back with, amongst others, a typewriter.

204. On their return to John Vorster Square, Sons went to park on the west side of the building and used the west entrance to access the building. On his way to the elevator, he heard people say that a person fell from the top floors of the building to the ground. He went back to his office on the 9th floor. On being questioned by the Court as to why he did not enquire from those people as to who fell, he repeatedly stated that he had a phobia of seeing people who have sustained injuries from a fall as that would turn his stomach. He did not want to make such enquiries. The Court reminded him that he had described himself as a leader of a unit operating from the 9th floor. Therefore the person who fell could have been a member of his unit. Under the circumstances one would expect that a natural reaction of any person in his position, out of curiosity, would be to inquire as to who fell from the upper floor of the building.

205. Faced with this obvious and simple logic, Sons became agitated and stated repeatedly that it is not his nature to enquire into other people's business as he thought it was some other people's business. The Court then put it to him that the only reason why he reacted the way he did, is because he already knew at that time, that the person spoken about was Timol. He denied that. He came to know of the identity of the person when he was back in his office on the 9th floor.

206. As with other two members of the Security Branch who testified, Sons stated that he does not know of any assaults on detainees and that he has read about these in the newspapers. He denied when it was put to him the names of people who will testify that he in fact assaulted them when he detained them. When confronted with this

evidence, he suddenly suffered loss of memory and stated that he could not remember some of these incidents.

207. After Sons testified, the Court received five affidavits from former detainees who allege that they were either assaulted by Sons or assaulted by members of his team in his presence.

Evidence of various other witnesses

208. Over and above the evidence of witnesses who testified orally before Court, there were a number of affidavits deposed to by witnesses, some of whose evidence is based on events after Timol's death and thus does not directly relate to the incident concerning Timol. However, their evidence contradicts denials of assault by former members of the security branch and further goes to show the pattern of behaviour and conduct by members of the Security Branch towards detainees.

Mr Laloo Chiba

209. Mr Chiba testified in his affidavit that he was arrested on 17 April 1963. During his detention he was subjected to torture in various forms including severe assaults, being thrown around, punched and slapped; a hessian bag placed over his head and over two third of his body and subjected to electrocution. He was interrogated by amongst others Captain *"Rooi Rus"* Swanepoel, Lieutenants Van Wyk, Brits, Van der Merwe and Victor.

Mr Abdulhay Jassat

210. Mr Jassat was also arrested in April 1963. He testified that he was subjected to various forms of torture which included having a wet hessian bag placed over his head and tied over his knee; being picked up under his armpits and by his feet and thrown down onto the cement floor; subjected to electrocution; made to stand on the same spot whilst being interrogated continuously; being hit on his hands with a ruler; forced to place his thumb on a coin and made to chase it around a table and being dangled outside a window whilst each officer held his ankles.

Miss Shantavothie Tweedie

211. Ms Tweedie is a former detainee who deposes as following in her affidavit. She was in detention from 13 June 1969 and subjected to various forms of torture, including sleep deprivation; solitary confinement; made to stand for long hours and denied a bath and the possibility of being drugged. Her interrogators included a "reddish round faced man", known as *"Rooi Rus"* Swanepoel.

Dr Snuki Zikalala

212. In his affidavit Dr Zikalala states that he was arrested on 12 May 1969 and subjected to various forms of torture such as being made to stand with his hands on his head on three unbalanced bricks; prolonged and continuous interrogation sessions; starvation and in those instances where food was provided, he was made to kill cockroaches with his bare hands before being allowed to eat with those hands. He was further subjected to physical assaults. Also in his case, his interrogators included Swanepoel.

Mr Peter Magubane

213. Peter Sexford Magubane *("Magubane")* is a professional photographer who stated in his affidavit that in June 1969 he was arrested and held in solitary confinement for a period of 586 days. Since then he was arrested and detained several times. He is an accomplished photographer with a number of prestigious awards to his name.

214. When he was arrested in June 1969, he was photographing the protest taking place outside of the Pretoria Central Prison where Mrs Winnie Mandela and 21 other people were held. He was suspected of having an affiliation with the ANC. He was held in John Vorster Square for two days and thereafter transferred to Compol Building in Pretoria. That is when he was tortured by Lieutenant Swanepoel *(Rooi Rus)*. Swanepoel made him stand on bricks for three days and three nights, interrogated for long hours and kept awake by being fed large quantities of black coffee. His body became dehydrated until he urinated blood. On his release, Magubane was placed under a banning order with restrictive conditions that in effect he was under house arrest and not allowed to be a photo journalist. As a result of the torture he endured, he experienced issues of body balance and memory loss.

215. Magubane suffered a fractured nose in a subsequent encounter with a police officer seeking to destroy his camera film.

Gadija Chothia

216. Gadija Chothia *("Chothia")* was also among the people who were detained on the Saturday 23 October 1971. During her interrogation she was not physically assaulted. She was assisting Timol with typing the addresses on the envelopes that would be used to distribute political literature by post.

217. Chothia states in her affidavit that she last saw Timol on 22 October 1971, the day of his arrest. Timol had visited her at her work place. He was either on his way to or from Friday Afternoon Jumuah prayers. She recounts that as far as she could see, Timol was injury free. *"He moved easily and freely and did not show that he was in pain of any sort, nor did he mention that he had been involved in an altercation or suffered any injuries of any sort."*

Dr Farouk Dindar

218. Dr Farouk Dindar *("Dindar")* is a neurologist, practising as such at the Scarborough Hospital, Birchmount Campus, Toronto, Canada. He is a first cousin to Timol.

219. Dindar recounts how he met several high profile ANC leaders such as Messrs Ahmed Kathrada and Nelson Mandela at the time the latter was operating underground. After graduation, he moved to work in Zambia where he continued to meet with other ANC leaders such as Messrs Oliver Tambo and Alfred Nzo. Dindar later moved to England where he met Timol, who at that time was residing with the Pahad brothers, Essop and Aziz. From London he moved to further his studies in Canada. He thereafter returned to South Africa.

220. Back in South Africa, Dindar reconnected with Timol who had also returned. Dindar's in-laws lived close to Timol's flat. He states that on the evening of 21 October 1971 after super at his in-laws, he visited Timol in his flat. He chatted with Timol, who was cheerful. *"Physically he was in his normal state of health and showed no signs of pain. He had no marks or injuries that I could see."*

221. Dindar heard of Timol's arrest and later of his death. When Timol's body was returned to his flat for burial, Dindar went to the flat to see the body. He narrates this experience in his affidavit as follows:

"24. I went to Ahmed's (Timol) family flat and walked amongst the women who were seated on the floor and asked to see the body of Ahmed. A family member removed the cloth that covered him, and my eyes fell upon the wounds on his body. I was appalled at the number of wounds and marks on him, which I suspected could not all be attributed to the fall."

222. Dindar attended the inquest in 1972, which he describes as a farce. He attended to *"know what the police pathologist would say about the microscopic examination of the wounds on his body."*
He continues:
"To my knowledge when a wound heals, initially there are polymorph nuclear white cells which are actively involved in the healing process. Once that is completed, macrophages are seen in the wound to do the final "cleaning up". In a fresh wound you would not see macrophages.
If you see macrophages the wound has to be a few days old. Microscopic examination of Ahmed's wounds showed a few macrophages. The question the police pathologist was asked "how many days does it take for macrophages to appear first after the injury." He selectively quoted one paper from an Australian pathologist in which the macrophages were first seen on day 10. He ignored all other studies where macrophages have been seen in wounds much earlier. On the

basis of a few macrophages seen in Ahmed's wounds he concluded that they were 10 days old."

Ms Monica Dube

223. Ms Monica Dube *("Dube")* is a Social Worker by profession, in private practice. She states in her affidavit that in 1982 she joined Centre for Social Development at Wits. That is where she met two friends, Terry Sacco and Maxine Hart. During or about June 1984, she and her two friends went to Botswana on a visit. She stated that for her it was a holiday.

224. In the early hours of 11 September 1984, four members of the Security Branch came to her home in Pimville, Soweto and arrested her. Dube was told that she was being held in terms of section 29 of the Internal Security Act 1982 *(the successor to section 6 of the Terrorism Act)*. She was first taken to Protea Police Station, then to her mother's home in Meadowlands, Soweto, where they searched the house, threatening her mother that she will not see her again if she insisted on production of a search warrant.

225. From her mother's house, Dube was taken to John Vorster Square where she was interrogated about the trip to Botswana with her friends. Dube recalls an incident during her interrogation, when a man was brought to in. She narrates:

"...I was introduced to an (sic) as member referred to as MS. They called him shouting "MS, MS", he was a very big strong man. He gave me a terrible look. He had what I could describe as a no nonsense face. He said "What is wrong with you, can't you co-operate with the police?" I said there is nothing to cooperate about. He lifted me up, almost totally off of my feet, with only one hand under my armpit and said "do you think

Timol jumped or was he pushed? I was dead frightened. I said I think he jumped. He said "no we pushed him. And that is what is going to happen with you. I am going to push you."

27. Then he put me down, his sneering look and the way he grabbed me was very dehumanising. He left the room saying "now, I will sort out the other hardegatte"[28]. I assumed he was referring to Maxine and Terry"

226. Dube states in her affidavit that she was made to sign a statement which she was not allowed to read. She was not physically assaulted, but deprived of sleep in the cells by a female police officer who kept her awake at night through repeated meaningless conversation. She was later released from detention. She heard later that the statement she was made to sign, whose contents she did not know, was used at the trial of Maxine. She was however not called to testify.

227. The evidence that follows is from the affidavits of former detainees who came forward after Sons testified, to dispute the allegations by Sons that he read about assault of detainees in the media. The deponents of the affidavits did not testify orally in Court and their evidence was not presented to Sons to comment thereon.

Mr Ismail Momoniat

228. Ismail Momoniat *("Momoniat")* is a Deputy Director General in the National Treasury in the Government of the Republic of South Africa. He is a former activist who also testified in the inquest into the death of Dr Neil Aggett. He was in detention with Dr Neil Aggett at the time the latter met his death.

[28] An Afrikaans derogatory word for persons accused of being stubborn or arrogant.

229. Momoniat writes in his affidavit that on his first day of detention in April 1980, at John Vorster Square, he was taken to the cells by Captain Sons. Sons kept threatening him that he will make him eat pig meat.

230. Momoniat believes that Sons would have definitely been aware of the beatings or torture at John Vorster Square. *"This is because one could easily hear people when they were being assaulted or tortured, and sometimes one could even see assaults taking place through stained glass partitions. It is simply not true that a long-serving and dedicated security policeman like Captain Sons would not have heard or seen any assaults on detainees, particularly since he operated or had access to the same security branch floor at John Vorster Square."*

Mr Parmananthan Naidoo

231. Mr Parmananthan Naidoo ("Naidoo") grew up in a family of political activists and later he also became an activist. After the death of Timol he became one of the founders of Ahmed Timol Memorial Committee He retired as ANC chief whip in the council of the City of Johannesburg in August 2012.

232. Naidoo narrates of his experience when he was arrested by Sons and other members of the Security Branch at his house in the presence of his family. They insulted and threatened him all the way to John Vorster Square. He was taken to the 10th floor where Majors Cronwright and Arbee began to assault him. This they did in the presence of Sons. He was held by the hair and had his head banged on the desk.

Mr Kevin Martin

233. Mr Kevin Martin ("Martin") is a semi-retired Civil Engineer Designer and former student activist. He states in his affidavit that he was arrested during or about July 1975 on his way to school. He was taken to the 9th floor of the John Vorster Square building. He was subjected to torture by Lieutenants Sons, Visser and sergeant Magoro. He was struck by Visser with his fists and when he fell down, both Visser and Sons repeatedly lifted him up by his arms and leg and dropped him on his back and head until he almost passed out. Sons then held him down as Visser sat on his chest and repeatedly kicked him with the heel of his shoe. Thereafter Sons pulled his pants down and squeezed his private parts.

234. Martin state further that he was tortured for an hour and then taken to a cell to heal without medication. It took a week for the swelling on his head to subside. He was released early in September 1975 without being charged.

Mr Alwyn Donovan Graham Musson

235. Mr Alwyn Donovan Graham Musson *("Musson")* is an Information Technology consultant. He grew up at Bosmont Township and attended school at Chris Jan Botha High School where he started his student activism against racial divisions in sport. He became part of an organisation called Action Youth, which was formed while he was a student at Wits. In June 1983 Musson was arrested together with his father by Sons who took him to the 10th floor of John Vorster Square building after he was separated from his father on arrival. Sons gave him a pen and paper to provide him with the names of other activists who were part of Action Youth and left the office. Soon thereafter a white member of the Security Branch came in and

threatened to throw him out of the window if he did not provide the names. *"Sons returned to the office after about half an hour and became angry when he noticed that I had not written down anything, He then slapped me on the sides of my head with an open hand."* I was later released and my father was released too.

Mr Hanif Mohamed Vally

236. Hanif Mohamed Vally *("Vally")* is the Deputy Director of the Foundation for Human Rights in Johannesburg. In 1977 Vally was detained in terms of the Internal Security Act (preventative detention) and held at Modderbee Prison in Benoni for 8 months. He participated in the 1980 student protests as an activist. He was arrested and taken to John Vorster Square by Security Branch police officers who worked with Sons. He was later accompanied by more police officers, including Sons to search at his flat and car. He was taken back to John Vorster Square where he was interrogated a number of times and Sons was part of the team. Vally recounts how he was stripped naked in the first session of the interrogation and Sons took off his spectacles and other policemen stated slapping and kicking him. Mr Paul Erasmus was present when he was assaulted.

237. Apart from a bundle of documentary evidence consisting of copies of newspaper cuttings, personal files of the police, building designs, publications and pictures of the autopsy and members of the Security Branch who interrogated Timol, this completes the evidence before Court.

EVALUATION

238. ***In re Goniwe and Others***[29] **(Inquest),** the Court approached the test applicable in inquests as follows:

> *"The presiding officer at the inquest need go no further than to ask himself whether a prima facie case has been established against any particular person…"*

And

> *"Bearing in mind the object of an inquest it is my opinion that the test to be applied is not "beyond reasonable doubt" test but something less stringent. In my opinion the test envisaged by the Inquest(s) Act is whether the judicial officer holding the inquest is of the opinion that there is evidence available which may at a subsequent criminal trial be held to be credible and acceptable and which, if accepted, could prove that the death of the deceased was brought about by an act or omission which involves or amounts to the commission of a criminal offence on the part of some person or persons."*

239. Murphy J in ***FULL v NDPP supra*** writes:

"[77]….The only question for the magistrate, in terms of section 16(2) of the Inquest(s) Act, was whether the death was brought about by conduct prima facie amounting to an offence on the part of any person. A prima facie case will exist if the allegations, as supported by statements and real documentary evidence available, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict."

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[29] 1994 (3) SA 877 (SE) at 879.

240. In arriving at a finding, this Court has to consider the entire evidence available on record and form a *prima facie* view.

241. The nub of this case is what really caused Timol to fall to his death. This is really the question. It is not about the cause of death, which in essence has been medically diagnosed as arising out of severe head and chest injuries consequent to the fall. This is the context within which the conspectus of the evidence should be understood.

242. In an attempt to respond to the question that lies at the heart of this case, the Security Branch fabricated a version that alleges that Timol, on his own, jumped out of the window of room 1026 at John Vorster Square to commit suicide. In order to support this narrative, the Security Branch proffered 3 reasons. Firstly that Timol during interrogation repeatedly expressed fear of being imprisoned for 20 to 25 years. Secondly, that he was scared that the 3 persons announced by Mr X to have been arrested, the Jacobsen brothers, will implicate him in criminal activity. Thirdly, that as a communist, he chose to commit suicide rather than betray his comrades. The magistrate was mindful of the inadequacy of these reasons and added the fourth that sought to explain the *ante mortem* injuries. His unsubstantiated reason was that Timol sustained the injuries in a brawl where he was pushed around.

243. The bulk of the evidence presented in the 2017 re-opened inquest mainly challenges the 4 reasons on which this version of suicide rests. The evidence of the former detainees, the medical doctors and the trajectory presents a version not considered in the 1972 inquest, in order to prove that Timol, like other detainees, was tortured to the extent that he could not have physically been in a condition to run towards the window, get out and propel himself to land on the spot identified by the Security Branch, within the time alleged by

Rodrigues. This evidence not only challenges the probability of the Security Branch version, but provides a counter to the magistrate's reason for the *ante mortem* injuries.

244. The evidence by members of the SACP is intended to demonstrate that Timol would not have committed suicide as suggested in the forged publication and that he was trained to embrace a possible conviction and long term prison sentence as a '*badge of honour'.* This evidence responds to the reasons advanced by the Security Branch that Timol was afraid to be imprisoned for 20 or more years and further that his suicide was inspired by directives in the Communist Party publication.

245. The evidence by former members of the police, Dutton and Erasmus as well as the 3 civilians who witnessed Timol's body during and immediately after the fall in the mid-morning, not only challenges the probabilities of the version that Timol jumped at about 15h50, but also supports the contention that Rodrigues's version, which is predicated on events occurring late in the afternoon, was fabricated and stage-managed as part of a cover up to conceal the facts around the death of Timol.

246. In regard to the reason advanced that Timol was afraid to be implicated by Quinton, Henry and Martin, no evidence was presented from either Mr X or the 3 people mentioned. In fact, Quinton was charged and tried. At his trial, no mention was made of Timol either by the State witnesses or any other person. Quinton was acquitted of the charges. The State had ample opportunity during that trial, even without Timol present to defend himself, to present evidence of a link between Quinton and him. That never happened. The Timol family, with reference to the evidence of Essop as to how he introduced Timol to the 3 brothers as well as the absence of any reference to

Timol in Quinton's trial, sought to demonstrate that the Jacobsen's story was fabricated to support the allegation of suicide.

247. Then there is the evidence of Nel on the mysterious disappearance of portions of the record containing the entire oral evidence of the police, during the 1972 inquest proceedings. Significantly, only page 3 of Rodrigues's affidavit dealing with the version as to how Timol is supposed to have jumped is missing. The impression one gets is that there was a deliberate attempt to destroy the evidence in order to frustrate any attempt to re-assess the evidence in case the inquest is re-opened.

248. The evidence presented in the 2017 re-opened inquest is thus in direct response and challenge to the conclusions and findings of the magistrate in the 1972 inquest. The task of this Court is therefore to evaluate all the evidence of the two inquests proceedings in light of the surviving record of the 1972 inquest and the further evidence received in the 2017 re-opened inquest. The evaluation of the evidence can thus no longer centre solely on the version of the Security Branch.

249. In his judgment of the 1972 inquest, the magistrate appears to have been constrained to reach a conclusion that would exonerate members of the Security Branch from culpability concerning Timol's death. He went out of his way, with no evidence in support, to proffer a view that the injuries on Timol's body which were inconsistent with the fall, were as a result of a "*brawl where he was possibly pushed around.*" The magistrate also concluded that Timol committed suicide as a result of a number of reasons. These reasons include fear of being identified by Quentin, Martin and Henry; fear of being imposed twenty years imprisonment and what turned out to be a forged document of the Communist Party purporting to direct its members to

opt to commit suicide rather than betray other comrades. These conclusions are the basis on which the finding of suicide by the magistrate is grounded.

250. The police's version, on its own, raised serious questions that called for answers. It seems to this Court that the magistrate also realised this fact, but somehow felt obliged to accept that version. He even went a step further to provide explanations where the version showed serious deficiencies. For example, in accepting the version that Timol was not assaulted, the magistrate went out of his way to express a view in the judgment, that Timol would not have been harmed since he was regarded as a "*big fish*" and to be of *"inestimable value*" to the Security Branch. Further, the magistrate went on to write in the judgment that it *was clear* that Timol "*and his followers were busy with a campaign of sabotage and even mass murder."* There was no evidence that Timol was waging a campaign of sabotage and/or mass murder. Timol was distributing publications of the SACP, in opposition to the Apartheid order.

251. I turn to evaluate the evidence along the lines of the reasons advanced to support the conclusions and findings of the magistrate and then deal with the evidence of what caused Timol to fall.

The denials of assault on Timol

252. The ill-treatment of detainees is often visualised or expressed in the form of physical assault, i.e beatings of detainees. It is indeed so the physical assault, apart from being a common method to hurt and bring fear into a detainee, it is also easier to prove by reference to scars from injuries or evidence of medical treatment. However, there are other less mentioned forms of torture which leave no evidence

and are difficult to prove, such as sleep deprivation, long hours of standing and interrogation as well as electrocution.

253. This Court is of the view that on the basis of the evidence received, it would be misleading to refer only to physical assaults as the ill-treatment of detainees. Detainees were subjected to beatings at various level of brutality, with the least being only slapped once across the face. It nevertheless remains an assault, but not comparable to those who were hit with solid objects, punched and kicked. It needs to be stated that there are instances of detainees that were not subjected to beatings, such as Monica Dube and Gadija Cothia. It will be more accurate to deal with the subject of ill-treatment or abuse of detainees under the rubric of torture, as it includes all forms of abuse visited on the detainees.

254. Some of the police in their sworn affidavits, clearly eager to exonerate themselves from culpability and in anticipation of facing possible allegations of assault on Timol, stated in their affidavits that they did not assault Timol or that Timol was not assaulted in their presence. These officers included Rodrigues, Van Wyk, Bean, Gloy and Van Niekerk. The police affidavits and the magistrate's judgment deals only with assault and does not deal with other forms of torture such as sleep deprivation, electrocution, causing the detainee to stand for hours and subjecting the detainee to long periods of continuous interrogation. The police officers were aware that unlike assault, which leaves evidence of physical injuries, the other forms of torture do not leave visible physical evidence and would be difficult to prove.

255. During the 1972 inquest, when the legal representatives of Timol raised the issue of torture and linked it with the *ante mortem* injuries,[30]

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[30] See the affidavit of Bizos.

it was met with denials throughout the proceedings and ultimate rejection by the magistrate. These denials and rejection were made, in spite of the visible injuries on the body of Timol, sustained before his fall.

256. The Magistrate accepted the version of the police that Timol was not assaulted. He went further and stated that Timol was treated in a "*civilised and humane manner*". In his attempt to explain away the obvious injuries on Timol's body, which were clearly sustained before the fall, the Magistrate expressed a view that was not supported by any grain of evidence. He stated that the *ante mortem* injuries on Timol could be explained as "*a brawl where Timol was possibly pushed around and possibly also fell*".

257. The evidence presented by former detainees in the 2017 re-opened inquest indicates that they were subjected to various forms of torture. In particular the evidence of Essop, Jetham, Naik who were detained, interrogated on the 10th floor (Essop and Jetham) and 9th floor (Naik) in the same building and over the same weekend is relevant in determining whether Timol could have been tortured. The torture of Mohamed would not be of direct relevance as it occurred in Durban.

258. An attempt to call civilian witnesses would have been helpful to the magistrate. For example, it was clear even from the police version that Timol was arrested in the company of Essop. An obvious question that should have arisen is what happened to fellow detainee Essop. By raising this question, the magistrate would have found that Essop was detained, just like Timol, under Section 6 of the Terrorism Act for purposes of interrogation. The magistrate would have further found that both were interrogated from Friday evening of 22 October 1971 on the same 10th floor in different offices, at John

Vorster Square until 26 October (Essop) and 27 October (Timol); the magistrate would have again found that Essop was hospitalised from the 10th floor, on 26 October in a comatose condition; The magistrate would have also found that two Supreme Court[31] Justices accepted on evidence that Essop was brutally assaulted during interrogation to a appoint where he became comatose, the day before Timol's death.

259. In rejecting the police denial of assault on Essop, the Supreme Court went into detail in giving reasons why they rejected Greyling's denial of assault and concluded that Essop was brutally assaulted and that an interdict should be granted to prevent further assaults. At this stage Essop was still under Section 6 of the Terrorism Act. The justices had this to say:

> *"The Colonel was unable or perhaps unwilling, to take the court into his confidence and give the true reason for this. Instead he dismissed the question with the answer 'I don't know'. In the light of what we have said, how can any court accept the Colonel's evidence on the aspects dealt with?"*

260. The judgment in that case had been available as at February 1972, two months prior to the commencement of the 1972 inquest. It was a judgment of two Judges which the magistrate should have been aware of. Greyling was the commander of all the team of Security Branch members who were interrogating Timol, Essop and others at John Vorster Square. Under the circumstances, it is difficult to understand how the magistrate would have failed to take note of this finding by a Superior Court. Significantly, Greyling, being the commander of the interrogating teams, neither filed an affidavit nor testified as a witness in the 1972 inquest.

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[31] The then Transvaal Provincial Division, the predecessor to the present Gauteng Division of the High Court, Pretoria, occupying the same building.

261. The evidence of assault and other forms of torture of detainees presented in the 2017 re-opened inquest is so overwhelming, that the denial and lack of knowledge thereof by the three former Security Branch police officers who testified is disingenuous. Further, the fact that each one of them testified during the 2017 re-opened inquest that they knew nothing about assault apart from what they read in the media, is a demonstration that they were regurgitating a standard response, seemingly prescribed to all members of the Security Branch. Else, Sons and Rodrigues's conduct calls for censure. Their conduct must be investigated further with a view to raise appropriate charges.

262. It is improbable that the Security Branch would subject the detainees arrested with or linked to Timol to various forms of torture, but treat him differently. There is sufficient evidence before this Court to hold that the Security Branch have tortured the detainees arrested within or a day after Timol. This torture continued over the same weekend and in the same building. It has been consistent and sustained. This evidence establishes similar facts in regard to the case of Timol.

263. On the basis of the overwhelming similar patterns of torture on the other detainees, this Court accepts that Timol was tortured, which torture included physical assault.

The ante mortem injuries on Timol

264. It is logical to expect that in inquest proceedings, one of the primary sources of evidence to determine the cause of death would be the autopsy (sometimes referred to as post mortem or medico-legal) report. While it is accepted that the autopsy report may inform on the direct cause of death, the agent directly responsible for the cause of death may not be apparent. Nevertheless, the autopsy report would

ordinarily be the first point of call. Fortunately in this case, it was made available during the 2017 inquest proceedings, since it is one of the documents which survived the mysterious disappearance of some of the 1972 inquest records.

265. On 29 October 1971, two days after Timol's death, the then District Surgeon, Dr Schepers, conducted an autopsy on the body of Timol and compiled a report. In that report, Schepers recorded the cause of death as being consistent with "Multiple Injuries". Under cross-examination during the hearing, Schepers changed his opinion and stipulated the immediate cause of death as "*Serious brain damage and loss of blood*".

266. Gluckman generally agreed with the findings by Schepers, in particular that certain serious injuries were consistent with the fall from a great height and these were on the right side of the body. There were bruises found on the body whose age was a subject of debate during the 1972 inquest. There was a long debate on the possible age of the bruises and lesions. A determination of the age of these injuries was a critical factor in establishing whether they were sustained while Timol was in detention or not. Schepers and Gluckman opined that the bruises indicate that the injuries could have been sustained between four and six days prior to death.

267. Koch for the police determined the injuries (*ante mortem)* as having been sustained between nine and twelve days before death, meaning they were sustained prior to Timol's arrest. This issue became the main bone of contention during the 1972 inquest proceedings.

268. The evidence by the Medical experts in the 1972 inquest raises some questions. Schepers buckled under the pressure of cross-examination during his evidence and changed positions contrary to his

observations and report. While he conceded that injuries like a cracked jaw bone and ribs were often the result of assault, he went on to opine that they could have been sustained by Timol bumping into furniture. He then described these injuries as possibly twelve days or older. Having described the injuries as being serious, under cross-examination he changed position by saying that they were not serious and potentially could be caused by every day accidents and sporting activity. He, however, admitted that they could also have been caused by assault.

269. The magistrate concluded by taking the view that the injuries were sustained five to seven days before death and could therefore not have been sustained during interrogation.

270. The two expert pathologists, doctors Holland and Naidoo, in their separate opinions, concluded that some of the *ante mortem* injuries were so serious that Timol could not have been in a state where he could walk unaided, eat or drink without difficulty or sustain consciousness. Their opinions are based on a study of Schepers's autopsy report. Naidoo in fact went further to study the portion of the 1972 inquest record that dealt with the evidence of the medical experts and the judgment by the magistrate.

271. Naidoo further opines that of the thirty five recorded injuries attached to the schedule prepared by Scheepers, approximately twenty five of these were sustained before the fall. Among these injuries was a serious injury on the calf, one on the toes, the other on the head and two others on both sides of the same hand. The argument of these doctors is that these injuries were sustained prior to the fall and could not have arisen as a result of the fall.

272. Counsel for the police submits that the Court should not place reliance on the opinion of these two doctors. The reason he advances is that their evidence cannot be better than that of doctors who performed the autopsy, namely Schepers and Gluckman. I do not agree. In the first instance the medico-legal report of Schepers and his conclusions were found wanting when the assessor, Simpson rose with Schepers that there were several other injuries that were visible on the photos but not included in the report. Secondly, under cross examination, Schepers found himself having to change his opinion as regards the cause of death. Consequently, the magistrate in formulating his conclusion relied on the views of Simpson, his assessor.

273. The evidence of Doctors Holland and Naidoo did not introduce new injuries, but shed light on the severity and what could have been the impact of the injuries on Timol before and after the fall. In their view, the evidence not caused by the fall contradicts the version of the police at least in two respects.

274. Firstly, the evidence of the Security Branch, including Colonel Van Wyk, Captain Bean, Sergeants Bouwer and Louw as well as arresting Officer Sergeant Kleyn, in a desperate attempt to extricate themselves from blame, testified that they did not notice any injuries on Timol. In particular, Bouwer and Louw testified that they were assigned to keep guard over Timol at night and they saw his torso free of injuries when he took his shirt off before he slept. If the statements of Bouwer and Louw are to be believed, then the magistrate's conclusion that Timol was injured in a "brawl' before his arrest, is incorrect. The pre-arrest injuries as ruled by the magistrate could have been visible to the two police officers. The magistrate accepted their evidence and failed to recognise the glaring inconsistency with the medical evidence.

275. Secondly, the opinions of Doctors Holland and Naidoo contradict that of Rodrigues. The injuries attributed to Timol prior to the fall, in particular on the toes and head, were such that he could not have moved with the alacrity and agility from the chair to the window without being assisted, as described by Rodrigues. Further, Rodrigues should have seen these injuries when, according to his evidence, he sat on a chair across the table opposite and facing Timol.

276. There is also the evidence of Essop that at the time he was arrested with Timol, the latter was fit and healthy. Essop is corroborated by Dr Farouk Dindar and Ms Gadija Chothia who submitted affidavits confirming that they saw Timol on 21st (*Dr Dindar*) and 22nd *(Ms Chothia)* of October 1971 and Timol was in good shape with no visible injuries.

277. The magistrate based his conclusion that Timol's *ante mortem* injuries were sustained prior to his arrest, on the discredited opinion of Koch. There is no other evidence supporting that conclusion.

278. In applying the principle of circumstantial evidence as set down in the seminal case of ***R v Blom,***[32] this Court accepts that there are overwhelming facts proven from which the only inference that can be drawn is that Timol was tortured, which torture includes physical assaults. The proven facts include *ante mortem* injuries.

279. This Court therefore accepts that there is incontrovertible evidence that Timol sustained the *ante mortem* injuries in detention while being interrogated.

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[32] 1939 AD 188.

The issue of Quentin, Martin and Henry.

280. The Magistrate further concluded that one of the causes for Timol to commit what is purported to be suicide was his fear of being exposed by witnesses identified by Mr X. These witnesses are Quentin Jacobsen, Martin and Henry. The probative value of this evidence from the police was not properly assessed as Mr X was never called to testify nor was Quentin, Martin and Henry called to testify.

281. Essop testified that he and Timol only met Quentin once after being introduced to him by a friend and relative. They shared an interest in photography. The introductions were made at Quentin's photographic studio on Pritchard Street, Johannesburg. Quentin was not a political activist and had no political affiliation.There was thus no political link between Quentin and Timol. This fact was confirmed when Quentin was arrested and prosecuted after Timol's death. At his trial, there was no reference to Timol at all.

282. The magistrate simply accepted the evidence of the Security Branch without question or corroborating evidence and concluded that the purported link between Timol and Quentin, which did not exist, is one of the reasons for Timol to commit suicide.

283. This Court finds no evidence to support the conclusion of the magistrate on this point and accordingly rejects it.

Fear of twenty years imprisonment and "Inkululeko Freedom" No 2, February 1972 document.

284. Members of the Security Branch allege in their evidence that during interrogation, Timol repeatedly expressed concern that he will be sentenced to twenty to twenty-five years. He is said to have done so

when he indicated to his interrogators that he accepts all the blame to himself and others were not to blame. Further, Van Wyk concludes his affidavit by stating as follows:

"Ek is van mening dat Timol selfmoord gepleeg het omdat hy besef het dat die getuienis teen hom, verdoemend was en dat hy vir baie jare tronk toe sou moes gaan. Daarbenewens is dit ook bekend dat kommuniste eerder selmoord moet pleeg voordat hulle enige inligting aan die Polisie verstek".[33]

285. The magistrate accepted the evidence that Timol was concerned about a possible twenty year sentence. He also relied on a document that was not formally admitted in evidence to express a view that Timol committed suicide on the basis of a call purportedly made by the Communist Party and stated in that document. That document is "*Inkululeko Freedom*", Volume 2 dated February 1972. The Magistrate did not indicate who presented that document to him and why it was not placed before Court and the presenter examined as to its origin. The document referred to is *"Inkululeko Freedom*" No 2 of February 1972, which was issued by the SACP.

286. The evidence of Stephanie Kemp, Pahad and Kasrils above, demonstrate in detail how the SACP document on which the magistrate relied was a forged copy of the real one. It was forged by addition of a few paragraphs at the end, which proved not to conform to the language style and the policy of SACP not to mention names of individuals in publications. The forged document is purported to be issued by the "*Communist Party of South Africa*", an organisation that no longer exists.

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[33] Free translation: "*I am of the view that Timol committed suicide because he realised that the evidence against him was damning and that he would have had to go to prison for many years. In addition thereto, it is also well-known that communists would first have to commit suicide before they could provide any information to the Police.*"

287. The publications were in fact issued by SACP, which was a banned organisation in South Africa at that time and its leadership operated underground in exile out of South Africa. Its activities were carried out by underground units or cells of recruits in South Africa. Apart from the obvious spelling mistakes and naming of individuals, the reference to an organisation that ceased to exist in a publication that is dated four months after Timol's death was a giveaway. The magistrate failed to scrutinise the forged document.

288. Erasmus testified that the Security Branch routinely forged documents as part of a counter- revolutionary propaganda. He was attached to that unit in John Vorster Square when he joined the police in 1977.

289. Essop, Mohammed and Pahad testified that it would not have been in the nature of Timol to commit suicide. Pahad in particular testified that Timol had a girlfriend in London and looked forward to re-joining her. In addition, it was against Timol's religion to commit suicide. These were facts which members of the Security Branch were clearly not aware of when they conjured up the suicide narrative as a cover up.

290. Kasrils in his evidence also stated how each recruit into the SACP was made aware, during training, of the possibility of arrest, torture in detention, trial and possible lengthy prison sentences. The recruits were trained as to how to respond to these situations should they arise and in particular to embrace a trial and prison sentence as providing an opportunity to live to continue the struggle. A lengthy imprisonment should be regarded as a "*badge of honour.*"

Evidence of the trajectory.

291. The evidence of Moodley, the Aeronautic Engineer, further contradicts Rodrigues' version that Timol jumped to his death. His

conclusions, which have been dealt with above, indicate that in terms of the trajectory, where the body landed in relation to the building, additional force was applied to accelerate his fall. He fell further from the trajectory which, if he had jumped, would have been nearer to the building itself. The scenarios 3 and 4 indicate that Timol was pushed. Rodrigues could not comment on it.

Evidence on the time of the fall.

292. The evidence of the time of the fall received by the 2017 re-opened inquest left the Court with two mutually exclusive versions. Civilian eye witness evidence by Matthis, Thoken and Adam state that the fall occurred mid-morning on 27 October 1971 between 09H00 and 11H00. In fact, one witness places the incident as having occurred between 10H00 and 10H30, at the time when he was on his tea break.[34]

293. Members of the Security Branch, led by Rodrigues placed the time of the fall as being at 15H45 and 16H00 on the same date. It is clear that both versions cannot be true and that only one of them would be true. Kemp, who declared Timol dead at 16H00, alleges in his affidavit that he was called at about 15H55 and arrived at the scene at 16H00 whereupon he declared Timol dead. In his one paragraph statement, he mentioned that the body had recently died (*"hy was pas dood"*). Naidoo opines that Kemp's reference to "*pas dood*", in all probability expressed his view in relation to the stage of decomposition of the body. A body begins the process of decomposition normally several hours after death. He then opines that it could be that Timol died early in the morning or even in the afternoon, he is unable to tell on a basis of the evidence. Kemp did

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34 See the evidence of Abdulla Mohammed Adam.

not give details in regard to the condition of the body as at the time when he declared it dead. It is thus left to a determination of probabilities based on the two versions, that of the police as against that of the civilians.

294. The relevance of the evidence on the time of the fall has a bearing on the credibility and reliability of the versions. More pertinently, it is critical in determining which version is fabricated.

The version of the Security Branch

295. The version of the police is that Timol, on his own initiative, jumped out of the window on the 10th floor of John Vorster Square and fell to his death. The magistrate concluded that Timol committed suicide. During the 1972 inquest, this version of the police was challenged by legal representatives of the Timol family. It emerged that there were contradictions and inconsistencies in the statements of the police in regard to what precisely happened. The primary witness and conveyer of this version in this regard was Rodrigues. His evidence has been dealt with in detail in this judgment. For purposes of evaluation, it is necessary to assess its credibility.

296. The contradictions start with Rodrigues himself. He testified in the 1972 inquest that when he entered room 1026, the police were interrogating Timol. Then he changed to state that Timol was not doing anything. This aspect of the evidence was further contradicted by Gloy and Van Niekerk who testified that when Rodrigues entered room 1026, Timol was writing a statement. In further contradiction, Rodrigues stated in his affidavit that after Timol fell, he rushed to Greyling's office. He is corroborated by Gloy who testified that immediately after the incident, he found Rodrigues in Greyling's

office. In the 2017 re-opened inquest he testified that he saw and met Greyling for the first time when Greyling, together with other officers on the 10th floor, came to room 1026 after Timol fell. He did not rush to Greyling's office, but to the corridor shouting alarm.

297. Rodrigues further gave different accounts as to what happened in room 1026. He was questioned at length about the scenario he painted in room 1026 concerning his version of events. The inconsistencies and improbabilities of that version were exposed, in particular, considering that at that time, he, Rodrigues was much younger, an athlete, a rugby player, tall and bigger than Timol. His version that he could not restrain him from jumping out of the window was improbable. In particular, it was put to Rodrigues that Timol could not have moved out the window as he described, as the window opened in the middle, leaving a narrow gap to go through without injuring oneself or tearing one's clothing. Further, that his version is not supported by the medical evidence which showed that Timol at the time, had been so tortured and assaulted that he could not, unaided, stand up from the chair and dash to the window and jump out in a matter of seconds as Rodrigues testified.

298. Rodrigues was also contradicted by Pattle, when the latter testified in 1972. Pattle testified that when he entered room 1026, there was no sign of struggle or chairs that had fallen. Rodrigues did not mention anything to him about stumbling over a chair. Rodrigues could further not explain the statement by Buys to the media, made two days after the death of Timol, that before Timol committed suicide, he suddenly jumped and rushed to the door, then turned and rushed to jump out of the window. Rodrigues denied having mentioned anything about rushing to the door. The version of rushing to the door was also repeated by Gloy, who like Buys, alleged that they were told this version by Rodrigues.

299. In 2017 Rodrigues introduced a new version concerning a suggestion made to him to include in his statement that he wrestled with Timol before the latter jumped. The impression gained by the Court from this statement was that Rodrigues wanted to paint a picture of a person who is independent and not easily influenced. He clearly fabricated this version so as to bolster the credibility of his evidence. He could not satisfactorily explain why he had not disclosed this aspect of his evidence in the affidavit, to the 1972 inquest or at any time thereafter. It seems to the court that this version was intended to bolster the credibility of its own story and to present him as a person who was stating the truth and being intolerant of any influence. This version is contradicted by his own statement that Buys asked him to add in his statement that Timol was not assaulted to which he agreed. The Court is of the view that there was no need for him to agree to any statement on assault as he was an officer from Compol Building in Pretoria who was employed as a salary clerk and therefore would not have known, on his own version, what goes on in the interrogation. He had repeatedly told the Court that he was not allowed to go into the area of interrogation as what goes on there was "*uiters geheim*" (utmost secrecy).

300. Rodrigues further revealed to the court that his statement which was made in November 1971 was written down by Buys in his presence. During questioning by the Court as to why he had made reference to assault on Timol in his affidavit, Rodrigues answered that Buys suggested that a sentence should be added in the affidavit, which would state that he did not assault Timol. He agreed to that suggestion. The affidavit which was written by Buys in the presence of Rodrigues, had a statement suggested by Buys which Rodrigues accepted and deposed to before the same Buys, attesting as

Commissioner of Oaths. This Court is unable to offhand recall any better example of evidence tempering and subversion of the truth on the part of both Buys and Rodrigues!

301. The magistrate ignored these material contradictions and inconsistencies on the version of Rodrigues and surprisingly accepted all police witnesses as being honest and truthful witnesses. The finding by the magistrate that Timol committed suicide rests primarily on Rodrigues' version. The Magistrate ignored the most obvious and material contradiction of Rodrigues' version by Brigadier Pattle. Pattle had a different version provided to him by Rodrigues as to what happened in Room 1026. The Magistrate in his judgment acknowledged the fact that Buys was aware of the two contradictory versions even as he took the stand. Ordinarily, such contradiction would have cast serious doubts on the credibility of Rodrigues' version. As Bizos stated, there was very little enthusiasm on the part of the magistrate to question this version of the police.

302. What also appears strange in the 1972 records is that of the 20 plus police officers who deposed to affidavits and testified in the 1972 Inquest, only 5 make mention of Rodrigues. These are Gloy, Van Niekerk, Pattle, Schoon and Buys. Schoon did not testify in 1972. Rodrigues testified that he went to the ground floor with Greyling in the elevator. Deysel says he went to the ground floor with Greyling in the elevator. Neither of the two makes reference to each other's presence. Further, Rodrigues is neither supported by any uniformed police officers who were on duty that day at the reception on the ground floor, nor by members of the Security Branch who were working on the 9th and 10th floor who, according to Rodrigues, came out of their offices when they heard him shout and went into 1026 to look for themselves. Neither of these witnesses nor their affidavits

were obtained and placed before the 1972 inquest proceedings or the 2017 re-opened inquest proceedings.

303. The mystery around the presence and role of Rodrigues at John Vorster Square at the time Timol fell, supports the contention that his version has been conjured up to conceal the truth.

304. It is not difficult to understand why the Rodrigues version lies at the heart of the 1972 inquest. It was the only version placed before the inquest by members of the Security Branch, Rodrigues being their main witness. The Security Branch took advantage of the fact that because of section 6 of the Terrorism Act, they, apart from the detainee, were the only persons privy to what transpired in the morning of the fateful day. The only other person who could have provided an alternative version in this case was Timol. Timol was not there to speak for himself.

305. It needs to be recorded that at the time Rodrigues gave evidence before the 1972 inquest, he already had a previous conviction of perjury.

Evidence of cover up.

306. There is evidence supporting the view that the statements by members of the Security Branch, the police officers investigating the death of Timol and the proceedings in the 1972 inquest were all part of an attempt to cover up or conceal the truth concerning Timol's death. This view is supported by the evidence of Dutton and Erasmus as well as the contradictions and improbabilities appearing in Rodrigues's version.

307. In the first instance, there is no evidence explaining why the police failed to hold an administrative inquiry in terms of the Police Act and Regulations, to determine whether any member of the police had contravened the Regulations by allowing Timol to escape while in police detention or custody. Such inquiry was never held. Sons further testified that it was totally against policy and the standing orders to leave a detainee, more so one of high profile, in the care of a single officer, let alone a salary clerk. There had to be no less than two police officers with a detainee at a given time. This view is confirmed by all former detainees held with Timol that there were always two or more members of the Security Branch in their presence, at any given time, rotating in teams. The statements of the police in their affidavits attest to the fact that they operated in pairs. These would be Kleyn and Thinnies *(arresting officers)*; Van Wyk and Bean *(interrogators)*; Gloy and Van Niekerk *(interrogators)*; Bouwer and Louw *(overnight guards);* Liebenberg and Van Rensburg *(Investigators)* and Ras and Van Rensburg *(Investigators)*. Why then was Rodrigues left alone with Timol, if his version is to be accepted as true? Having regard to Sons' evidence, it was against the regulations to leave a detainee under the care of one member of the Security Branch.

308. There was general substandard and sloppy investigation of the death of Timol by Buys and his team. According to Dutton, Buys, in conducting the investigation, broke every rule in the crime detection book. As stated, before taking statements from witnesses at the commencement of the investigation, Buys had claimed in the media that Timol had committed suicide. He personally commissioned the affidavits of witnesses, including that of Rodrigues as an investigator. During the 1972 inquest, while under cross examination, Buys collapsed and had to leave the court for medical attention. He never

returned to complete his cross examination but was able to resume work.

309. Dutton further testified that Buys' investigation of the crime scene was a disaster as it is littered with errors that suggest, on the police's own version, disregard of standard procedures at a crime scene. No effort was made to obtain forensic evidence on the ground where Timol fell as well as in room 1026; there was no cordoning of the crime scene; no photo of the body on the scene; no marking of the position of the body; no clothes and sample blood stains examination; no plan with measurements of the scene and no measurement of the depth of indentation where the body landed. No ambulance services or paramedics were summoned. Practically no forensic evidence was gathered.

310. Boffard testified that the removal of Timol's body from the shrubs could have accelerated his demise. Further, the removal of the body from the ground floor to the 9th floor before arrival of medical attendants and crime scene forensic investigators amounted to tampering with evidence.

311. Buys took statements only from members of the Security Branch who arrested, detained and interrogated Timol as well as those who assisted in the investigation of Timol's death. No attempt was made to obtain statements from civilian eye witnesses, other members of the Security Branch who were not involved in the interrogation of Timol, Uniformed Branch members at the reception next to where Timol fell and black members of the Security Branch.

312. The personal file of Rodrigues, as Dutton testified, reveal that he surprisingly received a commendation from the Commissioner of Police after he testified in 1972, although he had no record of having

distinguished himself as an outstanding officer in the performance of his duties. Such accolades from the Commissioner were a rare occurrence. Rodrigues was never promoted and he resigned two days after the delivery of the judgment of the 1972 inquest;

313. The evidence of Dutton and Erasmus corroborates that of the detainees that it was general practice for the police to torture detainees to a point of death. In the instance of death in detention, a cover-up story would be implemented so as to shield police from blame. This cover-up story would be handled by a unit within the Security Branch known as "*resident sweepers*". Later after Timol's death, Gloy who by then held the rank of Colonel during or about 1977 was part of the unit to cover up activities of members of the Security Branch who had contravened the law.

314. In their view, both Erasmus and Dutton admit that torture, including brutal assaults experienced by detainees were common occurrence and that there is no reason whatsoever to believe that Timol was handled differently. His death was a cover-up. In order to implement this cover-up strategy, the assistance of some selected members of the prosecuting authority, medical profession and magistracy were roped in to be part of the sham. Officials from these professions were carefully selected to support a cover-up version in the case of any judicial proceedings.

The view of this Court

315. Considering what has been stated above, this court is of the view that there is no merit or credibility in the evidence of Rodrigues and that of members of the Security Branch on their version. The version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version.

316. The evidence of the 2017 re-opened inquest, unmasked the cover up, but due to the absence of the interrogators who have all passed on, the real events leading to the push could not be established. However, the evidence *prima facie* and logically points out that at the time Timol was pushed either out of the window of room 1026 or at the roof top, he was in the company of members of the Security Branch in charge of his interrogation on duty. He could obviously not have been in a cell. These members were at least Gloy and Van Niekerk, as their police file records show and the evidence of Bouwer and Louw confirms. They were on duty at that time. The Court is unable to establish on the evidence whether there was anyone else with them.

317. It is the Court's *prima facie* view that the push occurred during interrogation under circumstances where the Security Branch involved, resorted to torture. The torture on Timol was applied with a view to extract information. Counsel for the family of Timol submits that the Security Branch are guilty of murder. Murder is committed intentionally (direct intent) or through *dolus eventualis*. There is no evidence supporting the view that the Security Branch had direct intent to commit murder. There are theories suggesting that possibility but no evidence to back that up. However, the evidence support murder through *dolus eventualis*. *Dolus eventualis* is present in instances where *" the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed."*[35]

318. There are four reasons from the evidence why the Court is of the view that the members of the Security Branch interrogating Timol had the

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[35] Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA), paragraph 26

requisite intent in the form of *dolus eventualis* to commit murder. Firstly, the methods of torture they applied on Timol's co-detainees were so brutal[36]that there was an element of recklessness with the manner in which they occurred. Secondly, the injuries on Timol sustained *ante mortem*, 35 in all, with various degrees of severity, demonstrate that there were no boundaries of respect for human life. Thirdly, the police on their own version removed the injured Timol from where he landed immediately after the fall, without summoning medical assistance, clearly in order to conceal the crime. The very act of his removal from the scene as he was alive, may have accelerated his demise due to the police's reckless conduct at the scene. Fourthly, there was a history of detainees having died in detention, which seemed not to have any deterrence on their conduct. Van Niekerk, one of Timol's interrogators on the day he died, already had a record of brutality at that time, which included convictions of two counts of assault (in which the victim died) and multiple complaints of serious assault and torture, in which he and Gloy were accused of. These referred to the assault on detainees with iron rods and electric shocks, some which occurred months before their interrogation of Timol. One such incident was in February of 1971. It is thus probable, on the evidence, that the Security Branch foresaw that their methods of interrogation carries the risk of death occurring, but nevertheless persisted unrestrained with the torture, appreciating that death might well occur.

319. The possibility of negligence is discounted on the basis that the police went out of their way to cover up the incident by fabricating suicide, rather than admit the incident as an accident, if it was so. There are few theories that were explored in argument as to how Timol was pushed, but due to absence of evidence, the Court cannot accept and

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[36] Essop was admitted in a comatose condition at hospital while Naik had no control of his hands after the 'helicopter method.

rely on them. . However, Timol did not jump as alleged. He was pushed by someone and there is thus a case that members of the Security Branch conducting interrogation at that time had to answer. Timol was in their custody as a detainee. They had complete control over him and they thus owed him a duty of care, for which they should have been held to account.

CONCLUSION

320. Having regard to the totality of the evidence of the 1972 inquest and the 2017 re-opened inquest, this Court concludes thus:

320.1 After his arrest on the night of 22 October 1971 and throughout the weekend, continuing to Monday 25, Tuesday 26 and Wednesday 27, Timol was interrogated by members of the Security Branch acting in teams and taking turns. This interrogation took place in Room 1026 and Timol, contrary to his detention warrant, was kept in that room and not once taken to a holding cell;

320.2 As with all other detainees who were arrested with and after him during the same weekend and in John Vorster Square, Timol was tortured by the interrogating members of the Security Branch in order to extract information out of him;

320.3 The torture included physical assaults which resulted in severe injuries. The injuries referred to were sustained before the fall and are distinct from those he sustained on his fall;

320.4 On 27 October 1971, Timol's interrogation was conducted by Gloy and Van Niekerk. At the time Timol fell, he was under the care of at least Gloy and Van Niekerk;

320.5 The personal file of Van Niekerk indicates how he had been implicated and facing charges together with Gloy in the assault and murder of detainees. Some of these occurred prior to the death of Timol while others continued even after the death of Timol. Thus on the day Timol died, it was during their turn to interrogate him and the records reflect that both were therefore in room 1026;

320.6 Consequently, the allegation by the Security Branch members that Timol was not assaulted is not true. Further, the conclusion by the magistrate that Timol was treated in a civilised and humane manner is also not correct;

320.7 The trajectory evidence by Moodley excludes the possibility of Timol having either dived or jumped out of the window of room 1026 on the day he fell. Instead, the trajectory calculations support the view that the cause of the fall was that Timol was pushed either from the window of room 1026 or from the roof of John Vorster Square building;

320.8 Three independent witnesses put the time of Timol's fall as mid-morning on 27 October 1971. This is in direct contrast to Rodrigues' evidence that Timol fell between 15H45 and 16H00. This Court accepts that Timol fell in the mid-morning and that Rodrigues, if ever he was in room 1026 later in the afternoon, was brought there to legitimise the cover up narrative;

320.9 The substandard and sloppy manner in which the investigation of Timol's death was conducted by Buys and his team supports the view that there was a clear intent to cover-up the incident through a fabricated version of suicide;

320.10 Timol's fall to the ground was as a result of being pushed either from window of room 1026 or from the top of the roof of the John Vorster Square building;

320.11 Consequently, Timol did not meet his death because he committed suicide. Timol died as a result of having being pushed to fall, an act which was committed by members of the Security Branch with *dolus eventualis* as the form of intent, and *prima facie* amounting to murder;

320.12 There is *prima facie* evidence implicating Gloy and Van Niekerk as the police officers who were interrogating Timol when he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact of that murder, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. A recommendation is made to have him investigated and prosecuted for these offences.

321. Ordinarily in an inquest, the court makes its finding in terms of section 16 (2) of the Act. This finding is made narrowly in answer to four questions. These questions are about (a) the identity of the deceased; (b) the cause or likely cause of death; (c) the date of death; and (d) whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person.

322. In case of an inquest re-opened in terms of section 17A, subsection 3 (b) thereof provides thus:

" (3) A judge holding an inquest that has been re-opened in terms of this section…..

(b) shall record any finding that differs from a finding referred to in section 16 (2), as well as the respect in which it differs;"

323. The finding by the magistrate in this instance is the finding referred to in section 16 (2). At the end of the 1972 inquest, the Magistrate made the following findings in terms of Section 16 of the Act:

"*(a) The identity of the deceased is Ahmed Essop Timol, an Asian male, 29 years old, born South African, teacher by profession.*

(b) Date of death: 27 October 1971.

(c) Cause or probable cause of death: the deceased died because of serious brain damage and loss of blood sustained when he jumped out of a window of room 1026 at John Vorster Square and fell to the ground on the southern side of the building. He committed suicide.

(d) No living person is responsible for his death."

324. In regard to item (a) in the paragraph above, This Court is of the view that even in death, Timol deserves the dignity of the restoration of his citizenship, like all South Africans. He entered the struggle and gave his life for that. This Court will not identify him as "*an Asian male*", but differently as a South African citizen.

325. Item (b) in the findings of the magistrate, the date of death 27 October 1971, remains unchanged.

326. Item (c), Cause or probable cause of death. The finding by the magistrate on the cause of death follows the evidence of Schepers who buckled under cross examination. Initially when he testified, he opined as it appeared in the autopsy report, that the cause of death

was *"Multiple injuries"*. Under cross examination he stated the cause of death as serious brain damage and loss of blood, which the magistrate accepted. This Court will follow the opinion of Naidoo that the death was caused by the *massive head (brain) and chest (vital centre damage and compromised respiration) injuries.* Further, and for reasons already stated in this judgment, this Court will record a different finding to that of the magistrate when he found that Timol jumped out of the window of room 1026 at John Vorster Square, fell to the ground on the southern side of the building and that he committed suicide. This Court came to a different conclusion that Timol did not *"jump out of the window of room 1026",* but was either pushed out of the window of room 1026 or rolled from the roof of the John Vorster Square building. Thus, he did not commit suicide but was murdered.

327. This Court will also record a different finding to that of the magistrate in regard to item (d) of his findings. He found that "no living person is responsible for Timol's death". It is ironic that 46 years after the death of Timol, the magistrate's finding is partly correct, as most of the main perpetrators this Court would have recommended for investigation and possible charges have since passed on.

328. The finding by this Court is that all members of the Security Branch involved with the interrogation of Timol or keeping guard over him in room 1026 are collectively responsible for the injuries sustained *ante mortem*. They were supposed to keep him in the police cell as the warrant for his detention stated. They did not do so, but kept him in room 1026 to conceal the torture.

329. In the first instance Timol was in their custody and they had a duty of care over him which they failed to exercise. Secondly, the Security Branch denied knowledge of the *ante mortem* injuries on his body,

which denials this Court found were a cover up. The Security Branch involved in the interrogation of Timol, inflicted the injuries through systematic and continuous torture. They intentionally and unlawfully applied brutal methods of torture on Timol.

330. This Court's *prima facie* finding is that members of the Security Branch who were interrogating Timol on the day he died, through an act of commission or omission, murdered Timol. This they committed through *dolus eventualis* as the form of intent.

331. Rodrigues placed himself on the scene as a party to the cover up to conceal the truth. He thereby *prima facie*, by his conduct became an accessory after the fact of murder. An accessory after the fact is " *a person who renders assistance to someone else (perpetrator) who has committed an offence."* [37]Corbett JA in ***S v Morgan***[38] opines that the association of the accessory with the crime should take the form of helping the perpetrator evade justice. This is precisely what Rodrigues, on his own version, did.

332. Els should be investigated for misleading the Court that he only knows of the allegation of assault on detainees from the media. The police file records reflect that he was in attendance as one of the interrogators when Naik was subjected to the "helicopter" method of torture for which he lost the use of his hands.

333. Sons should also be investigated for testifying under oath that he heard of detainees' assault from the media. There are five witnesses who filed affidavits to dispute his statement.

334. Rodrigues should be investigated for making contradictory statements whilst under oath. He has a previous conviction on perjury.

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[37] WA Joubert, "***The Law of South Africa***", Volume 6 paragraph 136.
[38] 1993 2 SACR 134 (A).

FINDINGS

335. Therefore, in terms of section 17A (3) (b), read with section 16 (2) of the Act, the Court finds as follows:

(a) The deceased is Ahmed Essop Timol, a South African citizen aged 29 at the time of his death;

(b) The cause of death is massive head (brain) and chest (vital centre damage and compromised respiration) injury;

(c) The date of death remains unchanged as 27 October 1971;

(d) Timol's death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through *dolus eventualis* as the form of intent and *prima facie* amounting to murder. There is *prima facie* evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution.

336. In terms of Section 17A (3) (c) of the Act, the record of the proceedings is hereby submitted to the Director of Public Prosecutions.

Recommendations

337. The 2017 re-opened inquest, the first of its kind in South Africa, has revealed a number of lessons to be learned. Of importance is that all branches of the state have to ensure that the boundaries set by the Constitution for the respect of Human Rights and dignity should never be crossed. It should be the task of all branches of the State to begin to develop a culture of intolerance to any form of violation of Human Rights.

338. One of the draw-backs with this re-opened inquest is the fact that the reopening came late in the day when most of the members of the Security Branch involved with the interrogation of Timol and the investigation of Timol's death had passed on. In addition, the Court had to do with the mysterious disappearance of part of the 1972 inquest record that dealt with the evidence of the police officials in Court, and in particular page 3 of the affidavit of Rodrigues which, according to the magistrate's judgment, explained how Timol fell. Consequently, the key police witnesses who would have been called to testify again in regard to the events preceding the fall were not available. It is therefore important for the future that the state ensures that the records of inquests are preserved, considering the fact that the Act provides for re-opening without any limitation as to time.

339. The inquest also revealed that there are many more families[39] who are seeking closure on the unanswered questions concerning the death of their relative in detention. They, like all families whose relatives died in detention, need healing. They need closure.

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[39] The Judge's Registrar, Mr Lesibana Makwela received a number of inquiries from persons who needed assistance to find closure in cases of their relative having died in detention.

340. It is thus the view of this Court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened. The Human Right Commission, working in consultation with the law enforcements agencies, should be sufficiently resourced to take on this task.[40]

341. It will be remiss of this Court not to address an issue on which Bizos' evidence put a spotlight. This is the impropriety role played by some in the magistracy, prosecuting authorities and medical experts in the past inquest proceedings. Bizos's evidence reveals the role of some of these public officials in being complicit in exonerating members of the Security Branch from the crimes they committed. The 1972 inquest into the death of Timol is one such example. From the outset, it had to take a Court order to allow Timol's family and their lawyers access to case documents, before the inquest commenced. The evidence of the 1972 inquest furthers demonstrate how the prosecution made no effort to obtain evidence other than that of the police and the magistrate attempting to explain away the ante mortem injuries, without any shred of evidence supporting his statement about a brawl.

342. Bizos also makes reference in his publication,[41] to the inquest into the death of Steven Bantu Biko. The much publicised and documented unprofessional conduct of the doctors[42] who testified in that inquest, illustrates the point. Doctors, like lawyers take an oath, in their profession it is a Hippocratic Oath.

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[40] Without being prescriptive, it would assist if the Human Rights Commission and IPID are sufficiently resourced to undertake the task of preparatory work, in consultation with the NPA, for the re-opening of such inquest at the request of the families concerned.
[41] ***"No one to Blame"***
[42] Dr Lang and Dr Tucker

343. Every professional lawyer and public official survives on integrity. Magistrates and prosecutors are lawyers participating in the administration of justice and are expected to discharge their functions in terms of the Oath they were sworn to uphold.[43] For all public office bearers of the State, an oath is sacrosanct. Apart from their knowledge of and experience in the practice of law, lawyers, in particular judicial officers, are expected to bring to bear their honesty, independence, personal and professional integrity and ability to act without fear or favour in the administration of justice. It is not ethical and proper on the part of a judicial officer to preside over or decide cases either out of fear; or in favour of a person, entity or institution; or in expectation of promotion or reward; or in advancement of some real or perceived interest. Judicial officers have to be loyal only to the Constitution and the cause of justice. Public officials in the administration of justice are enjoined by the law to jealously guard against casting aspersions on the integrity of the judicial system, by conducting themselves in a manner contrary to their oath of office. Such conduct has no place in a Constitutional Democracy.

S P MOTHLE
Judge of the High Court.
Gauteng Division, Pretoria.

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[43] This Court acknowledges that by and large, in particular since the advent of the democratic dispensation, most magistrates, prosecutors and doctors in public service discharge their functions ethically and in accordance with the oaths they took. The views expressed do not include all magistrates, all prosecutors and all doctors who take their oaths seriously.

Evidence Leader:	Advocate JT Pretorius SC
Assisted by:	Advocate S Singh
Instructed by:	National Prosecuting Authority
For the Timol Family:	Advocate H Varney
Assisted by:	Advocate M Musandiwa
Instructed by:	*Weber Wentzel inc., Johannesburg.*
For former Members of:	Advocate SJ Coetzee
the Security Branch	
Instructed by:	State Attorney, Pretoria.
For the SA Police:	Advocate Lithole
on watching brief	

Annexure "JR 4"

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:

In the application between:

THE STATE

And

JOAO ANASTACIO RODERIGUES Accused

REQUEST FOR FURTHER PARTICULARS

To enable the Accused to prepare for the trial herein the following further particulars are requested:

A. AD INDICTMENT

1. With reference to the allegation in the Indictment that Accused is guilty of murder read with section 257 of the CPA the following further particulars are requested:

   1.1 Does the State rely on section 257 of the CPA as an alternative count to the count of murder?

1.2 Does the State rely on section 257 of the CPA as a competent verdict on the count of murder;

1.3 Insofar as the State relies on the allegation that the Accused was an accessory after the fact relating to the death of the late Timol ("the deceased") the following further particulars are requested:

1.3.1. Is it alleged that the Accused acted as an accessory from his own volition;

1.3.2. Is it alleged that he acted on instructions when he acted as an accessory, if so on whose instructions;

1.3.3. What actions are alleged to have been committed by Accused as an accessory after the fact? Full detail is requested.

1.3.4. Full particulars of the evidential material that the State intends to rely to substantiate the allegation that Accused committed the actions as an accessory after the fact as mentioned in paragraph 1.3.3 above are required.

2. Insofar as the State indicated in the charge sheet that they will rely on a common purpose between the Accused, J Z van Niekerk and J H Gloy to unlawfully and intentionally kill deceased, the following particulars are requested:

2.1 When was the common purpose formed?

2.2 What were the objectives of this alleged common purpose

2.3 Did the Accused manifest his participation in the common purpose with the other perpetrators by himself performing any act of association with the conduct of the others? Full detail of any such act(s) of association that the Accused allegedly performed is requested.

2.4 Precisely what act(s) did the Accused commit in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by the Accused relied upon by the State.

2.5 Precisely what act(s) did J Z Van Niekerk commit in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by Van Niekerk relied upon by the State.

2.6 Precisely what act(s) did J H Gloy commit in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by Gloy relief upon by the State.

B. **SUMMARY OF SUBSTANTIAL FACTS**:

Ad Paragraph 18 of the summary of substantial facts:

3. The State provided the Accused, as part of the discovery of evidential material to be relied on by the State:

3.1 With the full Police docket in this matter.

3.2 The State further provided the Accused as part of the above process with all documentation and information relevant to this prosecution.

3.3 The State also provided the Accused with the full transcript of the inquest proceedings before the Honourable Mothle J during the re-opened inquest proceedings that occurred in 2017.

3.4 The State also provided the Accused in the above process with the judgment delivered by the Honourable Mothle J in the above inquest proceedings.

3.5 There appears to be no evidential material in any of the documentation and/or information provided by the State as set out above indicating that the Accused at any stage participated and/or was present during any of the alleged torture and/or assault of the deceased.

4. Insofar as the State alleged in paragraph 18 of the summary of substantial facts that the Accused participated in the torture and/or assault of the deceased the State is requested to provide the following further particulars:

4.1 On what statement and/or evidential material by any witness does the State rely for the allegation that the Accused participated in the alleged interrogation of the deceased?

4.2 On what statement and/or evidential material by any witness does the State rely for the allegation that the Accused participated in the alleged torture of the deceased?

5. Insofar as it is alleged that the Accused was involved in the torture and/or assault of the deceased detail are requested of the following:

5.1 What act(s) of assault and/or torture did the Accused commit?

5.2 When did the Accused participate in these act(s) of torture and/or assault?

5.3 What injuries to the deceased in these act(s) of torture and/or assault were allegedly caused by the Accused?

6. Insofar as it is alleged that the Accused was present when act(s) of torture and/or assault was committed by Gloy and Van Niekerk the following information is required:

6.1 Who allegedly assaulted and/or tortured the deceased?

6.2 When exactly was the Accused present when these act(s) of torture and/or assault was/were committed?

6.3 What precisely was the Accused's participation in these act(s) committed?

6.4 Insofar as these factual allegations are not substantiated by any of the discovered documentation and/or information that the State presented to the Accused in order to prepare for the trial, the State is requested to indicate on exactly which statements and/or other material will the State rely in this regard.

Ad paragraph 19 of the summary of substantial facts:

7. The State is again referred to paragraph 3 above and, insofar as the State alleged and intend to rely on the allegation that the Accused was involved in the act to push the deceased out of the window of room 1026 and/or throw the deceased down and/or rolled the deceased down from the roof of John Vorster Square Police State on 27 October 1971, the following further particulars are requested:

7.1 On what statement and/or evidential material by any of the witnesses does the State rely for the allegation that the Accused participated in the mentioned conduct? Full particulars are requested.

7.2 What act(s) did the Accused allegedly commit in the conduct described in this paragraph?

7.3 At what time on the 27th of October 1971 is it alleged by the State was the deceased pushed out of the window and/or thrown/rolled from the roof of John Vorster Square?

C. GENERAL:

8. When evaluating the charge sheet and summary of substantial facts compared to the judgment by the Honourable Mothle J in the re-opened inquest it appears that the allegations contained in the charge sheet are in material contradiction to the findings in the inquest proceedings. The State is requested to provide the following further particulars in this regard:

8.1 Is it the State's case that the findings of the Honourable Mothle J are incorrect insofar as it found that the Accused was not involved in the death of the deceased?

8.2 Is it the State's case that the findings by the Honourable Mothle J to the effect that the Accused was not at John Vorster Square at the time of the death of the deceased are incorrect?

8.3 What are the factual basis for the allegations in the charge sheet and summary of facts to the effect that the findings by the Honourable Mothle J in the above regard were incorrect?

DATED at PRETORIA on this _____ day of OCTOBER 2018

BEN MINNAAR ATTORNEY
ATTORNEYS FOR THE ACCUSED

TEL:
FAX:
REF:

TO: THE REGISTRAR OF THE
HIGH COURT
JOHANNESBURG

AND TO: THE SENIOR PROSECUTOR
HIGH COURT
JOHANNESBURG

RECEIVED COPY HEREOF:

DATE:

TIME:

_____

Annexure "JR 5"
220

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Ref number: 10/2/11/1(2018/041)

In the application between:

THE STATE

And

JOAO ANASTACIO RODERIGUES **ACCUSED**

REPLY TO REQUEST FOR FURTHER PARTICULARS

A. AD INDICTMENT

AD PARAGRAPH 1.1 TO 1.3.4

* The State does not intend to rely on section 257 of the Criminal Procedure Act 51 of 1977. The insertion of the words "section 257" is a typographical error. The count of murder on the indictment should read as follows:

    1. Murder, read with section 51(1) of the Criminal Procedure Act, 51 of 1977.

* From the outset of the matter, the State made clear its intention that it intended to pursue the charge of premeditated murder. It is apparent from the bail affidavit of the accused that he was aware of this as this was acknowledged by your goodselves, hence the application for bail being pursued as a

schedule 6 bail application. The bail affidavit of the accused is attached marked annexure A. See paragraphs 7.3 and 8 respectively.

- Furthermore, at the bail proceedings and at the first appearance of the accused, it is abundantly clear that the State was not intending to charge the accused as an accessory after the fact. In paragraph 3, the following sentence is noted. The State will allege(d) that the offence of murder was committed by the accused and his cohorts and that it was premeditated and planned whilst acting in the execution of a common purpose. The bail affidavit of the investigating officer is attached marked Annexure B.

AD PARAGRAPH 2

- It must be noted that this case is based on circumstantial evidence. The issue of common purpose will be cleared by evidence.

AD PARAGRAPH B

SUMMARY OF SUBSTANTIAL FACTS:

AD PARAGRAPH 4 – 5.3

- The State has provided all documentation and exhibits in its possession. Confirmation of same was received.

- As to how the assault on the deceased occurred, is a matter of evidence and will be addressed by oral evidence including medical and other expert evidence.

AD PARAGRAPH 6 – 6.4

- The State alleges that the accused acted in furtherance of a common purpose. This is a matter of evidence.

AD PARAGRAPH 7 – 7.3

- This is a matter of evidence. The State will call witnesses.

AD PARAGRAPH C. GENERAL:

- The Accused was involved in the murder of the deceased. Evidence to that effect will be led.

DATED AT JOHANNESBURG ON THIS 9th DAY OF OCTOBER 2018

.....

ADVOCATE SJ KHUMALO

.....

ADVOCATE SH SINGH

Annexure A. 223

IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF GAUTENG

HELD AT JOHANNESBURG,

CASE NO:

In the application between:

JOAO ANASTACIO RODERIGUES Accused/Applicant

and

THE STATE Respondent

AFFIDAVIT IN SUPPORT OF APPLICATION FOR BAIL

I, the undersigned,

JOAO ANASTACIO RODERIGUES

do hereby state under oath as follows:

1.

1.1 I am an adult male person and the accused in this case.

1.2 The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary and are true and correct.

1.3 I am the Applicant in this application.

NATURE OF THIS APPLICATION:

2.

This is an application for my release on bail pending the finalisation of the above trial.

3.

PERSONAL PARTICULARS

3.1 My identification number is 3903275032086;

3.2 My date of birth is the 27th March 1939;

3.3 I am a South African citizen;

3.4 I have no travel documents;

3.5 I have never travelled outside the borders of the Republic of South Africa and never took up residency in a foreign country;

3.6 The only relative that I have living outside the Republic of South Africa is my brother Ewert Roderigues who is a Botswana citizen;

3.7 I have no assets outside the Republic of South Africa.

4.

PERSONAL BACKGROUND

4.1 I was born in Viljoenskroon in the Free State;

4.2 I matriculated;

4.3 I did not undergo any tertiary training or education;

4.4 My work history is as follows:

4.4.1 I was in the South African Police Service from 1956 to 1972;

4.4.2 I was a Senior Journalist and Editor at the Hoofstad Press;

4.4.3 I was employed at the National Parks Board.

5.

CURRENT STATUS

5.1 I reside at 835 11th Avenue, Wonderboom South, Pretoria;

5.2 I have resided at the same address for a period of 54 years;

5.3 My previous address was at 227 Myburgh Street, Capital Park;

5.4 I am married to my wife me S. M. Roderigues;

5.5 I have no other dependants;

5.6 I am a pensioner;

5.7 My only income is from my pension;

5.8 I own the fixed property where I reside at Part 2 of erf 522, Wonderboom South, Pretoria;

5.9 Should my bail application be granted, I will be able to afford the amount of R2000.00 towards bail which will be available in cash from my own sources;

5.10 Should this honourable court set bail in a higher amount than what was respectfully requested, I would be able to raise the necessary funds to facilitate the payment of my bail.

5.11 I submit further that all my financial, cultural ties are in this province, being the jurisdictional area of this above honourable court.

6.

HISTORY OF ANTI-SOCIAL BEHAVIOUR

6.1 I have one previous convictions in 1956 on a charge of perjury;

6.2 I have no other pending criminal trials;

6.3 I have been warned by my legal representative about the consequences of misleading the court about my previous and pending matters in terms of the provisions of Section 60 (11) (B) of the Criminal Procedure Act as amended which may result in my bail be revoked and being criminally prosecuted.

7.

ARREST AND FACTUAL BACKGROUND THERETO

7.1 I was arrested on 30th July 2018 on a warrant after my legal advisors were informed of my pending arrest and arrangements were made in terms whereof I voluntarily handed myself to the police;

7.2 I understand that I am charged with a Murder that allegedly took place in 1971, whilst I was employed as a police officer;

7.3 I am advised that the charges brought against me fall under Schedule 6 of the Criminal Procedure Act, 51 of 1977;

7.4 I intend to plead not guilty to the charges against me.

LEGAL FRAMEWORK FOR BAIL:

8.

I am advised that the relevant considerations that a Court will have regard to when exercising its discretion as to what the interest of Justice would require is set out in section 60(4) of the CPA and that I have to prove that there exist exceptional circumstances justifying my release on bail.

8.1 I further submit that as provided for in section 60(4) (a) of the Act I will not endanger the safety of the public of any particular person or commit any offence. I further submit that there is no evidence of any likelihood that I pose a danger to public or individual safety.

8.2 I further submit that as provided for in section 60(4) (b) of the Act I will not attempt to evade any proceedings that may take place up to the conclusion of my trial. I intend of proving my innocence at the trial. I have no desire to forfeit everything I have worked for up to now and to become a fugitive of the criminal justice system.

8.3 I further submit that as provided for in section 60(4) (c) of the Act I will not attempt to influence or intimidate any person or conceal or destroy any evidence. I am, to my knowledge, unaware of the identity of all the witnesses that may be called against me. Should I know the identity of these witnesses the court may impose any conditions that cause me to refrain from any contact with such person and I intend to abide by these conditions.

8.4 I further submit that as provided for in section 60(4) (d) of the Act I will not do anything that will undermine or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system.

8.5 I further submit that as provided for in section 60(4) (e) of the Act I will not do anything that will in any way disturb the public order or undermine the public peace or security, nor will my release on bail cause such effects.

9

EXCEPTIONAL CIRCUMSTANCES

9.1 The alleged crime was committed in 1971, when the deceased (Mr. Timol) died whilst in detention as a political detainee at the then John Vorster Square Police Station, Johannesburg;

9.2 I have been aware of the allegations that the deceased was murdered since the finalisation of the inquest in the above honourable court was finalised in 1972 through various newspaper articles and media publications.

9.3 The inquest finding by the Honourable Justice Mothle was that I was not present when the deceased died, but that my actions might be as an assessor after the fact. The Honourable Justice Mothle made the following finding in the inquest at paragraph 335 (d):

> *"Timol's death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus*

eventualis as the form of intent and prima facie amounting to murder. There is prima facie evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution."

9.4 The finding by the learned justice was made 22nd May 2017 and I remained a resident at my house and did not in any way attempt to evade prosecution;

9.5 When I became aware that there was a warrant issued for my arrest and after communication through my legal team and the prosecution I presented myself to the police for arrest and presentation to this honourable court;

9.6 I am no longer a young man and have no desire to end my days as a fugitive of the law;

9.7 As most people of my age (79) I suffer from ailments and illnesses usually associated with old age and will suffer greatly should I be detained in cells.

10

I further undertake to adhere to any condition that this Honourable Court may impose if this Honourable Court indeed exercise its discretion in my favour and order my release pending the finalisation of these proceedings.

11

In the circumstances I submit that my release is in the interest or Justice and that I have proven that exceptional circumstance exists justifying my release on bail. I therefore request the Honourable Court to order my release on bail pending the finalisation of these proceedings against me.

_____

DEPONENT

SIGNED and SWORN to at PRETORIA on this _____ day of JULY 2018 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:
BUSINESS ADDRESS:
AREA:
DESIGNATION:

Exh B 236

IN THE REGIONAL DIVISION OF GAUTENG
HELD AT JOHANNESBURG

THE STATE

versus

RODERIGUES, JOAO ANASTACIO (hereinafter called the accused)

AFFIDAVIT IN RESPECT OF BAIL

FRANS NGWAKO MATHIPA hereby states under oath:

1.

That I am a Captain in the South African Police Services stationed at Serious Organised Crime, Crimes against the State, Directorate for Priority Crime Investigation, Pretoria. From the context hereof, the facts herein contained are within my personal knowledge and belief both true and correct.

M.R.

2.

I am the investigating officer of Johannesburg Central 798/10/2017. The accused is charged for Murder and Defeating the ends of justice. The offence of murder falls within schedule 6.

3.

The nature of the offences for which the accused is charged, stems from the death of Mr Ahmed Timol who died in police detention in 1971 at John Vorster Square as it was then known. (now Johannesburg Central) At an inquest into the deceased's death in 1972, the inquest court found that the deceased had committed suicide. However, on new evidence led at a subsequent inquest, held in 2017, before Judge Mothle, the re-opened inquest overturned the verdict of suicide finding that Ahmed Timol did not commit suicide but was in fact murdered.

4.

At all times relevant to the charge sheet, the accused was employed as a police official with the security branch of the South African Police. By his own admission, he was the last person to see the deceased alive in office 1026 at John Vorster Square police station.

M. R

5.

From the investigations that I have undertaken and the affidavits which I have in my possession, it transpired that on the evening of 22 October 1971, a Ford Anglia bearing registration TU 22315, driven by Mr Salim Essop (Essop) a third year medical student was intercepted at a roadblock, on Fuel Road, Coronationville. Mr Ahmed Essop Timol (the deceased), a teacher was a passenger in the vehicle.

6.

The roadblock set up on 22 October 1971 at approximately 22H40, was manned by amongst others but not limited to, members of the then South African Police, uniform branch members, Sergeant Leonard Kleyns (Kleyns), Constable Adam Alexandra Thinnies (Thinnies) and the Station Commander of Newlands police station, Major Kloppers. The abovementioned vehicle was stopped at the roadblock.

7.

After searching the boot of the vehicle, both the deceased and Essop were arrested for allegedly being in possession of prohibited pamphlets and documents of banned political organisations namely the South African Communist Party (SACP) and the African National Congress (ANC).

M.R

8.

Both the deceased and Essop were transferred in custody to Newlands Police station and further detained for contravening the provisions of section 6 of the Terrorism Act, Act 83 of 1967.

9.

The Security Branch was a branch of the South African Police whose function, amongst others, was to gather intelligence so as to assess the threats to the State in the then Apartheid South Africa. Apartheid was a system of institutionalised racial segregation and discrimination that was in existence from 1948.

10.

Members of the security branch at John Vorster Square police station, including senior members, were informed of the arrests of both the deceased and Essop. At Newlands Police station, Essop and the deceased were separated from each other.

11.

Soon thereafter, and during the early parts of the morning of 23 October 1971, other senior members of the security branch at John Vorster Square, including and not limited to Captain Dirker(Dirker) and Colonel Greyling (Greyling) arrived at Newlands police station.

M. R

12.

Essop was interrogated and repeatedly assaulted by members of the security branch. After the assault, Essop was handcuffed, placed in an unmarked police vehicle, driven by Greyling and another police official. They drove to the offices of the South African Police, John Vorster Square.

13.

During the early hours of the morning of 23 October 1971, the deceased was transported to John Vorster Square police station, by Dirker and Kleyns.

14.

Lieutenant Colonel Willem van Wyk (van Wyk) from the security branch headquarters in Pretoria, was informed of the arrest of Essop and the deceased on the morning of 23 October 1971. He arrived at John Vorster Square police station at 03H15.

15.

During his period of detention from 23 October 1971 until 26 October 1971, Essop was tortured and severely assaulted by members of the security branch, at John Vorster Square Police Station. On 26 October 1971, Essop was hospitalised in a comatose state, as a result of assault and torture on him by members of the security branch.

16.

From the time of his detention on 22 October 1971, until his death on 27 October 1971, the deceased was still in police detention, in room 1026, and subjected to continuous interrogation and torture by the security branch.

17.

On 27 October 1971, the deceased was still in room 1026, on the tenth floor of John Vorster Square Police Station, never having ever been detained in a cell at any stage of his detention at John Vorster Square.

18.

At the time of his death, the deceased was under the care of the accused, Captains Johannes Hendrik Gloy (Gloy) and Johannes Zacharias van Niekerk (Van Niekerk). Gloy and van Niekerk arrived at John Vorster Square on the morning of 23 October 1971 at 06H00, on instructions of van Wyk. All three police officials, Gloy, van Niekerk and the accused were based at the security branch headquarters at Compol Building, Pretoria.

19.

The accused arrived at John Vorster Square police station on 27 October 1971. The accused, Gloy and van Niekerk tortured and assaulted the deceased. Prior to his death, and whilst in their custody and under their care, the deceased sustained multiple bruises and fractures including and not limited to inter alia the nasal bone, left orbital ramus, right inferior orbital ramus, fractures of the left and upper jaw, an isolated depressed skull fracture, extensive contusions on the right leg, and a dislocated left angle.

20.

Subsequently, they thereafter either pushed the deceased out of the window of room 1026 and/ or threw the deceased down from and/ or rolled the deceased from the roof of John Vorster Square Police Station on 27 October 1971.

21.

After the demise of the deceased, the accused and his cohorts alleged that the deceased committed suicide by jumping from the window of the tenth floor (room 1026) of John Vorster Square Police Station.

22.

Therefore the State will allege that the offence of murder was committed by the accused and his cohorts and that it was premeditated or planned, and/or the offence was committed in the execution of the common purpose.

23.

I have been informed that the accused intends to apply for bail, on 30 July 2018.

24.

I am not opposed to the granting of bail for the following reasons:

24.1 The accused is not a flight risk. A warrant of arrest was authorized for the accused who then voluntarily handed himself over to me.

24.2 I have established that the accused has a fixed address. The accused has a permanent residential address at house number 835, 11th avenue, Wonderboom South, Pretoria. He has resided at this address for 54 years.

24.3 The accused is a South African Citizen with identity number 3903275032003. He is not the holder of a passport. He is 79 years old. He is retired and a pensioner. He is married and has five self- supporting adult children who all reside on their own. I submit that he has sufficient personal ties to stand trial.

M.R

24.4 The accused has only one registered fixed property namely that mentioned in paragraph 24.2 above. He is also an established author and has published at least eight books. Besides serving as a member of the South African Police, he also worked as a senior journalist at a Pretoria newspaper and at the Parksboard.

24.5 I have established that the accused has no outstanding warrants and no pending cases.

24.6 He does however have a previous conviction in that on 27 June 1956, he was convicted of Statutory Perjury for contravening section 9 of Act 16 of 1914 and given a suspended sentence for five years provided that he was not convicted for an offence involving dishonesty.

25.

I submit that under the circumstances the accused does have exceptional circumstances to justify his release on bail. He is almost 80 years of age, was aware of the possibility of being charged already in October 2017, and did not flee. Furthermore, his personal circumstances, as well as the fact that he has fixed property, establish a reason for him to remain in South Africa

If the accused is admitted to bail, an amount of approximately R2000, with normal bail conditions would be appropriate.

I know and understand the contents of this statement.
I have no objection in taking the prescribed oath.
I consider the prescribed oath to be binding in my conscience.

CAPTAIN FN MATHIPA

I certify that the deponent has acknowledged that he knows and understands the contents of the above statement. This statement was sworn to before me and deponent's signature was placed thereon in my presence at Johannesburg on this the 27TH day of July 2018.

COMMISSIONER OF OATHS

FULL NAMES : MARTIN RAMOBA

DESIGNATION : W/O

AREA : PRETORIA 218 General Piet Joubert building.

A400
247

IN THE REGIONAL DIVISION OF GAUTENG
HELD AT JOHANNESBURG

THE STATE

versus

RODERIGUES, JOAO ANASTACIO

(hereinafter called the accused)

AFFIDAVIT IN RESPECT OF BAIL

1.

Frans Ngwako Mathipa hereby states under oath:

That I am a Captain in the South African Police Services stationed at Serious Organised Crime, Crimes against the State, Directorate for Priority Crime Investigation, Pretoria. From the context hereof, the facts herein contained are within my personal knowledge and belief both true and correct.

A4(2)
249

2.

I am the investigating officer of Johannesburg Central 798/10/2017. The accused is charged for Murder and Defeating the ends of justice. The offence of murder falls within schedule 6.

3.

The nature of the offences for which the accused is charged, stems from the death of Mr Ahmed Timol who died in police detention in 1971 at John Vorster Square, now known as Johannesburg Central. At inquest into the deceased's death in 1972, the inquest court found that the deceased had committed suicide. However, on new evidence led at a subsequent inquest, held in 2017, the re-opening inquest overturned the verdict of suicide finding that Ahmed Timol did not commit suicide but was murdered. The accused, by his own admission, was the last person to see the deceased alive in office 1026 at John Vorster Square police station. At the stage that that the deceased died, the accused was employed as a police official with the security branch of the South African Police. The deceased was in his care and he had a legal duty to protect the deceased by virtue of his appointment as a police official. From the investigation that I have undertaken and affidavits which I have in my possession, they directly contradict the version of the accused that the deceased committed suicide. The State will alleged that the offence of murder was committed by the accused and his cohorts and that it was premeditated or planned

A40(3)
25

and/orthe offence was committed by a group of persons acting in the execution of a common purpose.

5.

I have been informed that the accused intends to apply for bail, on 30 July 2018.

6.

I am not opposed to the granting of bail for the following reasons:

6.1 The accused is not a flight risk. A warrant of arrest was authorized for the accused who then voluntarily handed himself over to me.

6.2 I have established that the accused has a fixed address. The accused has a permanent residential address at house number 835, 11th avenue, Wonderboom South, Pretoria. He has resided at this address for 54 X years. Captain, is it not so that he has another address in Cape Town?

6.3 The accused is a South African Citizen with identity number 3903275032003. He is/is not the holder of a passport. He is 79 years old. He is retired and a pensioner. He is married and has adult children. He lives on his own/with. I submit that he has sufficient personal ties to warrant that he not evade justice but stand trial.

A40(4)
252

I know and understand the contents of this statement.

I have no objection in taking the prescribed oath.

I consider the prescribed oath to be binding in my conscience.

Mathipa Capt

CAPTAIN FN MATHIPA

I certify that the deponent has acknowledged that he knows and understands the contents of the above statement. This statement was sworn to before me and deponent's signature was placed thereon in my presence at Johannesburg on this the 27TH DAY OF JULY 2018.

700124-0
Dlamini Sgt

Signature - Commissioner of oaths

LORENTO BUSISIWE DLAMINI

Full first names and surname in block letters

218 Gnel Ret Joubert Building, Visagie Str Pretoria

Business address (Street address)

Rank SERGEANT

SOUTH AFRICAN POLICE SERVICE

Annexure "JR6"

253

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: SS 106/2018.

In the matter between:

GRIFFIER VAN DIE HOOGGeREGSHOF VAN SUID AFRIKA
GAUTENG PLAASLIKE AFDELING, JOHANNESBURG
PRIVAATSAK / PRIVATE BAG X7
2018 -10- 12
JOHANNESBURG 2000
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

THE STATE

and

JOAO ANASTACIO RODERIGUES Accused

NOTICE IN TERMS OF SECTION 85 READ WITH SECTION 87 OF THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

WHEREAS the State charged the Accused *inter alia* on a charge of murder. A copy of the charge sheet is annexed hereto as **Annexure "A"**.

AND WHEREAS the Accused filed a written request for particulars from the State relating to the charge of murder in terms of section 87 of the CPA relating to allegations made in the charge. A copy of the request for further particulars is annexed hereto as **Annexure "B".**

AND WHEREAS the State provided certain answers to the request for further particulars referred to above. A copy of the State's reply to the request for further particulars is annexed hereto as **Annexure "C".**

AND WHEREAS the answers provided by the State referred to above were insufficient and a failure by the State to comply with the obligation that the State has in terms of section 87 to provide further particulars to the Accused.

NOW THEREFORE the Accused request this Honourable Court to direct the State to provide further particulars to the Accused relating to the issues raised in the request for further particulars.

1. **DETAIL OF STATE'S FAILURE TO COMPLY WITH SECTION 87 READ WITH SECTION 85 OF THE CPA**:

   1.1 The State alleged in the charge sheet that:

> ***"COUNT 1: MURDER***
> ***THAT*** *the Accused is guilty of the crime of Murder.*

IN THAT *on or about 27 October 1971, and at or near Johannesburg Central Police Station (John Vorster Square, as it was then known), in the district of Johannesburg Central, the accused, together with inter alia Johannes Zacharia van Niekerk and Johannes Hendrik Gloy, separately and/or together in the execution or the furtherance of a common purpose did unlawfully and intentionally kill* ***AHMED ESSOP TIMOL,*** *a 29 year old adult male."*

1.2 The State further alleged in the summary of substantial facts:

"18 The accused arrived at John Vorster Square police station on 27 October 1971. The accused, Gloy and van Niekerk tortured and assaulted the deceased. Prior to his death, and whilst in their custody and under their care, the deceased sustained multiple bruises and fractures including and not limited to inter alia the nasal bone, left orbital ramus, right inferior orbital ramus, fractures of the left and upper jaw, an isolated depressed skull fracture, extensive contusions on the right leg, and a dislocated left angle."

And

"19 *Subsequently, they thereafter either pushed him out of the window of room 1026 and/or threw the deceased down from and/or rolled the deceased from the roof of John Forster Square Police Station on 27 October 1971."*

2. With reference to the allegation in the charge sheet and the summary of substantial facts to the effect that the Accused is charged with pre-meditated murder that he committed together with Van Niekerk and Gloy in the execution or furtherance of a common purpose, the Accused requested the following particulars:

2.1 When was the common purpose formed?

2.2 What were the objectives of this alleged common purpose?

2.3 Did the Accused manifest his participation in the common purpose with the other perpetrators by himself performing any act of association with the conduct of the others? Full detail of any such act(s) of association that the Accused allegedly performed is requested.

2.4 Precisely what act(s) did the Accused commit/perform in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by the Accused relied upon by the State.

2.5 Precisely what act(s) did J Z Van Niekerk commit/perform in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by Van Niekerk relied upon by the State.

2.6 Precisely what act(s) did J H Gloy commit/perform in the furtherance of the common purpose relied on? The State is requested to provide full particulars of each such act by Gloy relied upon by the State.

3. The State failed to provide any detail relating to any of the particulars requested and their answer only stated:

"It must be noted that this case is based on circumstantial evidence. The issue of common purpose will be cleared by evidence."

4. With reference to the allegations to the effect that the Accused participated in the torture and/or assault of the deceased the State was requested to provide *inter alia* the following particulars:

4.1 What act(s) of assault and/or torture did the Accused commit/perform?

4.2 When did the Accused participate in these act(s) of torture and/or assault?

4.3 What injuries to the deceased in these act(s) of torture and/or assault were allegedly caused by the Accused?

4.4 On what statement and/or evidential material by any witness does the State rely for the allegation that the Accused participated in the alleged interrogation of the deceased?

4.5 On what statement and/or evidential material by any witness does the State rely for the allegation that the Accused participated in the alleged torture of the deceased?

5. The State failed to provide any particulars on the above questions and only stated the following:

> *"The State has provided all documentation and exhibits in its possession. Confirmation of same was received.*
>
> *As to how the assault on the deceased occurred, is a matter of evidence and will be addressed by oral evidence including medical and/or other expert evidence."*

6. With reference to the allegation that the Accused was present when acts of torture and/or assault was committed by Gloy and Van Niekerk the following particulars were requested from the State:

6.1 Who allegedly assaulted and/or tortured the deceased?

6.2 When exactly was the Accused present when these act(s) of torture and/or assault was/were committed?

6.3 What precisely was the Accused's participation in these act(s) committed?

6.4 Insofar as these factual allegations are not substantiated by any of the discovered documentation and/or information that the State presented to the Accused in order to prepare for the trial, the State is requested to indicate on exactly which statements and/or other material will the State rely in this regard.

7. The State also failed to comply with the request and failed to provide any particulars in the above regard. The only answer to the above questions provided by the State was the following:

"The State alleges that the Accused acted in furtherance of a common purpose. This is a matter of evidence."

8. With reference to the allegation by the State that the Accused was involved in the act to push the deceased out of a window and/or throw the deceased down and/or rolled the deceased down from the roof of John Vorster Square Police Station the following particulars were requested:

8.1 On what statement and/or evidential material by any of the witnesses does the State rely for the allegation that the Accused participated in the mentioned conduct? Full particulars are requested.

8.2 What act(s) did the Accused allegedly commit/perform in the conduct described in this paragraph?

8.3 At what time on the 27th of October 1971 is it alleged by the State was the deceased pushed out of the window and/or thrown/rolled from the roof of John Vorster Square?

9. With reference to the fact that the abovementioned allegations in the charge sheet and summary of substantial facts was in complete contradiction to the judgment by the High Court in the re-opened

inquest proceedings the State was requested to provide the following particulars:

9.1 Is it the State's case that the findings of the Honourable Mothle J are incorrect insofar as it found that the Accused was not involved in the death of the deceased?

9.2 Is it the State's case that the findings by the Honourable Mothle J to the effect that the Accused was not at John Vorster Square at the time of the death of the deceased are incorrect?

9.3 What are the factual basis for the allegations in the charge sheet and summary of facts to the effect that the findings by the Honourable Mothle J in the above regard were incorrect?

9.4 On what evidential material does the State rely for the allegation(s) that the findings by the Honourable Mothle J were incorrect?

10. The State failed to provide any particulars in the above regard and only stated:

"The Accused was involved in the murder of the deceased. Evidence to that effect will be led."

11. It must of course be emphasised that the above request for further particulars and the answers provided by the State must be read on the basis as set out in paragraph 3 of the request for further particulars that there is no allegation in the Police docket and/or further material provided by the State to the Accused that the Accused participated and/or was present at any stage when the deceased was assaulted, tortured and/or pushed/rolled through the window and/or from the roof of John Vorster Square.

DATED at PRETORIA on this 12th day of OCTOBER 2018

BEN MINNAAR ATTORNEY
ATTORNEY FOR THE ACCUSED

TEL:
FAX:
REF: BM 01/10/18.

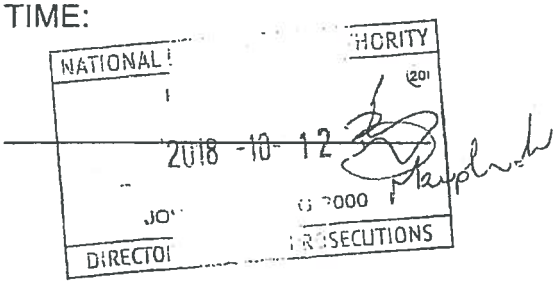
TO: THE REGISTRAR OF THE
HIGH COURT
JOHANNESBURG

AND TO: THE SENIOR PROSECUTOR
HIGH COURT
JOHANNESBURG

RECEIVED COPY HEREOF:

DATE:

TIME:



Annexure "JR7"

265

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: SS 106/2018

DPP Ref:- 10/2/11/1-041/2018

Trial date: to be arranged

In the matter of

THE STATE

versus

RODERIGUES, JOAO ANASTACIO **ACCUSED**

MINUTES OF THE PRE-TRIAL CONFERENCE

---

(1) DATE: 12 October 2018

(2) VENUE: DPP Office – Johannesburg, 1st floor training Room 2

(3) PARTIES PRESENT:

State Counsels: 1: Advocate SJ Khumalo

Contact details: 0762393286/011 2204090

Email: sjKhumalo@npa.gov.za

4.2 Admissions agreed to by the State and the accused in terms of Section 220 of the CPA: to be agreed upon between the counsels. Defence will look at the admissions, state will make certain suggestions that will either be accepted or not by counsel. State suggests date of death, date of arrest, post mortem and pics, the rest of which all had been handed in at the inquest.

4.3 Plea to be entered by the accused at the trial:

Not Guilty

4.4 Pre Trial obligations of the State:

Disclosure of case docket was done. State confirms that all statements In its possession handed to Defence. Defence confirms. Statement up To annexure A61 contained in docket.

4.5 Pre Trial obligations of the defence:

Consult with the accused and agree to section 220 admissions was done. Will serve Section 35(3) read with S342A by end of next week. State raises the issue of urgency. Also want to give the accused his day in court.

4.6 The state of readiness for trial of the State:

Ready

4.7 The state of readiness for trial of the defence:

Ready. Defence wants to bring an application for S342A read with Section 35 of the Constitution for a permanent stay in Pretoria Division. State expresses its intention to oppose. Jurisdiction is Johannesburg, It is where the offence took place. Defence says that the NDPP and the

Minister who it wants to site are based in Pretoria. State says that this is a Delaying tactic. Defence disagrees saying it took 48 years for the NPA to Enrol the matter. Defence cites the reason that Mr Cajee in his evidence said That NDPP aware in 2004

4.8 The language requirements and services of the accused and witnesses:

Afrikaans, English

4.9 Expert witness and chain evidence:

As per exhibit A

4.10 Any other matter of relevance to the trial readiness of the matter:

If any, will be communicated in advance.

4.11 The estimated duration of the trial: Six months

OTHER:

ISSUES RAISED BY DEFENCE

B FURTHER PARTICULARS:

AD PARA 2 - 5

State stands by its reply to request for further and/or better particulars as served by Defence on 11 October 2018.

Defence to file application to compel the State to provide and/or better particulars by today, 12 October 2018.

AD PARAGRAPH 6- 12

Parties agree that all statements and exhibits were furnished and received.

AD PARAGRAPH 13 – 15

The State has furnished all that is relevant,discovered as a result of

Investigation and which the state intends to use in evidence.

AD PARAGRAPH 16 – 18

A draft of S342A will be served on or before 19 October 2018.

Both agree that time is off the essence

AD PARAGRAPH 19 – 24

All witnesses to be called. If there are changes, Defence will be informed. If necessary S3 applications to be brought.

Permission granted iro General Groenewald. State indicated this before.

Parties agree that the indictment will be substituted with the one with the corrected

section.

It is also agreed that all copies of originals handed in at inquest. Copies and confirmatory

Affidavits were filed in the docket. Some originals in docket are available and may be

Produced.

AD PARAGRAPH 25 – 27

Duration: as per 4.11

Running Record: parties requiring it will request same.

AD PARAGRAPH 28:

Admissions made ito S220 include:

- Name of deceased
- date of arrest of the deceased
- Date of death of the deceased,
- Place of death of deceased
- Photo albums depicting deceased at mortuary

Signatures: _____ _____

STATE **DEFENCE**

271

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 76755/18

In the matter between:

JOAO RODRIQUES	**APPLICANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	**FIRST RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**SECOND RESPONDENT**
MINISTER OF POLICE	**THIRD RESPONDENT**

FILING SHEET

DOCUMENTS: SECOND RESPONDENT'S ANSWERING AFFIDAVIT

SIGNED at **PRETORIA** on the **27TH** day of **NOVEMBER 2018.**

FILED BY

SECOND RESPONDENT'S ATTORNEYS
STATE ATTORNEY PRETORIA
SALU BUILDING, GROUND FLOOR
316 THABO SEHUME STREET
PRIVATE BAG X91
PRETORIA, 0001
Ref: 6002/18/Z65

272

Tel: (012) 309-1545
Fax: (012) 309 1649/50
Dx: 298 PRETORIA
Enq: G.P SELEKA

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA**

AND TO:

APPLICANT'S ATTORNEYS
BEN MINAAR ATTORNEYS
190 MELT MARAIS ATTORNEYS
WONDERBOOM A/H X 1
WONDERBOOM
PRETORIA
TEL: 082 446 2644
REF: BM/01/10/19

Copy received

Date:

Time:

APPLICANT'S ATTORNEYS

273

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 76755/18

In the matter between:

JOAO RODRIGUES **Applicant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA **First Respondent**

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **Second Respondent**

MINISTER OF POLICE **Third Respondent**

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

TSHILILO MICHAEL MASUTHA

do hereby make oath and state:

Oath 11/06 TM

1.

1.1 I am the Minister of Justice and Correctional Services ("the Minister"), and the Second Respondent;

1.2 save as may otherwise be stated or as may appear from the context, the facts herein deposed to are within my personal knowledge and belief;

1.3 to the extent that I make submissions of a legal nature herein, I do so from my own knowledge and on the basis of advice from counsel.

2.

2.1 I have read the Notice of Motion and founding affidavit of the Applicant in this matter, together with the annexures thereto;

2.2 I do not propose to deal with each and every one of the allegations as they appear in Applicant's founding affidavit. I deal only with those specific allegations which are relevant to myself for the purposes of the relief sought against me in the Notice of Motion, and my failure to so address the said allegations is not to be construed as an admission of those allegations. I accordingly, to the extent necessary, deny them.

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26 TM

Relief Sought

3.

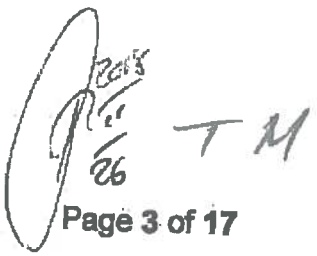
3.1 In paragraph 1 of the Notice of Motion, a declarator order is sought that the criminal proceedings instituted against Applicant constitutes an unfair trial as envisaged in Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996;

3.2 in paragraph 2 of the Notice of Motion, a declarator order is sought that section 35 (3) of the Constitution must be read with section 342A of the Criminal Procedure Act, Act 51 0f 1977;

3.3 in paragraph 3 of the Notice of Motion, Applicant seeks an order authorising a permanent stay of prosecution on the charge of murder relating to the death of the late Ahmed Essop Timol on 27 October 1971;

3.4 in paragraph 4 of the Notice of Motion, an interdict is sought against First and Second Respondents in which they are prohibited from proceeding with a criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol;

3.5 in paragraph 5 of the Notice of Motion, an order is sought that First and Second Respondents withdraw the criminal proceedings against Applicant.



4.

4.1 The specific relief sought by the applicant against me appears in paragraphs 4 and 5 of the Notice of Motion, and I accordingly confine my response, in the main, thereto;

4.2 I submit that the relief sought against me in terms of paragraphs 4 and 5 is ill conceived. The initiation of the prosecution and the conduct of a criminal trial is the prerogative of the First Respondent as set out in the provisions of Section 179 of the Constitution and Section 32 of the National Prosecuting Authority Act 32 of 1998.

5.

I am advised that it is expedient, before dealing with the allegations contained in the founding affidavit and the Notice in terms of Rule 16A of the Uniform Rules of Court, to set out the background to this application in so far as it is applicable to my decision to reopen the inquest.

Background

6.

6.1 My office was in receipt of a memorandum, dated 25 October 2016, from the then First Respondent, a copy of which is annexed hereto

2018 TM

marked Annexure **"TMM1"**, requesting the reopening of the Inquest into the death of Ahmed Timol in terms of section 17A of the Inquest Act 58 of 1959;

6.2 Section 17A of the Inquest Act 58 of 1959 reads as follows:

> *"(1) The Minister may, on the recommendation of the attorney general concerned, at any time after the determination of an inquest and if he deems it necessary in the interests of justice, request a Judge President of a Provincial Division of the Supreme Court to designate any Judge of the Supreme Court of South Africa to reopen that inquest, whereupon the Judge thus designated shall reopen such inquest."*

6.3 The criterion set out clearly in the enabling legislation is "*the interest of justice*";

6.4 I perused the memorandum and assessed the content to ascertain whether it was necessary, in the interests of justice, that the inquest be reopened;

6.5 In arriving at this decision, I considered the content as set out in paragraphs 2.11 to 2.18 of Annexure **"TMM1"** with regard to the new evidence that was available to be placed before a presiding officer at the inquest;

6.6 I had regard to the background to this matter and the import of the new evidence coming to light for the first time, as set out in paragraphs 2.1 to 2.9 of Annexure **"TMM1"**;

6.7 I am aware that our Courts have repeatedly said that the underlying purpose of an inquest is to promote public confidence and satisfaction that all deaths from unnatural causes will receive proper attention and investigation;

6.8 our Courts have also held that inquest proceedings require to be so thorough that the public and interested parties are satisfied that there have been full and fair investigations into the circumstances of unnatural deaths;

6.9 the abovementioned considerations informed my decision that it was indeed in the interests of justice to accede to the request of the First Respondent to reopen the inquest and to recommend that a Judge of the Supreme Court of South Africa be designated to preside upon such proceedings.

T M

6.10 I accordingly approved the recommendation, as appears *ex facie* page 7 of Annexure **"TMM1"**;

6.11 On 17 January 2017, I caused a communication, indicating my decision to be forwarded to the office of the Chief Justice of South Africa, and requesting that a judge be designated to preside over the reopened inquest. Copy of the correspondence is annexed hereto marked annexure **"TMM2"**.

7.

I turn now to addressing the content of the founding affidavit, *ad seriatim*, insofar as it relates to me.

8.

Ad paragraph 1

Save for admitting the averment in paragraph 1.3, I have no knowledge of the further averments made herein.

9.

Ad paragraphs 2; 3; 4

The content herein is admitted.

10.

Ad paragraph 5

I note the content herein.

11.

Ad paragraph 6

11.1 I note the purpose of the application as set out in paragraph 6;

11.2 I reiterate that the initiation and conduct of a prosecution is solely within the purview of the statutory duties of First Respondent;

12.

Ad paragraphs 7

12.1 I note the content hereof pertaining to the infringement of the right to a fair trial, allegations pertinent to First Respondent;

12.2 with specific regard to **paragraph 7.1** and the reference to "*fair procedure prior to the institution of the prosecution*", it is not specifically averred that Applicant makes reference herein to my decision to reopen the inquest and I accordingly do not respond with any degree of particularity, thereto;

12.3 in the event that such reference is intended, I refer to the content of paragraph 6 above and the criteria apposite to my decision with regard to the request from the First Respondent.

13.

Ad paragraph 8

13.1 I am advised that the reference to Section 342A of the Criminal Procedure Act 51 of 1977 is not apposite in these application proceedings;

13.2 The section reads:

> ***" 342 A Unreasonable delays in trials***
>
> *A Court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.*
>
> ....."

13.3 I am also advised that in terms of the above-mentioned section, the correct forum for the enquiry contemplated, as to the delay and any prejudice consequent thereupon, is the court dealing with the criminal charges.

14.

Ad paragraph 9 and 10 thereof

The content is noted. The Notice in terms of Rule 16A pertains to the conduct of the criminal trial, and I do not address the factual allegations pertinent thereto. I am advised that submissions will be made in argument at the hearing of this matter.

15.

Ad paragraphs 11 to 18

Whilst these allegations are pertinent only to First Respondent, I am advised that the averments are disputes that are more appropriately aired in the criminal court and that application proceedings in this Honourable Court is neither the correct procedure nor the proper forum to resolve disputes as enunciated in these paragraphs.

TM 2018/11/21

16.

Ad paragraph 19

Save for admitting **ad paragraph 19.6** that I was in receipt of recommendations from First Respondent to reopen the Inquest, I note the content hereof.

17.

Ad paragraph 20

The content is noted.

18.

Ad paragraphs 21 and 22

The content is noted.

19.

Ad paragraph 23

The content is admitted.

TM

20.

Ad paragraphs 24 to 26

The content is noted;

21.

Ad paragraph 27

I am advised that Applicant incorrectly sets out the findings of the reopened Inquest herein.

22.

Ad paragraph 28 to 36

The content is noted.

23.

Ad paragraph 37

At the time I considered the request by the First Respondent for the reopening of the inquest, it did not appear *ex facie* Annexure **"TMM1"** that First Respondent had taken any position with regard to a prosecution of Applicant.

24.

With regard to the allegation that Applicant did not have the right to silence during the re-opened Inquest proceedings, I am advised that:

24.1 the Supreme Court of Appeal has held that a witness at inquest proceedings has a right to refuse to answer questions that might incriminate him;

24.2 Applicant was represented by counsel during the reopened inquest proceedings, who would have assisted Applicant to protect his rights;

24.3 it is open to Applicant during proceedings in a criminal court, to seek to exclude any evidence he alleges might have been obtained as a result of any infringement of his constitutional rights.

25.

In the premises, I deny that his constitutional rights have been infringed.

26.

Ad paragraphs 38 to 40

The content is noted.

2018/11/26

27.

Ad paragraph 41 to 43

The content is noted.

28.

Ad paragraphs 44 and 45

28.1 The content is noted;

28.2 I am advised that submissions will be made in argument *apropos* the legal authorities pertaining to unreasonable delay, and the considerations apposite to any prejudice consequent upon delays.

29.

Ad paragraph 46 to 48

The content is noted.

30.

Ad paragraphs 49 to 50

30.1 I note the content herein;

30.2 I reiterate that I am not involved in the institution of a prosecution or the subsequent criminal trial. That is within the purview of First Respondent;

30.3 in the circumstances, I deny the allegations herein insofar as they relate to me;

30.4 I am advised that some of the averments made herein will be addressed in legal argument at the hearing of this application.

31.

Ad paragraphs 51 to 66

The content is noted as being relevant to First Respondent.

32.

Ad paragraph 67

I have been advised that submissions will be made in argument as to the legal authorities pertaining to the issues raised in this application, which include, *inter alia*, some of the following:

32.1 the Constitutional Court has formulated a test to determine whether a permanent stay of prosecution should be granted. The test includes an analysis of the conduct of all the parties and a weighing up of

TM 11/26

factors such as the length of the delay, reasons given for the delay, prejudice to the accused and accused's assertion of his right to a speedy trial;

32.2 the delay relates to the period between when an accused was charged and the beginning of the trial;

32.3 the pertinent enquiry here is whether Applicant was an "accused person" at any time throughout the 47year period that is in issue;

32.4 the Constitutional Court and the Supreme Court of Appeal have held that the staying of prosecution is a *"drastic remedy"* because barring the prosecution before the trial begins is far reaching.

33.

I am advised that it will be argued that the allegations made by Applicant herein, do not make out a basis for the relief sought.

WHEREFORE, I submit that the application be dismissed with costs.

DEPONENT

The Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to at Pretoria. before me this 26 day of November 2018 and that the provisions of the regulations contained in Government Notices R1258 of 21 July 1972 and R1648 of 16 August 1977 having been complied with.

SOUTH AFRICAN POLICE SERVICE
LEGAL SERVICES DIVISION
HEAD OFFICE
2018 -11- 26
HOOFKANTOOR
REGSDIENSTE AFDELING
SUID-AFRIKAANSE POLISIEDIENS

0488305
DeSwardt
Capt.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS
EX OFFICIO: SA POLICE SERVICE
PRESIDIA BUILDING,
255 PAUL KRUGER STREET
PRETORIA

290

TMM 1

F 3/16/1

file to



OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
CAPE TOWN
2016 -11- 03
CAPE TOWN
OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6750
Email: ndpp@npa.gov.za
www.npa.gov.za

MINISTERIAL MEMORANDUM

TO : **T. M. MASUTHA, MP (ADV)**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FROM : **ADV. S.K. ABRAHAMS**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT : **REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT, 58 OF 1959 TO REOPEN THE INQUEST INTO THE DEATH OF AHMED TIMOL.**

DATE : **25 OCTOBER 2016**

1. PURPOSE

The purpose of this memorandum is to request the Honourable Minister of Justice and Correctional Services to invoke the provisions of Section 17A of the Inquest Act 58 of 1959, by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge to reopen the inquest into the death of Ahmed Timol (*'Timol'*).

MINISTRY OF JUSTICE AND CORRECTIONAL SERVICES
PRETORIA
2016 -11- 07
PRETORIA
MINISTERIE VIR JUSTISIE EN KORREKTIEWE DIENSTE

2. BACKGROUND

2.1. In Timol v The Magistrate of Johannesburg 1972(2) SA 281 (T), the Court *inter alia* held that:

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"... the inquest must be so thorough that the public and interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".

2.2 Timol was a member of the Communist Party who was detained on 22 October 1971 by the Security Branch of the then South African Police at the notorious John Vorster Square Police Station.

2.3 On 27 October 1971 he died in detention while under interrogation by members of the Security Branch.

2.4 According to his interrogators, Timol is alleged to have committed suicide by jumping out of a window on the 10th floor of the John Vorster Square Police Station building in Johannesburg.

2.5 The then Attorney General, Johannesburg, declined to prosecute and a formal inquest was held before a Johannesburg Regional Court Magistrate under reference Johannesburg 2361/71, which handed down a verdict that Timol had committed suicide and that the Police were not responsible for his death. The inquest commenced in late April 1972 and concluded on 22 June that same year.

2.6 The evidence comprised almost entirely of the Police Officers involved in his arrest, detention and interrogation, along with the medical evidence.

2.7 Due to the prevailing situation at the time, persons who were in detention or in exile did not testify. This resulted in the Regional Magistrate finding that Timol had committed suicide and had not been assaulted or ill-treated by the Police prior to his death.

2.8 The Regional Magistrate's finding was criticised by human rights organisations. Notwithstanding this, no further action was taken.

2.9 In addition, no one applied for amnesty for Timol's death during the Truth and Reconciliation Commission ('*TRC*').

2.10 As a result of representations received by the Priority Crimes Litigation Unit ('*PCLU*') in my office, the Directorate for Priority Crime Investigation ('*DPCI*') were requested to reopen the investigation into Timol's death.

2.11 It would appear that there is compelling new evidence relating to the torture, which if considered could result in a different finding.

2.12 In this regard, Dr Salim Essop ('*Essop*'), who was arrested with Timol on 22 October 1971, and who was subjected to severe torture at the hands of the self-same members of the Security Branch, was never permitted to testify at the ~~in~~ the inquest into Timol's death.

2.13 In short, Essop, who had been subjected to severe torture at John Vorster Square Police Station to the extent that he was rendered unconscious on numerous occasions, collapsed again on the morning of 26 October 1971, whereafter he was examined by a district surgeon. Whilst unconscious he was taken to the General Hospital in Johannesburg by ambulance where he received emergency medical treatment. Although still in an extremely fragile condition, he was thereafter taken to HF Verwoerd Hospital in Pretoria.

TM 2018/11/

2.14 Essop was later taken to Pretoria Central Prison where he was held *incommunicado*. He was thereafter secretly admitted into hospital and later to a prison hospital where he remained until his first court appearance in the Johannesburg Magistrate's Court on 8 March 1972 whereafter he was remanded in custody. On 13 June 1972 he was indicted on terror related charges along with three other co-accused in the Pretoria Supreme Court (as it was known then).

2.15 Essop's trial ended on 31 October 1972 when he and his co-accused were convicted on terror related charges and sentenced to five years' imprisonment.

2.16 At no stage did Essop present the facts of his torture during any judicial proceedings in the Republic of South Africa, nor was he afforded the opportunity to do so.

2.17 Recently, in a 37-page affidavit dated 14 October 2016, Essop extensively explains the circumstances of his and Timol's arrest and his subsequent harrowing brutal torture and inhumane treatment at the hands of members of the Security Branch.

2.18 Essop's eye witness account of Timol's condition at the time of their arrest, his own torture and assault at the hands of the Security Branch Police, contradicts the version of the members of the Security Police in so far as their treatment of Timol and the injuries sustained by him.

3. THE RELEVANT LEGISLATION

3.1 Although there is more than one section of the Inquest Act 58 of 1959 that can be used to reopen an inquest, the most applicable is Section 17A, which reads as follows:

T.M 11/10/2018

> *"(1) The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court to designate any judge of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."*

3.2 There are compelling reasons as summarised above along with the high public interest in this matter to motivate for the reopening of the said Inquest.

3.3 Essop is a very credible and relevant witness who was not afforded an opportunity to provide his evidence during any judicial proceedings. The probability exists that there is a real likelihood that his version could result in a court coming to a different finding as to the circumstances surrounding the death of Timol than that of the Regional Magistrate Johannesburg in 1972.

3.4 As such, the interests of justice would justify the reopening of the Inquest into the death of Ahmed Timol.

3.5 The Acting Special Director of Public Prosecutions and Head of the PCLU have consulted with the Directors of Public Prosecutions (DPPs) of South and North Gauteng in terms of the provisions of Section 24(3) of the National Prosecuting Authority Act 32 of 1998. Both DPPs are in agreement and have recommended that the Honourable Minister be requested to invoke the provisions of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South

T M 2018/11/

Africa to designate a judge to reopen the inquest into the death of Ahmed Timol.

4. RECOMMENDATION

4.1 It is recommended that the Honourable Minister of Justice and Correctional Services invoke the provision of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge of the High Court to reopen the inquest into the death of Ahmed Timol.

4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.

Yours sincerely

ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 25-10-2016

PARAGRAPH 4: SUPPORTED / NOT SUPPORTED

ADV. M. DONSELA, Esq
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 02/11/2016

TM 2016

4. RECOMMENDATION

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4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.

✓

PARAGRAPH 4: RECOMMENDED/ NOT RECOMMENDED

MR J. JEFFERY, MP
DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 3/11/16

PARAGRAPH 4: APPROVED/NOT APPROVED

LETTER NOT SIGNED - IT NEEDS AMENDMENT

T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
DATE:

TM 2016/11/26

297

Thm 2

MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA
Private Bag X 276, Pretoria, 0001, Tel: (012) 357 8600, Fax: (012) 406 4990
Private Bag X 369, Cape Town, 8000, Tel: (021) 467 1700, Fax: (021) 467 1730

Judge President D Mlambo
Gauteng Provincial Division
Private Bag X67
PRETORIA
0001

Dear Judge President Mlambo

REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT 58 OF 1959 TO APPOINT A JUDGE TO REOPEN THE INQUEST INTO THE DEATH OF AHMED ESSOP TIMOL:

JOHANNESBURG INQUEST NUMBER 2361/71

1. Section 17A(1) of the above Act reads that:

   "The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."

2. In reference to the above, I attach hereto a copy of a memorandum received from the National Director of Public Prosecutions ("National Director"), requesting that I invoke the provisions of Section 17A(1) of Act 58 of 1959 in pursuance of reopening the inquest into the death of Mr Ahmed Essop Timol.

3. I have carefully considered the request by the National Director and I am satisfied that the interests of justice would be best served by the reopening of the inquest as contemplated in Section 17A(1).

4. I would be most grateful if you could designate a judge within your division to reopen the inquest into the death of Mr Ahmed Essop Timol.

TM 2018/11/26

5. The National Director will ensure that a prosecutor and all the evidence is made available once a judge has been appointed.

Yours sincerely

T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE & CORRECTIONAL SERVICES
DATE: 17/01/2013

2008/11
TM

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

FILING SHEET

DOCUMENT: Replying affidavit in response to second respondent's answering affidavit

Nature: Opposed Motion

Filed by:

BEN MINNAAR ATTORNEYS
ATTORNEYS FOR THE APPLICANT
190 Melt Marais Street
Wonderboom AH X1
Pretoria
E-Mail: benjaminnaar@gmail.com
TEL:082 4462644
REF: BM 01/09/18

TO: **THE REGISTRAR OF THE HIGH COURT**
PRETORIA

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
First Respondent
C/O State Attorney
316 Thabo Sehume Street
SALU Building
Pretoria
Ref: Peter Seleka

Served by e-mail as agreed to:
Pseleka@justice.gov.za;

AND TO: **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
Second Respondent
C/O State Attorney

316 Thabo Sehume Street
SALU Building
Pretoria
Ref: Peter Seleka

Served by e-mail as agreed to:
Pseleka@justice.gov.za

AND TO: **THE MINISTER OF POLICE**
Third Respondent
C/O State Attorney
316 Thabo Sehume Street
SALU Building
Pretoria
Ref: Peter Seleka

Served by e-mail as agreed to:
Pseleka@justice.gov.za;

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

REPLYING AFFIDAVIT IRO SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JOAO RODRIGUES

do hereby declare under oath as follows:

F 50

1.

1.1. I am an adult pensioner presently residing at 835 Eleventh Avenue, Wonderboom South, Pretoria, Gauteng. I have been residing at the address for the past 54 years.

1.2. The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary, and are both true and correct.

AD ANSWERING AFFIDAVIT: SECOND RESPONDENT:

2.

AD PARAGRAPHS 1 AND 2 THEREOF:

Apart from denying that the legal submissions made in the affidavit are correct in all regards, I take note of the further allegations contained in these paragraphs.

3.

AD PARAGRAPHS 3 AND 4 THEREOF:

3.1. It is correct that the initiation of a Prosecution and the conduct of a criminal trial is the prerogative of the First Respondent.

3.2. I have, however, been advised that the Second Respondent, as the Minister of Justice and Correctional Services, had an interest in the matter as the Cabinet member responsible for the administration of Justice.

3.3. I am further advised that the First Respondent has to determine prosecution policy and issue policy directives but he has to do that with the concurrence of the Second Respondent. This is provided for in section 21(1) of the National Prosecution Authority Act, Act 32 of 1998 ("NPA Act").

3.4. I am further advised that the First Respondent has to advise the Second Respondent on all matters relating to the administration of criminal justice as provided for in section 22(4)(a)(iii) of the NPA Act.

3.5. I am also advised that section 33 of the NPA Act provides that the Second Respondent shall, for purposes of section 179 of the

Constitution, exercise final responsibility over the Prosecuting Authority in accordance with the provisions of the NPA Act.

3.6. I therefore deny that the relief sought against the Second Respondent in this application is ill conceived either as alleged or at all.

4.

AD PARAGRAPH 6 THEREOF:

I deny that all the facts set out in Annexure "PMM1" are correct in all respects. I am, however, advised that I am not relying on the decision to re-open the inquest as part of the grounds for the relief sought. As is set out in the founding papers the application is based on the long delay since 1971 to institute a prosecution and the fact that the Prosecution ignored findings by the re-opened inquest without any basis therefore.

5.

AD PARAGRAPH 13 THEREOF:

5.1. I am advised that it is correct that this application is indeed an application in terms of section 35 of the Constitution and not an application in terms of section 342A of the Criminal Procedure Act.

5.2. It is not my case that there was an unreasonable delay caused by the Prosecution after the decision was taken earlier this year to prosecute me. The basis for my complaint is the material delay in the Prosecution prior to the present decision to prosecute me.

6.

AD PARAGRAPH 15 THEREOF:

I deny that this Court is not the proper forum to resolve the present issues raised in the application papers. Legal argument will be addressed to the Honourable Court at the hearing of this matter in this regard.

7.

AD PARAGRAPH 21 THEREOF:

I deny that the findings of the re-opened inquest have been incorrectly stated. The full judgment will be available during the hearing of this matter and the Honourable Court will be referred to it insofar as it may be relevant.

8.

AD PARAGRAPH 30 THEREOF:

I refer the Honourable Court to what I have already stated in this regard hereinbefore.

9.

AD PARAGRAPH 32 THEREOF:

It is correct that the approach that a Court should follow when considering al permanent stay of prosecution has been formulated previously by our Courts. I am advised that a proper case has indeed been made out in the founding papers for the relief sought. I am further advised that this issue will be fully addressed during argument of this application.

10.

I therefore persist with the relief set out in the notice of motion.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 03 December day of DECEMBER 2018 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

COMMISSIONER OF OATHS

FULL NAMES: Thou B. Phaha
BUSINESS ADDRESS: PTA Moot SAPS 17th Avenue SSC
AREA: Rietfontein
DESIGNATION: 0084

SUID-AFRIKAANSE POLISIEDIENS
VISPOL
2018 -12- 03
PRETORIA MOOT
SOUTH AFRICAN POLICE SERVICE

IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,

PRETORIA

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

OF SOUTH AFRICA **FIRST RESPONDENT**

MINISTER OF JUSTICE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned:

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below:

1. INTRODUCTION

1.1 I am an admitted advocate of this Honourable Court and a member of the personnel of the National Prosecuting Authority (NPA) with offices at the Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. I am the Acting Special

Director of the Priority Crimes Litigation Unit in the offices of the NPA. I make this affidavit on behalf of the First Respondent in this application to answer some of the submissions of the Applicant.

1.2 The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context and are both true and correct.

1.3 I am competent to depose to the contents of this answering affidavit for purposes of opposing the relief which the applicant seeks.

1.4 I have read the founding papers and wish to inform the Honourable Court that I oppose the application on behalf of the First Respondent.

1.5 I further wish to inform the Honourable Court that I will only deal with the facts and principles relating to matters that I was personally involved in. I will refrain from dealing with allegations against Second and Third Respondents and/or submissions made relating to them as well as matters relating to further particulars and the framing of the charges which was handled by the Director of Public Prosecutions South Gauteng. I will leave it to themselves and their legal teams to deal with allegations against them which do not have a direct bearing on the case against the National Prosecuting Authority and my involvement.

1.6 I am not part of the present prosecuting team but the prosecution is done by South Gauteng Division under the Director of Public Prosecutions, Adv. A Chauke. I therefore do not address the matter of further particulars and/or the framing of charges as I am not personally involved in these matters. These matters will be

addressed in the confirmatory affidavit of Adv R Du Toit, a senior Deputy Director of Public Prosecutions in the Johannesburg Office.

1.7 In my career I have been involved in a number of matters relating to state sponsored violence and covering up of such offences by those involved. Since the Goldstone Commission I have been involved in the investigation and prosecution of matters like the case of EA De Kock (Vlakplaas), - Dr Wouter Basson (chemical biological warfare) and a number of other matters like the Samora Machel plane incident and the Smit murders. These matters constitute extra-ordinary cases. Witnesses are reluctant to come forward, there is a conspiracy to silence and it takes a long time to solve these matters and to obtain the necessary evidence to prosecute any person.

I have considered the contents of the applicant's founding papers and I respond thereto below.

2. THE CONTEXT OF THE APPLICANT'S PROSECUTION

2.1 This application must be considered with due regard to the context of the applicant's prosecution.

2.2 The applicant's prosecution emanates from the criminal offences committed by the apartheid government, in particular members of the then South African Police, against those who opposed it.

2.3 With the advent of the new democratic dispensation in 1994, the Government of National Unity set up the Truth and Reconciliation Commission (TRC) to deal with what happened under Apartheid. The TRC was based on the Promotion of National Unity and

Reconciliation Act, No 34 of 1995. One of the main purposes of this policy was to enable the perpetrators of the aforesaid crimes to come forward, make full disclosure of the nature and extent of the offences committed against the victims and their families and to then seek forgiveness and amnesty from prosecution.

2.4 The mere fact that amnesty from prosecution was required is a clear indication that it was considered that unless same was granted, prosecution would follow where a perpetrator was identified as having committed criminal offences. The applicant did not participate in the aforesaid reconciliation process despite being invited to do so. It would then follow that neither was he granted any amnesty.

2.5 The provisions of the abovementioned Act was intended to address the injustices of the past perpetrated by the apartheid government. It is for this reason that the preamble to the Constitution reminds the people of South Africa that they must not only recognize the injustices of the past, but they must also honour *"those who suffered for justice and freedom in our land"* and respect *"those who have worked to build and develop our country"*.

2.6 In the context of this case, and in order to give meaning and effect to the Constitution, one must ask as to *"who suffered for justice and freedom in our land"* and who must be respected for having *"worked to build and develop our country"*. The answer to this painful question is Mr. Ahmed Essop Timol ("Mr Timol").

2.7 There is no dispute that Mr Timol was arrested for his political activism which formed part of the fight *"for justice and freedom in our land"* and the work *"to build and develop our country"*. The Constitution obliges us to honour his ultimate sacrifice. He is not the only martyr who made this sacrifice.

2.8 The available evidence accepted by the 2017 inquest Court was to the effect that Mr. Timol was subjected to pain and suffering after his arrest. Mr Timol accordingly *"suffered for justice and freedom in our land."*

2.9 The plight and suffering of the family of Mr. Timol ("the Timol family") cannot be ignored. Neither can the continued suffering be tolerated by the repeated denial to the truth of what really transpired in the final hours of Mr Timol's life. Justice demands that the evidence against the Applicant be presented by the State and that the Applicant be given the opportunity to state his case.

2.10 In his application, the applicant seeks an order, the effect of which would be to effectively deny the people of the Republic of South Africa the right to justice, the right to know the truth of what happened to their loved ones, and in particular, deny the Timol family the justice which the Constitution promises and to which they are entitled to.

THE ORIGINAL INQUEST OF 1972

2.11 There could not have been a prosecution in 1971 immediately after Mr. Timol' s death because:

2.11.1 The original inquest did not hear all the evidence relevant to Mr Timol' s death, in particular, the evidence of the only other person who was in company of Mr Timol on the evening of their arrest, namely Dr Saliem Essop. Not only would he have shed light on exactly what had transpired from the moment of their arrest until his subsequent hospitalization in a comatose state a day before Mr Timol died. His evidence would have revealed the stark reality of severe brutality and human rights abuses at the hands of the very police officers who were supposed to have protected them.

2.11.2 No other civilian witnesses who were detained, at least 55 in all, were ever called to testify. Their evidence would have revealed similar fact evidence of severe assaults and interrogation that they were subjected too repeatedly for months whilst held in communicado.

2.11.3 The original inquest was unsatisfactory which reflected just how well orchestrated and well protected members of the security branch were. Mr Timol was not the first person to die in custody. Neither was he the last. Especially so at the notorious John Vorster Square Police Station. Had there really being a

concerted effort made to expose the reality of how Mr Timol died, the court would have acknowledged that there was a startling similarities in the cause of deaths of the number of detainees at John Vorster Square under the very control of the Security Branch police officers.

2.11.4 No evidence of the improbabilities of Mr Timol's physical ability to jump to his death was ever presented. In fact, apart from the parents of Mr Timol, and one or two unrelated witnesses, the State's case comprised only of security branch police officers.

2.11.5 The inquest court with respect ignored material evidence which included the evidence of the mother of Timol who informed the court that she had been told by the members of the security branch that her "child was being given a hiding" because she did not give him a hiding. The conversation to more- or- less that effect was not denied by the Security Branch police. In fact, the police officers went out of their way to convince the court that Timol was treated as a decent human being and had no injuries. This can hardly be accepted especially in view of our troubling past and the human rights violations at the height of Apartheid.

2.11.6 Furthermore, it is not as if there was no dispute about ante and post -mortem injuries on the body of the deceased during the inquest. In fact the only issue was when it had been sustained.

2.11.7 Furthermore, even then there were conflicting versions presented by the Applicant and the witnesses for the State, the police officers themselves, as to exactly how Mr Timol died. That should have immediately raised red flags. The presiding officer concluding, with no evidence, that Mr Timol must have been involved in a brawl prior to his arrest, was without any rational basis.

2.11.8 The original inquest held that no *"living person is responsible for"* Mr Timol's death.

2.11.9 It also concluded that Mr Timol committed suicide;

2.12 On the basis of the above conclusions, the State could not prosecute any person; alternatively, it decided not to prosecute any person, because the only process established to identify a possible accused concluded that there was no *"living person"* to prosecute.

2.13 During the first inquest, the applicant gave evidence to the effect that he was not responsible for Mr. Timol' s death and that Mr. Timol jumped out of window of the famous (or infamous) Room 1026 of the then John Vorster Square Police Station. It concluded that Mr Timol died after he committed suicide on 27 October 1971.

THE RE-OPENED INQUEST OF 2017

2.14 The second inquest was re-opened as a result of the Timol family's tireless efforts to find closure to the painful circumstances under which Mr Timol died.

2.15 The aforesaid efforts led to the Timol family approaching the first respondent *"with information that was not placed before or considered by the Magistrate conducting the inquest in 1972."* [See paragraph 4 of the 2017 inquest Court judgment]. It is this information which led to the re-opening of the second inquest, referred to herein as the 2017 inquest.

2.16 In paragraphs 10 and 12 of the 2017 inquest Court judgment(Annexure X) , the following is stated:

> *"10. This monumental task of re-opening the 1972 inquest was largely simplified by the evidence of witnesses who testified orally in court. The court is indebted to these witnesses as well as those who submitted affidavits. In particular, this court recognizes the courage with which the witnesses, who are former detainees, were able to share with this court and through this court, the public, as to how they had to endure abuse, humiliation and torture at the hands of the Security Branch. Their contribution has been of tremendous assistance to [these] proceedings.*
>
> ...

12. *It is through the persistent effort of Mr Imtiaz Cajee that this historic sitting of the re-opened inquest occurred. His efforts should be emulated as an example of how citizens have to assert their rights."*

2.17 In paragraph 15 of its judgment, the 2017 inquest court quoted from Marais NO v Tiley 1990 (2) SA 899 (A) that:

"... The underlying purpose of an inquest is to promote public confidence and satisfaction to reassure the public that all death from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences and so that persons responsible for such death may, as far as possible, be brought to justice ..."

2.18 The criminal trial which the applicant desperately seeks to avoid, permanently, is intended to serve the purpose of an inquest as described in *Marais NO*, i.e. *"to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences and so that persons responsible for such deaths may, as far as possible, be brought to justice ..."*

2.19 The 2017 inquest Court further said the following in its judgment:

"339. The inquest also revealed that there are many more families which are seeking closure on the unanswered questions concerning the death of their relative in

detention. They, like all families whose relatives died in detention, need healing. They need closure.

340. It is thus the view of this court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened ..."

2.20 The reference to *"death of their relative in detention"* referred to in paragraph 339 of the 2017 inquest Court judgment is a reference to the deaths of detainees at the hands of the apartheid government security branch police. These deaths occurred decades ago, and very few perpetrators were prosecuted for those deaths that resulted from criminal action. It is for this reason that the 2017 inquest Court correctly said that the *"many more families"* affected by this death *"should be assisted"*.

2.21 If the relief which the applicant seeks in this application is granted on the grounds relied upon by him, it would necessarily follow that there would be no purpose of assisting the *"many more families"* affected by the *"death of their relative in detention"* if the perpetrators are going to be entitled to a permanent stay of prosecution on the grounds that the applicant relies upon in this present application. In the premise, the outcome of this case will influence the direction

which the first respondent will take in relation to the cases of the *"many more families who are seeking closure on their unanswered questions concerning the death of their relative in detention."*

2.22 In simple terms, if this application succeeds on the grounds relied upon by the applicant, which grounds would potentially be available to other perpetrators in his position, no purpose would be served by the re-opening of other similar inquests and there are *"many more families"* affected by deaths in detention. In this regard, I attach hereto as **JPP 1** a supporting affidavit provided by one of the "*many more families*" contemplated in the 2017 inquest Court judgment.

2.23 When regard is had to the above context, it is not in the interests of justice for the applicant to be granted any of the relief which he seeks. This is more so when regard is had to the fact that the applicant is the last person to see and be with Mr Timol before Mr Timol allegedly got out of Room 1026 through the window.

2.24. The position as it stands is simple. There are two mutually destructive versions which the court will be faced with. On the one hand is the State's case which avers that Mr Timol sustained at least 35 noted injuries, 27 of which were sustained ante-mortem. On the other hand, the Applicant maintains his 47 year old version with some consistency. He maintains that the deceased was fine, healthy and in good spirits. It is only the trial court which can decide whether Mr Timol, with extensive

bruising, a depressed skull fracture, a fractured left jaw, a dislocated left ankle, and extensive bruising on his body amongst other injuries was able to easily outrun and out maneuver the Applicant in a matter of seconds, open the window of the room where he was detained in, and jump out, landing a few meters from the wall of the police station.

3. THE RELIEF IS NOT COMPETENT

3.1 Before responding to each of the allegations contained in the applicant's founding affidavit, it is necessary that I set out the basis on which the first respondent contends that the relief which the applicant seeks in this application is not sustainable in law.

3.2 In his notice of motion, the applicant seeks five orders, all of which are aimed at achieving a permanent stay of his criminal proceedings. What the applicant seeks is an order to the effect that he shall not be prosecuted for any crime in relation to the death of Mr Timol.

3.3 At the centre of the applicant's case for a permanent stay of his criminal trial is an allegation that his right to a fair trial envisaged in section 35(3) of the Constitution and read with section 342A of the Criminal Procedure Act 51 of 1977 ("the CPA") has been violated by the State. I deny that this is so.

3.4 On the facts pleaded by the applicant, there is nothing to justify the conclusion that the applicant has suffered any trial prejudice or that he cannot have a fair trial at all, i.e. that a fair trial would be impossible.

3.5 Section 35(3) of the Constitution provides that:

"35. *Arrested, detained and accused persons*

(1) ...

(2) ...

(3) Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defense;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the

offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

..."

3.6 The applicant has not made out a case to establish that any of the above listed rights have been violated – and even if they have been violated, which is denied, that they have been irreparably violated such that there is trial prejudice and that it would be impossible for him to exercise any of the above listed rights so as to enable him to have a fair trial.

3.7 In paragraph 7 of his founding affidavit, the applicant says that the pending criminal prosecution against him will infringe the following of his rights promised in section 35(3) of the Constitution:

3.7.1 the right to have a fair trial that is procedurally fair and is not instituted with an unlawful or improper motive;

3.7.2 the right to have the trial to begin and be concluded without unreasonable delay;

3.7.3 the right to be informed of the charge against him with sufficient detail to answer it;

3.7.4 the right to adduce and challenge evidence effectively;

3.7.5 the right to remain silent and not to incriminate oneself.

3.8 None of the applicant's aforesaid rights have been violated or irreparably violated. I demonstrate this below.

Fair trial without unlawful or improper motive: (also ad par 42 and 37)

3.9 The applicant does not define these two concepts: unlawful of improper motive. An unlawful motive is one which is not authorized by law. An improper motive is a motive which is not related to the purpose for which the power to prosecute is exercised.

3.10 In paragraph 42 of his founding affidavit, the applicant says that his allegation of unfair, improper and unlawful motive is based *"on the charges as formulated in the indictment, more in particular the first count of murder ..."* In this regard, the applicant says that the charge of murder *"is therefore directly in contrast with the findings of the court in the judgment relating to the inquest."* This will be answered by Adv Du Toit in his confirmatory affidavit.

3.11 In paragraph 37 of the founding affidavit the applicant also avers that the First Respondent request for an reopening of the inquest was inherent unfair and unlawful in the light that the relevant facts already concluded that the NPA would prosecute the applicant or were in a position to take such a decision if they properly applied their minds;

3.11.1 I deny that at the time of the request for the re-opening of the inquest that I had already concluded that the National Prosecuting Authority would prosecute the Applicant or anybody else or that we were in such a position to take such a decision if we properly applied our minds. The prosecution team and I were of the opinion that there was no reasonable prospect of success to prosecute any person at that stage. In fact it was only after the inquest was re-opened and two weeks before the re-opened inquest on the 26th of June 2017, after information was received on the whereabouts of the Applicant, that it was ascertained that the Applicant was alive and had been utilizing a different name. On a public holiday just before the inquest was reopened, I personally with the investigating officer, Captain Ben Nel, informed the applicant of his constitutional rights at his house, informed him to obtain legal representation and in fact ensured that I arranged for the legal representative to be present at the inquest when it re-opened. That much is evident from the record. I absolutely deny that we destroyed his right to remain silent. That right was always available to him and is borne out by the record of the inquest where he was repeatedly warned, in the present of both his present counsel of his rights and the implications of him testifying.

THE ALLEGED UNREASONABLE DELAY

3.12 There is no merit in the applicant's suggestion that there has been an unreasonable delay in commencing and concluding his criminal trial.

3.13 Mr Timol passed away on 27 October 1971. The Applicant was arrested and indicted on 30 July 2018. There are two time periods that need to be scrutinized namely a pre-trial phase and a trial phase.

3.14 Section 35(3) (d) promises a right *"to have their trial begin and conclude without unreasonable delay."* Unlike its predecessor in the interim Constitution, section 35(3) (d) does not say that the reasonableness of the time to commence and conclude a trial must be assessed with reference to the *"time after having been charged"*.

3.15 Despite the above, the correct position is that a trial can only commence after an accused person has been charged. Accordingly, the unreasonableness of any delay, of which there is none in this case, must be assessed with reference to the time after the applicant was charged with murder. Once this is done, it will become clear that there has not been any delay, let alone an unreasonable delay. Since the verdict of the 1972 inquest court was overturned, it took a mere nine months to enroll the matter for trial. This can hardly be termed a lengthy, unreasonable delay. Further, there were no lengthy opposed bail applications. The Applicant was

warned to hand himself over on the very day he was arrested and charged. He was immediately charged and brought to court on the same day. The indictment was served on the same date. The matter was transferred to the High court and set down for pre-trial issues to be dealt with. And that is when the delay, caused by the Applicant, started.

3.16 The applicant's version about when he was charged and the events thereafter is that:

3.16.1 he *"was arrested on these charges on the 30th July 2018 and brought before the Regional Court in Johannesburg"*;

3.16.2 On the same date of his first appearance, and at an unopposed bail application, the matter was transferred to the High Court. He appeared for the first time in the High Court on 18 September 2018. On 18 September 2018, he informed the court that he wishes to bring an application for a permanent stay of prosecution. The matter was then postponed to 15 October 2018 for a pre-trial conference to take place and for the application.

3.16.3 he requested further particulars from the State on 1 October 2018;

3.16.4 he received the State's reply to his request for further particulars on 5 October 2018;

3.16.5 he delivered an application to compel further and better particulars on 12 October 2018;

3.16.6 He, obviously through his legal representatives, attended a formal pre-trial on 12 October 2018.

3.17 In addition to the above, the applicant attended Court on 15 October 2018. The application for the permanent stay had still not been served on the NPA. The matter was postponed to 22 October 2018. The applicant's legal team then *"undertook to finalize this application and have it issued by 19 October 2018."*

3.18 In the light of what is stated above, there is no delay, let alone an unreasonable delay, in commencing the applicant's criminal trial. On his own version, the applicant was only charged in July 2018 and he launched this application on or about 19 October 2018. This being the case, it cannot be concluded that the period between August 2018 and September 2018 that the trial had not commenced, constitutes an unreasonable delay in commencing the trial to justify a permanent stay of the applicant's prosecution.

3.19 The question of unreasonable delay does not in fact even have to be entertained because during the period complained of, the applicant himself had been meaningfully engaging with the State on the conduct of his trial by, amongst others, requesting further particulars and receiving such particulars and thereafter bringing an application to provide further and better particulars. In the premises, it cannot be

said that the State has negligently forgotten to bring the applicant to trial so as to justify a conclusion that there has been an unreasonable delay.

3.20 In paragraph 49 of his founding affidavit, the applicant raises a new issue which is not based on section 35(3) (d) of the Constitution. Therein, the applicant says that the first respondent *"failed to act in a diligent manner in coming to a decision to institute a prosecution against me."*

3.20.1 Section 35(3) (d) does not apply to the process leading up to the taking of the decision to institute criminal proceedings against an accused. The sub-section is very clear – it talks about the beginning and conclusion of a trial without unreasonable delay. It says absolutely nothing about the decision to prosecute. On a proper reading of section 35(3) (d) an accused person can only complain if a trial does not begin within a reasonable time – that reasonable time can only be assessed with reference to the date on which the accused person was charged. This is so because a criminal trial cannot begin until such time that an accused person has been charged.

3.20.2 Section 35(3) (d) is concerned with the commencement and conclusion of the criminal trial and not with the decision to prosecute.

3.20.3 Even if this is so, the offences with which the applicant has been charged, one of which is Murder read with Section 51(1) of Act 105 of 1997, does not prescribe. In terms of section 18 of the Criminal Procedure Act 51 of 1977, the right to institute a prosecution for any offence....other than the offences of ....(a) Murder....shall unless some other period is expressly provided for by the law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

3.20.4 The State is in law entitled to charge a person with that offence as soon as it is ready to do so – when the State has evidence that the relevant accused person *prima facie* committed the offence.

3.20.5 The State was not ready to charge the applicant at any time before July 2018 when he was charged. The time that had lapsed since the commission of the offence was 47 years.

3.20.6 The applicant does not suggest with reference to admissible evidence that the State had evidence of his guilt and full participation in the killing of Mr Timol all along. All he says is that Mr Cajee, the nephew of Mr Timol had furnished information in respect of his murder to the NPA in as early as 2002.

3.20.7 It is clear that only once the family members met with the NDPP that a decision was taken to present new evidence in a democratic South Africa.

3.20.8 The applicant must now know that new evidence which includes similar fact evidence of fellow detainees and medical and trajectory evidence, amongst other evidence presented, draws one to the conclusion that Mr Timol could not have jumped out of the window of room 1026. In fact, the most likely scenario was that he was in all probability rolled from the roof of John Vorster Square. In paragraph 19.16 of his founding affidavit, the applicant acknowledges the discovery of some new evidence. Therein, he says the following:

"... Basically, the only material of recent origin relates to medical evidence from pathologists, with reference to the injuries and death of the deceased and expert evidence relating to the probable trajectory of the body falling from the tenth floor and/or roof of the building to the ground.

3.21 The applicant deals with the issue of undue delay in paragraphs 44 to 50 of his founding affidavit. There is nothing contained in these paragraphs to suggest that:

3.21.1 the commencement of the trial was unreasonably delayed;

3.21.2 the State charged the applicant and thereafter neglected to commence the prosecution.

3.22 There is no merit in the applicant's suggestion that *"all material witnesses have passed away and I will not be in a position to consult with these witnesses and/or to adduce evidence"* because:

3.22.1 the applicant's version has been somewhat consistent with his version since 1971 in the statement he made to the investigating officer, his evidence at the 1972 inquest, and the evidence he gave at the re-opened inquest in 2017. He has been consistent in saying that there were only two people in the room, he and the deceased. That he was the last person to see the deceased alive. That there was nothing wrong with the appearance or demeanor of the deceased. And that the deceased outran (and outmaneuvered) him and jumped through the window of room 1026. For this reason, he is the only person who saw that fateful event and there are therefore, no other witnesses who were present there will be able to take his case any further.

3.22.2 On his own version, the applicant saw Mr Timol before he died and there is no reason why he himself cannot testify about exactly what transpired during the final minutes of Mr Timol' s life.

3.22.3 Further, that the witnesses who the State intends to call are well and available to testify. That again, this is mere conjecture in an attempt to quash charges.

3.22.4 the applicant's perceived future loss of memory also does not take the matter any further when regard is had to the fact that the applicant's version is already on record and that it remains the same as it was in 1971 and 1972;

3.22.5 the applicant remains free to employ his own medical expert pathologists to study the post mortem reports and provide him with new expert evidence to the extent that he requires the same. In addition, the applicant remains free to challenge any evidence presented by the State. That is his prerogative and right in a democratic South Africa. Further he is in a very fortunate position when he has three counsels and access to experts, none of whom he funds personally.

3.23 It must always be borne in mind that our political dispensation is unlike most other countries. Offences committed in turbulent times, by those charged with protection of its citizens are often brought to justice, albeit decades later. South Africa is no different. It is expected that there might be other factors at play. In paragraph 341 on page 128 of the Re opened inquest the honourable Judge Mothle refer to the improper "*role played by some in the magistracy, prosecuting authorities and medical experts in the past inquest proceedings. Bizos's evidence reveals the role of some of these public officials in being complicit in exonerating members of the Security Branch from the crimes they committed. The 1972 inquest*

into the death of Timol is one such example. From the outset, it had to take a Court order to allow Timol' s family and their lawyers access to case documents, before the inquest commenced. The evidence of the 1972 inquest furthers demonstrate how the prosecution made no effort to obtain evidence other than that of the police and the magistrate attempting to explain away the ante mortem injuries, without any shred of evidence supporting his statement about a brawl." However, the very people who now ask for justice to take its course must be heard. This is a unique case, with a unique set of circumstances which resulted in a historic overturning.

3.24 In the premise, there was no unreasonable delay in commencing the applicant's trial. There is also no irreparable trial prejudice. Once the verdict turned on new evidence, it set in motion criminal proceedings.

3.25 In addition and in any event, section 342A of the CPA requires the trial court itself to investigate any delay in the completion of criminal proceedings which appears to it to be unreasonable and could cause substantial prejudice to both parties. The applicant has not correctly invoked this section. In addition, the applicant has not made out a case that the issues listed in section 342A (2) of the CPA ought to be decided in his favour – he cannot make out such a case without placing the necessary facts before the court.

3.26 In the circumstances, there is no merit in the suggestion that there has been an unreasonable delay and this point ought to be rejected. Section 35 does not lay down a remedy but it could hardly have

been the intention in each and every case where there has been a delay, even if unreasonable, or prejudice, however slight, that a trial should be stayed.

3.27 There is nothing to indicate that the Applicant will be unable to make out a proper defence. There is also nothing indicating that the Applicant will not be fairly tried. Furthermore even if there is prejudice, but the delay does not affect the quality of his defence that the will put up, there should be no room for the extreme decision of staying a prosecution.

3.28 The Applicant had an opportunity to testify at the TRC as is borne out by Mr Piers Pigou. (JPP 2) His conduct towards the investigator speaks volumes.

3.29 In this matter, all the tools available for a prosecution are available. The docket with affidavits, experts, reports and the full transcribed inquest record of 2017 has been furnished to the Applicant. Witnesses are available to testify. The quality of available evidence is not materially flawed as a result of the lengthy lapse of time on the memories of the witnesses the State intends to call. The reasons that the Applicant advances are speculative. He has failed to establish prejudice. It is submitted that even if the State does not call all the witnesses called at the inquest, the charges are still sustainable.

Interests of justice

3.30 The relief which the applicant seeks is not only extra-ordinary, it is very drastic. It is not the norm to stay criminal prosecutions forever.

3.31 When extraordinary and drastic relief is sought, exceptional circumstances must exist to justify such relief because it amounts to a departure from the norm.

3.32 In addition, the test in an application such as the present is whether it is in the interests of justice to grant a permanent stay of the applicant's prosecution. The applicant has not made out a case to establish that it is in the interests of justice to grant the relief which he seeks. Without the applicant himself making out such a case in his founding affidavit, the Court cannot assume that the interests of justice favour the granting of the relief which the applicant seeks.

3.33 The following factors make it not in the interests of justice to grant a permanent stay of the applicant's criminal prosecution:

3.33.1 the context of this case set out above;

3.33.2 the nature of the crimes committed against Mr Timol during the period of Apartheid;

3.33.3 the fact that Mr. Timol' s rights to life and human dignity were so brutally and inhumanely violated in the manner in which he was treated and killed;

3.33.4 the fact that the applicant had an opportunity to appear before the Truth and Reconciliation Commission to apply for amnesty – even if he wanted to argue that he was an accessory after the fact – and that he deliberately refused to be a part of that process by not participating in it. (In this regard, see the affidavit of Piers Ashley Pigou attached hereto as JPP 2 deposed to in London and for which I state that it is in the interests of justice that it be admitted);

3.33.5 the fact that this is not the only case in which people died in police detention at the brutal hands of the apartheid government and that few of such cases have been prosecuted;

3.33.6 the fact that the people of South Africa require that justice be seen to be done in this case by prosecuting the applicant;

3.33.7 the fact that the applicant does not have reasonable prospects of success in the criminal trial because the available evidence shows that Mr Timol could not have willingly jumped or pushed himself out of John Vorster Square building. Only one other person can testify as to what happened in room 1026.

3.33.8 the applicant with respect continues to persist with his unsustainable version that he played no part in the killing of Mr. Timol, forcing the State to run what he also says is going to be a long trial. A lengthy trial will depend on the evidence that the

State will lead and the cross examination of its witnesses by the Defence, which it is entitled to. In any event, there is no right to a shorter trial. It depends on the nature of the proceedings.

3.33.9 The fact that a permanent stay would deny the Timol family the justice which they deserve and for which they have been waiting since 1971. The reality is that both the Timol family and the Applicant deserve closure. It cannot be that the case "hangs in the air". The reality is that we need to move forward. And the way to move forward is to oblige both the Timol family and the Applicant. The Timol family wants the evidence to be presented and tested. The Applicants wants to clear his name and enforces his right to a speedy trial. The only way is to allow the prosecution to honor its mandate. Both interested parties get closure, one way or the other.

3.34 In the premises, the application ought to be dismissed with costs, including the costs consequent upon the employment of two counsels.

I now turn to deal with the contents of the applicant's factual and legal averments contained in the founding affidavit.

4. AD PARAGRAPHS 1 TO 10

4.1 The contents of paragraph 1.1 are not in dispute.

4.2 I deny that the contents of the applicant's founding affidavit are true and correct to the extent that they are inconsistent with the contents of this answering affidavit and the 2017 Inquest Court judgment.

4.3 The contents of paragraph 2 are not in dispute.

4.4 The contents of paragraphs 3 to 5 are not in dispute and do not require a response from the first respondent.

4.5 The contents of paragraph 6 in which the nature or purpose of this application is restated, is not in dispute.

Ad paragraph 7

4.6 Paragraph 7 of the applicant's founding affidavit deals with the basis on which the applicant seeks the relief set out in his notice of motion.

4.7 I have already demonstrated elsewhere above in this answering affidavit that the prosecution which is sought to be permanently stayed will not in any way infringe upon the applicant's constitutional right to a fair trial.

4.8 In the premises and for the reasons stated above, there is no merit in the basis upon which the applicant seeks a permanent stay of his criminal prosecution as alleged in paragraph 7.

Ad paragraph 8

4.9 The applicants' reliance upon section 342A of the CPA is misplaced.

4.10 Section 342A of the CPA does not contemplate an automatic permanent stay of criminal prosecution as a result of an alleged delay in commencing and concluding criminal prosecution. On the contrary, section 342A contemplates that the criminal court dealing with the criminal trial will conduct an inquiry into whether there has been an unreasonable delay "*which could cause substantial prejudice*" not only to the accused person, but also "*to the prosecution … the State or a witness.*"

4.11 When regard is had to the wide ambit of section 342A, it must necessarily follow that a permanent stay of criminal prosecution in terms of section 342A would only be ordered if, in addition to what is stated therein, it is in the interests of justice to grant such an order.

4.12 In this case, the applicant has not even paid lip service to the question whether it is in the interests of justice to grant a permanent stay of his criminal prosecution.

Ad paragraphs 9 and 10

4.13 The contents of paragraphs 9 and 10 are not in issue.

5. AD PARAGRAPHS 11 TO 18

Ad paragraph 11

5.1 The contents of paragraph 11.1 are not in dispute.

5.2 The contents of paragraph 11.2 are not in dispute.

5.3 The State has already advised the applicant that the reference to section 257 of the CPA in the indictment is incorrect and that the State will not be relying on the provisions of section 257 of the CPA. In this regard, and for purposes of good order and housekeeping, the indictment will be formally amended to reflect the sections of the legislation upon which the State intends to rely. Such an amendment, however, will not affect the main charge of murder levelled against the applicant. Reference ought to have been made to Act 105 of 1997, Criminal Law Amendment Act (or the Minimum Sentence Act.)

Ad paragraph 15

5.4 It is incorrect for the applicant to create an impression that the 2017 Inquest Court was called upon to make a finding on his involvement or otherwise in Mr. Timol's death.

5.5 As stated above, the function of the 2017 Inquest Court was to determine whether Mr. Timol' s death was as a result of an act or omission which *prima facie* involves an offence. As to what criminal offence the applicant or who of any accused persons must be charged with lies exclusively in the NPA's territory. For this reason, the NPA has decided to charge the applicant with murder and with defeating or obstructing the administration of justice.

5.6 As I have stated above, the available evidence leads to one and only one conclusion which is clearly stated at paragraph 22 (page 69 of the Applicant's founding affidavit) of the summary of substantial facts "The State will allege that the accused at all relevant times committed the offence in count one above in the execution of a common purpose. Precisely when, where and how it was formed and who all the parties were, are at present unknown to the State. The State does however allege that the said common purpose was in existence from at least shortly before and for the duration of the commission of the crime."

5.7 Despite having attached the judgment of the 2017 Inquest Court, the applicant has not engaged therewith in his founding affidavit to make out a case that the evidence contained therein does not lead to a conclusion or inference that he is not responsible for the death of Mr. Timol. He is selective in sourcing what is favourable to him as opposed to being honest and forthcoming as to exactly what the findings of the court was.

Ad paragraph 16

5.8 The contents of paragraph 16 are denied.

5.9 The charge of murder levelled against the applicant was not influenced by the fact that the applicant could no longer be charged with being an accessory after the fact. The charge of murder levelled against the applicant was directly influenced by the fact that the

available evidence, carefully analyzed and set out in the 2017 Inquest Court judgment leads to one and only one inference that the applicant was by virtue of the doctrine of common purpose involved in the murder of Mr Timol.

Ad paragraph 17

5.10 The contents of paragraph 17 are denied.

5.11 The applicant's denial that he did not assault or torture or interrogate Mr. Timol is his defense and he is entitled to put that version at his trial. It cannot be debated in this forum in an attempt to quash the charges and prevent the prosecution from presenting its case.

5.12 The applicant's denial that he interrogated Mr. Timol or that he participated in Mr. Timol's interrogation or assault is expected.

5.12.1 The applicant is the only person who was with Mr. Timol at the exact date and time shortly before he died.

5.12.2 The two mutually destructive versions of the Applicant and the State must be weighed up in a trial court. That can only be assessed once the evidence is presented.

5.12.3 The applicant's application is an abuse of process where an attempt is being made to establish the strength or weaknesses of the State's case. The applicant expects the issues which he must raise at his trial to be ventilated in this forum. The deliberate selective interpretation, with the full inquest judgment

attached, is proof that the applicant is abusing the process and the court. Thus contributing to the delay he so vehemently opposes and blames on the State. The Applicant, whilst being in possession of all the affidavits and evidence presented at the inquest court in 2017, together with the content of the police docket expects the evidence and arguments to be explained and interpreted to him.

5.13 The State has already indicated that it intends to rely on circumstantial evidence and similar fact evidence. It will argue that if logic dictates, both versions, that of the Applicant, and that of the State, cannot be reasonably possibly true. Conversely then one must be false. Only the trial court, after assessing all the evidence presented, can decide that. Further that both the functions of the Judiciary and Prosecution are clearly spelt out in their constituting Acts. That the prosecution should be entitled to present its case. The State persists that the applicant is criminally responsible for Mr. Timol's death.

Ad paragraph 18

5.14 The contents of paragraph 18 do not assist the applicant.

5.15 This is the version of the Applicant. These issues cannot be ventilated in this forum. The applicant abuses the process to test the strength of the State's case. It is the applicant himself who placed himself inside Room 1026 from which he alleges Mr. Timol left

through the window. On the applicant's own version, he was the only person who was with Mr. Timol when Mr. Timol left the room through the window. Prior to that Mr Timol, for all intents and purposes, displayed no unusual tell-tale signs that might have led the Applicant to believe that he was unwell or unable to move. When regard is had to the evidence placed before the 2017 Inquest Court about Mr. Timol's physical condition, the only conclusion to be drawn from that evidence is that if both the pathologists found that 27 of the 35 injuries on Mr Timol were inflicted ante-mortem, and only the applicant was in the room then either the pathologists or the Applicant is lying.

5.16 Furthermore, that the applicant must be deterred from misusing this process to canvas issues that he feels will persuade the court in quashing the charges against him. Whether he was a fully- fledged police official performing clerical work is of no consequence. He will be given the opportunity to challenge the evidence presented in court. This is not the forum to request that the evidence be assessed.

5.17 For purposes of its case against the applicant, the State does not have to prove that the applicant participated or did not participate in other operational issues of the Security Branch of the apartheid police. This has already been canvassed and is apparent from the 2017 Inquest Court judgment which is attached to the applicant's own founding affidavit.

6. AD PARAGRAPHS 19 AND 20

Ad paragraph 19.1

6.1 The contents of paragraph 19.1 are not in dispute.

Ad paragraph 19.2

6.2 Mr. Timol was interrogated and tortured.

Ad paragraph 19.3

6.3 Mr. Timol died as a result of having been thrown out of or rolled from the roof of John Vorster Square Building. The available evidence on this issue leads to one and only one irresistible inference: that Mr. Timol was severely assaulted and incapacitated whilst in the care of and in the detention of the security branch police officers. He could not have been in the position to jump to his death. It is for this reason that the State has charged the applicant with Mr. Timol's murder because his version directly contradicts the evidence in the State's possession, amongst other evidence.

Ad paragraph 19.4

6.4 The contents of paragraph 19.4 are not in dispute.

6.5 The 2017 Inquest Court, however, overturned the findings of the 1972 inquest court concluding that "Mr. Timol did not jump out of the

window of Room 1026, but was either pushed out of the window of room 1026 or rolled from the roof of the John Vorster Square building. Thus he did not commit suicide but was murdered" (page 124 of the Judgment).

Ad paragraph 19.5

6.6 The contents of paragraph 19.5 are not in dispute.

The new evidence placed before the 2017 Inquest Court shows that the Timol family was correct in not accepting the findings of the first inquest.

Ad paragraph 19.6

6.7 The contents of paragraph 19.6 are not in dispute.

6.8 Once it was brought to my attention that Mr Saliem Essop, who was in the company of Mr Timol was available to attest to an affidavit, I immediately requested the inquest into the death of Mr Timol be re-opened. A 37 page affidavit from Dr Essop was obtained. This is evident from a Ministerial memorandum dated 25 October 2016. This is attached marked JPP 3. The National Director of Public prosecutions acted immediately and signed the memorandum on the same date. On 3 November 2016, the Deputy Minister of Justice and Constitutional Development, Mr J Jeffery and the Minister of Justice and Correctional Services approved the re-opening of the Inquest. On 17 January 2017, the Judge President, Justice D

Mlambo was requested by the Minister of Justice and Correctional Services to "in the interests of justice ...to re-open the inquest (pertaining to Mr Timol) ". This is attached marked JPP 4. The inquest re-opened on 26 June 2017 and was finalized on 12 October 2017.

Ad paragraph 19.7

6.9 The contents of paragraph 19.7 are not in dispute and are irrelevant to the question whether a permanent stay of the applicant's criminal prosecution should be granted.

Ad paragraph 19.8

6.10 The contents of paragraph 19.8 are in dispute.

6.11 The mother of Mr Timol made an impassioned plea to the police officers involved in the interrogation and the death of her son to come forward and explain what happened to her son. She passed on ten months later with no answers. The contents of paragraph 19.8 clearly indicate that the applicant did not take any steps to assist the Truth and Reconciliation Commission in its investigation. The fact that the applicant simply informed the Truth and Reconciliation Commission's investigator that he was unable to assist "*at that stage, without having had the opportunity to jog my memory from my statement and/or evidence at the initial inquest*

during 1972 to assist him" is clearly contradictory to the content of the affidavit of the investigator appointed by the TRC, Mr Piers Pigou. In any event it does not take the matter any further because the applicant did not thereafter provide the Truth and Reconciliation Commission with any information that could have assisted it in its investigation.

6.12 The applicant's aforesaid attitude confirms what I have stated above that he continues to refuse to take any responsibility in relation to Mr. Timol's death and, when regard is had to the purpose of the Truth and Reconciliation Commission, his conduct justifies the dismissal of this application and the granting of an order that his criminal prosecution should commence forthwith. Had he made full disclosure to the TRC, Gloy and van Niekerk were still alive at that stage. A prosecution could have ensued.

Ad paragraph 19.9

6.13 The contents of paragraph 19.9 are in dispute. The Applicant is not being honest when he advises that the affidavit of Piers Pigou, JPP 2, confirms that he was interviewed. In fact, no interview took place because according to paragraph 7 of his affidavit, Mr Pigou states: "he indicated when we spoke telephonically that he was willing to discuss the case. Several days later I drove to Pretoria as arranged and met with Mr Rodrigues at his place of work". At paragraph 8 of

his affidavit, he states the following: "However, at this meeting he was no longer amicable nor was he willing to co-operate. He came across at reticent and insisted that our entire interaction be recorded with a voice recorder. He was not willing to talk to me about what has happened with Timol and our interaction was concluded rather quickly". At no stage does Mr Pigou say that the applicant requested an opportunity to jog his memory from his statement and/or evidence at the initial inquest during 1972 to assist him. The Applicant is being deliberately untruthful to create the impression that he would have willingly co-operated had this request being complied with. In fact, this is directly at odds with what Mr Pigou submits. Further, this affidavit was handed in at the 2017 inquest. This was never disputed and neither was this point ever raised.

Ad paragraph 19.10

6.14 The contents of paragraph 19.10 are not in dispute.

Ad paragraph 19.11

6.15 The contents of paragraph 19.11 are not in dispute.

Ad paragraph 19.12

6.16 It is correct that the applicant agreed to testify during the 2017 inquest proceedings. He was duly warned by the court of the purpose of the inquest court, of his rights and the ramifications of

any findings it would make at the end of the inquest before he chose to participate.

6.17 The Applicant was given an opportunity to comment on the evidence presented, in particular the medical and trajectory evidence which were in direct contradiction to his version. It would be very strange for the applicant to have any comment to this evidence at the criminal trial in circumstances when he did not have any comment or had offered little objection to it, during the 2017 inquest proceedings.

Ad paragraph 19.13

6.18 The contents of paragraph 19.13 are not in dispute.

Ad paragraph 19.14

6.19 The contents of paragraph 19.14 are not in dispute.

Ad paragraph 19.15

6.20 The contents of paragraph 19.15 are not in dispute.

Ad paragraph 19.16

The content of paragraph 19.16 is disputed. Significantly, I draw the Court's attention to the fact that the applicant accepts that there is indeed "*material of recent origin*" upon which the State will rely in his criminal trial to prove that the only logical inference to be drawn is

that the Applicant was involved in the death of the deceased. The State also placed the Applicant in possession of all the exhibits and transcribed inquest record of 2017. It is incorrect and misleading to say that "basically the only material of recent origin" relates to medical and trajectory evidence. The inquest court also heard evidence from various witnesses and fellow detainees pertaining to torture and assaults at John Vorster Square. The court also heard evidence of collusion, cover ups, and forging of documents which the security branch relied on to justify deaths in detention.

Ad paragraph 19.17

6.21 The contents of paragraph 19.17 are not in dispute.

Ad paragraph 19.18

6.22 The contents of paragraph 19.18 are not in dispute.

Ad paragraph 19.19

6.23 The contents of paragraph 19.19 are in dispute. The averment that the reply to request for further particulars did not comply with the requirements of section 87 of the Criminal Procedure Act must be still is adjudicated before the trial court. An indictment with a detailed summary of substantial facts was served on the applicant. He was also furnished with the content of the docket and the entire transcribed inquest proceedings of 2017, including exhibits. Any

legal practitioner, on thorough perusal of the content of the docket, would have been in a position to plead. This application that the Applicant seeks to rely on in an attempt to get further and better particulars must be seen in the main as a "novel and unmeritorious attempt to get the State to deal with and reply to the Applicant's version of what he submits must be accepted, at this stage, as the true facts giving rise to the counts he faces". What the Applicant has in his possession is sufficient for him to plead and constitutes an abuse of process and a tactic to delay the prosecution from presenting its case.

Ad paragraphs 19.20 and 19.21

6.24 The contents of these paragraphs are not in dispute.

6.25 When regard is had to the contents of paragraphs 19.13, in particular the dates of the events referred to in those paragraphs, there could be no rational basis to contend, let alone find, that there has been an unreasonable delay in commencing with the applicant's criminal prosecution. For this reason, the suggestion that the applicant is entitled to a permanent stay of his criminal prosecution as a result of an alleged unreasonable delay in commencing and concluding his criminal trial is unfounded and ought to be rejected.

Ad paragraph 20

6.26 The contents of paragraph 20 are not in dispute.

7. AD PARAGRAPHS 21 TO 43: ALLEGED UNFAIR AND IMPROPER MOTIVE

Ad paragraph 21

7.1 The contents of paragraph 21 are not in dispute. There is nothing to suggest that the applicant will not have a fair trial.

7.2 As I have stated above, the applicant has not suffered any trial prejudice on the basis of which it could be concluded that he will not have a fair trial.

Ad paragraph 22

7.3 I have already dealt with the provisions of section 35(3) of the Constitution elsewhere above in this answering affidavit.

Ad paragraph 23

7.4 The contents of paragraph 23 are not in dispute.

Ad paragraph 24

7.5 The contents of paragraph 24 are in dispute. This was not the only consideration. As is evident from my draft memorandum, once the affidavit of the only other witness who was in the vehicle with Mr Timol when he was arrested and detained was obtained and other investigations conducted, that the request was made.

Ad paragraph 25

7.6 The exposition of the law in paragraph 25 are correct.

7.7 However when the request for re-opening was made by the NPA, the institution of Criminal Proceedings were not envisaged. In fact the prosecution did not even know the applicant was still alive at that stage. See answer supra.

Ad paragraph 26

7.8 Paragraph 26 should be read with paragraph 37 of the founding affidavit. It is answered in paragraph 3.11.1 on page 18.

Ad paragraph 27

7.9 The contents of paragraph 27 are inconsistent with the contents of the 2017 Inquest Court judgment. The content of this paragraph are denied. The applicant is selective about which comments were made in his favour. He conveniently makes no reference to the fact that the court made adverse credibility findings against him. In fact, multiple contradictory versions emerged during his evidence.

7.10 Despite what I have stated above, there is nothing which prevents the NPA from conducting a thorough assessment of the record to determine whether a person such as the applicant in this case could

be charged with a different offence from that contemplated in the inquest judgment.

Pursuant to the 2017 Inquest Court judgment the NPA assessed the evidence carefully summarized therein and concluded that such evidence leads to one and only one conclusion that the applicant was involved in the murder of Mr Timol.

Ad paragraph 28

7.11 The contents of paragraph 28 are in dispute. The findings of the Presiding Judge should be seen in the full context. The NPA is furthermore not bound by the findings of an inquest court.

Ad paragraph 29

7.12 The contents of paragraph 29 is denied and do not assist the applicant.

7.13 On the applicant's own version, there is material of recent origin which relates to medical evidence from pathologists and expert evidence relating to the trajectory of the body falling from the window of Room 1026.

7.14 The aforesaid evidence is extremely important and the State must be given an opportunity to place it before the criminal trial court for that Court to decide whether, when it is considered with all the other available evidence, it supports the State's contention that the only

conclusion or inference to be drawn therefrom is that the applicant is the person who, was involved in the killing of Mr. Timol.

7.15 In the circumstances, it does not assist the Court for the applicant to say what he says he has "*no hesitation to submit*" to this Court without him placing the correct context of the available evidence before the Court.

Ad paragraph 30

7.16 The contents of paragraph 30 do not take the matter any further and do not constitute a basis to grant a permanent stay of the applicant's criminal prosecution for the death of Mr. Timol. The state merely confirms that all documents and exhibits in its possession have been furnished to the Applicant. The applicant confirmed it received all the documents and exhibits.

Ad paragraph 31

7.17 The contents of paragraph 31 are not in dispute insofar as they correctly reflect the contents of the statutory provisions and the Directive referred to therein.

7.18 I state that there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution of the applicant for the murder of Mr. Timol.

7.19 I have already stated elsewhere above in this answering affidavit what the available evidence shows and what conclusion or inference

could be drawn from that evidence. I state that the available evidence is sufficient to enable a Court to draw the conclusion that the applicant was involved in the killing of the deceased. For this reason, I persist that there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.

7.20 In the premises, there is a legal basis to commence and continue with the criminal prosecution of the applicant.

Ad paragraph 32

7.21 The contents of paragraph 32 are not in dispute insofar as they correctly reflect the contents of the statutory provision referring to the Prosecution Policy Directives referred to therein.

Ad paragraph 33

7.22 The contents of paragraph 33 are not in dispute insofar as they correctly reflect the contents of the statutory provision referred to therein.

Ad paragraph 34

7.23 The contents of paragraph 34 are not in dispute. The NPA is exercising its functions without fear, favour or prejudice.

Ad paragraph 35

7.24 The contents of paragraph 35 are irrelevant.

7.25 Even if it may be found that the contents of paragraph 35 are relevant, I deny them.

7.26 The correct position is that the Inquest Court is only required to record whether the death of the person who is the subject of the inquest was caused by an act or omission which *prima facie* involves an offence. If it does, as in this case, it is for the National Director of Public Prosecutions or the National Prosecuting Authority to decide whether or not to prosecute. In this case, the national prosecuting authority is exercising its constitutional mandate to prosecute the applicant for murder.

7.27 In the premises, nothing really turns out on contents of paragraph 35. It must be pointed out, that even if the submissions are made by the representative of the NPA, we are not bound by the findings of an inquest court. After the matter was referred to the National Prosecuting Authority, and after a thorough and critical analysis of the evidence, charges are preferred.

Ad paragraph 36

7.28 The contents of paragraph 36 are denied.

7.29 There is no prescription period for the first respondent to charge any person with murder.

7.30 The mere fact that there is no prescription period within which the first respondent is in law allowed to charge anyone with murder

necessarily means that a person such as the applicant could be charged with murder after 49 years from the date on which the murder in issue was committed. This is indeed such a case.

7.31 The findings of the 2017 Inquest Court as far as the exact charge to be levelled against the applicant are not conclusive and it is not binding upon the NPA. The NPA is in law required to consider the findings of the Inquest Court and then decide as to what charge to be preferred against the persons implicated in the death which is the subject of the inquest.

In this case, after having considered the evidence carefully summarized in the 2017 Inquest Court judgment, the NPA has correctly decided to charge the applicant with murder. There is respectfully nothing wrong in law with the decision taken.

I dispute that the Inquest Court found that the applicant was not involved or even present at the time of the murder of the deceased.

Ad paragraph 37

7.32 The contents of paragraph 37 are denied. It has been discussed supra on page 17 and 18 uin paragraph 3.11.

7.33 The NPA respondent only decided to prosecute after the conclusion of the 2017 inquest proceedings.

7.34 In the circumstances, it is also not correct that the applicant no longer had a right to remain silent. The Applicant was ably

represented at the Inquest Proceedings and elected to give evidence. This was a voluntary decision. He also voluntarily provided a warning statement.

7.35 The applicant remains free to attend the criminal trial and thereat remain silent if that is what he wants to do. Section 35(3) of the Constitution is very clear in this regard. It says that every "*accused person*" has a right to a fair trial. An inquest is not a criminal trial. At the 2017 inquest proceedings, the applicant was not an "*accused person*". For this reason, the applicant was not thereat entitled to a right to remain silent as promised in section 35(3) of the Constitution.

7.36 In the event that the applicant wishes to exercise his right to remain silent at the pending criminal trial, the applicant remains entitled to do so.

Ad paragraph 38

7.37 It is correct that the crime of murder does not prescribe.

7.38 The right to a fair trial which the applicant seeks to enforce entitles him to be tried within a reasonable time from the date on which he is charged with an offence. In this case, on his own version, he was only charged in July 2018. The applicant only brought this application in October 2018. There were no previous attempts to subject the applicant to criminal prosecution and it is not suggested that the applicant is now considered by the public to be guilty of the

killing of Mr. Timol such that it could be said that he has suffered trial prejudice to justify a permanent stay of his criminal prosecution. In any event, an accused person once he or she appears as an accused person will run the risk usually associated with being an accused person. But this does not outweigh the mandate of the NPA to prosecute offences of murder.

Ad paragraph 39

7.39 The contents of paragraph 39 are denied.

Ad paragraph 40

7.40 The contents of paragraph 40 are denied.

Ad paragraph 41

7.41 The contents of paragraph 41 are denied.

7.42 On the applicant's own version, the crime of murder does not prescribe.

7.43 The fact that all the police officers who were involved in the interrogation of Mr. Timol have died is irrelevant. This is so because the applicant is not being charged with the interrogation, assault or torture of Mr. Timol. They also could not have assisted his case because he placed himself, alone, in the room with Mr Timol before he died. Furthermore, his version that all was well with Mr Timol, is

supported by his colleagues "from their graves" because their affidavits and evidence was to a large extent "preserved" by the available record.

7.44 The case against the applicant is based on the fact that he is the only person, and the last person who was with Mr. Timol shortly before he died. Insofar as the only person, who was in that room with Mr Timol before he died, it must necessarily follow that the only inference to be drawn is that the Applicant is untruthful as to how and when Mr Timol came to meet his demise.

7.45 The fact that the medical experts who participated in the postmortem examination of Mr. Timol have passed away is irrelevant. Their findings have been preserved in a 77 page judgment. Photographs of the deceased are still available as well as a detailed medico-legal report. The reports remain available and there is nothing which prevents the applicant to employ new experts to consider those reports and file new reports in support of his defence, if he has any.

7.46 The contents of paragraph 41.3 are denied. The applicant refers to "*the memories of all possible witnesses, including myself.*" The applicant relies on his same old version. For this reason alone, the question of impairment on his memory is completely irrelevant and untruthful. The allegation he makes that all possible witnesses have problems with their memory is speculative and conjecture.

7.47 The applicant has not identified any possible witnesses whose memories may have been impaired as a result of the long time that has passed.

7.48 The contents of paragraph 41.4 are irrelevant because the evidence upon which the State would want the criminal trial court to draw the necessary conclusion or inference is already contained in the 2017 inquest judgment and in the docket which has already been provided to the applicant. Accordingly, the contents of paragraph 41.4 do not take the matter any further. In any event, the applicant does not take the Court into his confidence to tell the Court as to what "*crucial records pertaining to the incident*" and "*relevant to the incident*" have been destroyed. The applicant also does not tell the Court as to who destroyed what he says is the many "*crucial records pertaining to the incident*."

7.49 The medical records upon which the Security Branch relied during the first inquest are still available and it is upon him to decide whether he wants to rely thereupon or whether he wants to engage new medical experts to review those records and provide new expert reports. The difficulty with this, however, is that the applicant did not tell the 2017 Inquest Court that the records, upon which he and his Security Branch relied in 1972, are not a true reflection. He only has himself to blame for this and this does not constitute a basis to grant an order to permanently stay his criminal prosecution.

7.50 The contents of paragraph 41.5 are denied. The applicant has placed no medical records of his "*fragile health*" before the court to substantiate what he says in paragraph 41.5. In any event, as I have already stated above, the applicant has recently confirmed that his version remains as it was during the first inquest. His well-known and somewhat consistent version is that he is the only person who was with Mr. Timol when Mr. Timol left Room 1026 through the window. In his recent, unopposed bail application, marked XX, the applicant also confirmed that his memory was fine and that other than the usual ailments, he had no problems. This flies in the face of allegations of "fragile health" and must be seen as a feeble attempt to evade prosecution. It is also evident from the affidavit of the investigating officer, attached and marked, XX, that the Applicant has a selective use of his crutch. It seems to serve the purpose when it suits the Applicant.

Ad paragraph 42

7.51 I deny that the State has an unfair, improper or unlawful motive for prosecuting the applicant.

7.52 I have already extensively dealt with the alleged unfair, improper or unlawful motive elsewhere above in this answering affidavit.

7.53 The contents of paragraphs 42.1 to 42.12 are not in dispute and correctly reflect what is contained in the 2017 Inquest Court judgment.

7.54 The contents of paragraph 42.13 are not in dispute insofar as they correctly reflect a selection of the contents of the 2017 Inquest Court's judgment. In this regard, it is important to draw the Court's attention to the fact that the applicant's version is that he was present with Mr. Timol when Mr. Timol left Room 1026 through the window thereof. This version makes the applicant the last person to have seen and to be with Mr. Timol inside Room 1026.

7.55 In regard to 42.14 it should be noted that submissions by First Respondent to the Court in the re - opened inquest, not only related to role of the applicant "as accessory after the fact" It is specifically also stated "or as a co-conspirator. " The contents of paragraph 42.14 do not take the matter any further when regard is had to what the 2017 Inquest Court was required to do in terms of the Inquests Act 58 of 1959, i.e. to record whether the death of Mr. Timol was caused by an act or an omission which amounts to an offence. The fact that the 2017 Inquest Court may have gone further to express its views about who may or may not have killed Mr. Timol does not take the matter any further due to the fact that at the end of the day, the first respondent is still in law required to take an independent decision as to which person, if any, should be charged with the murder or any offence in relation to the death of Mr. Timol and as to which offence the person should be charged with.

Ad paragraph 43

7.56 The contents of paragraph 43 do not take the matter any further in the light of what I have already stated above.

7.57 It is important to again emphasize that the first respondent is in law not married to the findings of the Inquest Court as far as the charges to be preferred against an accused person is concerned. The NPA remains free to take an independent decision as to what charges, if any, should be preferred against any person who is responsible for the death of Mr. Timol.

8. AD PARAGRAPHS 44 TO 50: ALLEGED UNDUE DELAY

8.1 The contents of paragraph 44 are not in dispute. The delay contemplated in section 35(3) (d) can only be assessed from the time after the accused person has been charged. In this case, an unreasonable delay has not occurred when regard is had to the fact that the applicant was only charged with murder in July 2018.

8.2 The contents of paragraph 45 are not in dispute. In this case, there is nothing which prevents or makes it impossible for the applicant to exercise his fundamental right to adduce and challenge the State's evidence.

8.2.1 As far as adducing evidence is concerned, the applicant's version remains what it was in 1972 when he gave evidence at the first inquest. For this reason, the applicant has not suffered

and will not suffer any trial prejudice as far as his ability to adduce evidence at his pending criminal trial is concerned.

8.2.2 There is no impediment to the applicant being able to challenge any of the State's evidence intended to be led at his criminal trial. On his own version, the applicant is now fully aware of all the available evidence and it is not suggested that he will not be in a position to challenge any of the evidence which he now knows is available.

8.2.3 Without the applicant, being aware of all the available evidence, telling the Court as to what evidence would be impossible for him to challenge at his criminal trial, the Court cannot simply accept that the applicant's right to adduce and challenge evidence has been infringed or that it would be impossible for the applicant to exercise such a right.

8.3 It is correct that the applicant has only been charged 47 years after Mr. Timol's death. This, however, does not constitute a violation of his right to a fair trial.

Ad paragraph 47

8.4 The contents of paragraph 47 are irrelevant. The applicant again directly contradicts what evidence was already handed in at the re-opened inquest. An attempt was made by a TRC investigator to interview him. The content of that affidavit is self- explanatory.

Ad paragraph 48

8.5 It is not the State's case that the applicant took any steps to evade justice or cause any delay in his criminal trial.

8.6 In any event, the contents of paragraph 48 are completely irrelevant to the question whether there has been an unreasonable delay in commencing and concluding the applicant's criminal trial prosecution.

8.7 The applicant did not have a choice but to hand himself over. A J50 had been authorized for his arrest. A "gentleman's agreement" was put in place which enabled him to hand himself over. Had the State really intended to be malicious and have ulterior motive, they could easily have executed the warrant and kept him in custody. Or opposed bail for that matter.

Ad paragraph 49

8.8 I deny that the first and second respondents failed to act in a diligent manner in coming to the decision to prosecute the applicant.

8.9 In the context of this case, the right to a fair trial has not in any way been violated or irreparably violated by the time that it took the first respondent to take a decision to prosecute the applicant.

8.10 The contents of paragraph 49.1 are not in dispute.

8.11 The contents of paragraph 49.2 are not in dispute.

8.12 The contents of paragraph 49.3 are not in dispute and do not constitute a basis for a conclusion that there has been an unreasonable delay in commencing and concluding the applicant's criminal trial.

8.13 The contents of paragraphs 49.4 and 49.5 are not in dispute.

8.14 In response to paragraph 49.6 it can be stated that even if there is likelihood that cases of this nature were deliberately suppressed by the State, why should the families of victims suffer? The administration of justice will fall into disrepute if perpetrators and alleged perpetrators are allowed to continue with carefree living, after the truth surrounding the mysterious deaths of their loved ones comes to the fore only to be ignored by prosecution and investigation services. In any event, it is the function of the prosecution to prosecute and the function of the police to investigate. It is not for the victims to engage in investigation and prosecution. It will be a sad day in history when where even if it is found that organizations seized with these mandates fail in their functions and our Constitutional democracy whilst acknowledging our painful past, continues to exacerbate the pain of the families by granting permanent stay of prosecutions against alleged perpetrators because of interference, political or otherwise.

8.15 The contents of paragraph 49.7 are not in dispute. However I deny that there was an unreasonable delay. I was not directly involved in the matter until January 2016. I was present when

representations were made to the NDPP and the Head of NPS on Tuesday, 19 January 2016. Adv. George Bizos, Adv. Varney, Frank Dutton and members of Webber and Wentzel also attended this meeting and did a presentation. It related to two matters to wit:

the late Ahmed Timol, and

Dr Niel Aggett.

I immediately started to read and study all the relevant material and gather the material relating to the Timol inquest. I consulted a number of witnesses, the investigating officer and obtained documents and statements. Obviously I also consulted with Adv. Macadam and I confirm his affidavit as far as it relates to me. (Annexure **JPP** 5 attached hereto) When Dr Saliem Essop who resided in the UK, could be seen in South Africa, an interview was held with him. This was done on the 13 October 2016. I ensured that a statement under oath be obtained as soon as possible. This was done on the 14 October 2016. Thereafter I immediately submitted a memorandum to the National Director of Public Prosecutions requesting a reopening of the Inquest in terms of Section 17A. This was done on the 19 October 2016. (See annexure **JPP 3**(2) attached hereto) The NDPP addressed a letter to the Minister on the 25 October 2016. (See Annexure **JPP 4** attached hereto.) I was involved in numerous other matters during that time. From the above it is clear that there was no inordinate delay in this matter once the affidavit from Dr Saliem Essop was obtained. I deny that failed to act in a diligent manner in coming to a decision to reopen an inquest.

8.16 The contents of paragraphs 49.8 are not in dispute.

8.17 The content of paragraph 49.9 is in dispute. Since the overturning of the finding of the 1972 inquest court on 12 October 2017, the applicant became aware of the investigation when he was

approached for a warning statement in June 2018. Eight months is a relatively short period of time in which to conclude investigations, and indict and bring an accused before court.

8.18 The contents of paragraph 50 are denied and do not constitute a basis to conclude that there has been an unreasonable delay in commencing and concluding the applicant's criminal trial such that his right to a fair trial has been irreparably violated for the following reasons:

8.18.1 On the applicant's own version, there were no other people inside Room 1026 when Mr. Timol left that room through the window other than himself and Mr. Timol. For this reason, the suggestion that "*all material witnesses have passed away and I will not be in a position to consult with these witnesses and/or to adduce evidence*" is wrong and misleading.

8.18.2 The question whether Mr. Timol "*was able to move at the time prior to his death and/or whether he was incapacitated as a result of injuries already sustained prior to his fall from the tenth floor*" is irrelevant as far as the applicant is concerned. This is so due to the fact that the applicant's version is that Mr. Timol was able to move and that he moved from one side of Room 1026 to the door thereof and again to the window through which he left that room. That is the applicant's version and one fails to understand as to which witnesses the applicant wants to

consult with and what further evidence the applicant wants to adduce in relation to that version which he has been consistent about. The state has always indicated its state of trial readiness. It is the applicant who delays the matter repeatedly by abusing the process with flimsy applications.

9. AD PARAGRAPHS 51 TO 59: RIGHT TO ADDUCE AND CHALLENGE EVIDENCE

In the light that these facts are within the personal knowledge of the prosecution team, Adv Du Toit will address these averments of 51 – 19 in his confirmatory affidavit.

10. AD PARAGRAPHS 60 TO 67: ALLEGED PREJUDICE

Ad paragraph 60

10.1.1 I deny that the first respondent has infringed the applicant's rights to a fair trial.

10.2 I deny that there has been an "*undue and excessive delay to begin with the prosecution.*" As I have stated above, a prosecution can only begin once an accused person has been charged. What is contemplated in section 35(3) of the Constitution is an unreasonable delay in commencing and concluding a criminal trial with reference to the date after the accused person has been charged with an

offence. The question of unreasonable delay does not arise until such time that the person has been charged with an offence.

10.3 In this case, the applicant was only charged in July 2018 and he brought this application in October 2018.

10.4 The contents of paragraph 60.2 are denied. This is based on speculation.

10.5 I deny that the applicant has suffered any irreparable trial prejudice.

10.6 The contents of paragraph 60.4 are denied. There is nothing to suggest that the new evidence upon which the State seeks to rely which was unearthed during the 2017 inquest was available to the State in 1996 when the matter was investigated by the Truth and Reconciliation Commission or in 2003.

Ad paragraph 61

10.7 The contents of paragraph 61 are denied. It is disrespectful of the Applicant to place himself in the same position as that of the family of Mr Timol.

Ad paragraph 62

10.8 The contents of paragraph 62 are denied. Even if this was the case, once new evidence emerged, the NPA acted on the evidence. It is unacceptable that the status quo must then remain because of a

denied "culpable and reckless inactivity". That would defeat the interests of justice and bring the administration of justice into disrepute.

Ad paragraph 63

10.9 The contents of paragraph 63 are denied for the reasons which I have already stated above.

Ad paragraph 64

10.10 I deny that there is no evidence available to sustain a charge of murder against the applicant. I have already stated above the basis on which the State seeks to contend that the applicant is guilty of Mr. Timol's murder.

10.11 The contents of paragraph 64.2 do not take the matter any further in the light of the fact that the NPA is not bound to charge the applicant with what the Inquest Court thought he should be charged with. The NPA respondent remains free to take an independent decision as to what charges to be preferred against an accused person based on the available evidence. The available evidence clearly shows that the applicant is guilty of Mr. Timol's death.

10.12 The contents of paragraph 64.3 do not take the matter any further. In any event, the applicant's remedy for the complaint in paragraph 64.3 is to bring an application to compel the production of the

requested further particulars or such information as he may in law be entitled to.

Ad paragraph 65

10.13 The contents of paragraph 65 do not constitute a bar from commencing and continuing with the applicant's criminal trial.

10.14 It would not be for the first time that a person of the applicant's age and health is subjected to a criminal trial.

10.15 The fact that the applicant stays in Pretoria and that the trial is scheduled to take place in Johannesburg is irrelevant to the question whether the criminal prosecution should be stayed. Accused persons are always tried at the jurisdiction at which the offence was committed regardless of their place of residence. It is strange that the "dismal" state of health is now being raised as a bar to prosecution. These are neutral factors.

Ad paragraphs 66 and 67

10.16 The contents of paragraphs 66 and 67 are denied.

10.17 In the premises, the applicant has not made out a case for the relief which he seeks and the application ought to be dismissed with costs.

WHEREFORE, I pray that it may please the Court to dismiss the application with costs, including the costs consequent upon the employment of two counsels.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 3rd day of December 2018, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

Colonel.

COMMISSIONER OF OATHS
FULL NAMES:
BUSINESS ADDRESS:
OFFICE:

ALBERTUS MARTHINUS MATHYS FLYNN
218 Visagie Street: Pretoria.
Crimes Against the State.
Colonel.

CRIMES AGAINST THE STATE
PRIVATE BAG X1500
2018 -12- 03
SILVERTON, 0127
DIRECTORATE FOR
PRIORITY CRIME INVESTIGATION

JPP 1

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

FIRST RESPONDENT'S SUPPORTING AFFIDAVIT BY JOHANNES LASCH MABELANE

I,

JOHANNES LASCH MABELANE

state under oath:

1. I am an adult male with I.D. Number 5212085665087 residing at number 88 Nkomo Street, Diepkloof Extention Phase 3 Soweto. I am the brother of the late Matthews Mabelane ("**Deceased**"), who died while in custody at John Vorster Square Police Station on 15 February 1977.

2. This affidavit is provided in support of the First Respondent's opposition to the above application. I depose of this affidavit personally and on behalf of the Mabelane family ("**Family**") in the interests of justice for my family, and the families of all of those whose relatives died at the hands of the

apartheid police. I am duly authorised to represent the Family in these proceedings.

3. The facts contained herein are true and correct and based on documents the Family has gathered. Where I make statements that relate to legal matters, I do so on the advice of my legal advisers.

4. The Applicant in the proceedings is Mr Joao Rodrigues, an adult male person who was found to be an accessory after the fact of the murder of Ahmed Timol, under the Re-opened Inquest into the Death of Ahmed Essop Timol, case number: IQ01/2017, Gauteng Division ("**Ahmed Timol Case**"). He is now applying for permanent stay of prosecution in the above matter.

5. This affidavit sets out the Family's basis on which we support the opposition by the First Respondent to the relief sought by the Applicant for a permanent stay of his prosecution. The Applicant is applying for a permanent stay, and the withdrawal, of the criminal proceedings in respect of the charge of being an accessory after the fact for the murder of Ahmed Timol on the ground of time lapse since the events took place and his lack of involvement in, or presence at, the time of the murder of Ahmed Timol.

6. From the Family's intensive research we have found that:

6.1 On the 22nd of January 1977, the Deceased was arrested and was taken to John Vorster Square Police Station. He died in custody on the 15th of February 1977 as the result, I submit, of being thrown from a 10th story window of John Vorster Square by the apartheid police officers who were interrogating him.

7. It was alleged by the police at the time that the deceased died as a result of him accidentally falling from the 10th floor of the John Vorster building. The documents attached to this affidavit contains the State's allegation at the time of the deceased's cause of death:

7.1 The version of the police was given as follows according to the United Nations Special Committee against Apartheid:

"Major General W.H. Kotze, Divisional Commission of Police, said he was being interrogated in a room with an un-barred window on the tenth floor at Security Policy headquarters, John Vorster Square, Johannesburg, by Warrant Officer D. Jordaan, Warrant Office Viljoen, and Detective Sergeant I. Cilliers, at about 9 a.m. on 15 February. Warrant Officer D. Jordaan left the room to answer a telephone call. A moment later, Mabelane jumped on to a chair, forced the window open, climbed on to a 130cm furrowed ledge that ran alongside the north side of the building and was walking on the ledge. The police were unable to stop him but called to him to come back. As he looked back he lost his balance and fell to his death. Senior police officers do not believe that he was attempting suicide when he went through the

window. The other police officers in the room were taken by surprise. Mabelane had been sitting calmly at a table moments earlier." **(Annex JLM1)**

7.2 The inquest findings dated 30 May 1977 states that the cause or likely cause of death was "multiple injuries – sustained the deceased whilst questioned by the police jumping through a window and walking along a ledge on the outside of the building at the 10th floor loosing his balance and falling to the ground below – Accidental." **(Annex JLM2)**

7.3 The police version and the inquest findings are beyond belief and will be tested at a re-opened inquest in due course.

8. The United Nations Special Committee against Apartheid report, dated 20 February 1979 did not accept the above finding. **(Annex JLM1)**.

9. The Truth and Reconciliation Committee report, 2006 Vol 5 also disputes the police allegations. **(Annex JLM3)**

10. In the Ahmed Timol Case the Pretoria High Court found that Ahmed Timol was pushed to death by members of the South African Security branch out of a window from the 10th floor of the John Vorster building in 1971.

11. As per the Ahmed Timol Case recommendations, the Family together with the South African Police and the National Prosecuting Authority, are currently investigating the circumstances surrounding the Deceased's

death with a view to reopening the Inquest and to criminally prosecuting those responsible.

12. The Applicant who was found to be an accessory after the fact in the Ahmed Timol Case, Mr Joao Rodrigues, is applying for permanent stay of prosecution in relation thereto on the ground of the time lapse since the events and his lack of involvement in, or presence at, the time of the murder of Ahmed Timol. The Family is of the opinion that a finding in favour of the Applicant on the basis of lapse of time will have negative implications in their own intention to see that those responsible for the death of the Deceased are prosecuted.

13. The circumstances alleged by the police at the time relating to the death of Ahmed Timol and of Matthews Mabelane are disturbingly similar.

14. There were, according to the Truth and Reconciliation Report (2006) Vol 2, Chapter 3 (**Annex JLM4**) five cases where death of detainees whilst in police custody was the result of jumping from a window. There are other equally incredible stories to explain the murders of many other detainees by police officers, like "slipping on soap".

15. If the Applicant is successful and his prosecution is stayed on the grounds of lapse of time it will create a precedent for all similar prosecutions and claims that will be pursued by the families of such victims who have, like the Mabelane family, been encouraged by the Timol matter to seek a

JPP1.

proper finding as to the death of their relative with the prospect of consequent criminal and civil proceedings against those responsible.

16. I therefore respectfully request that, representing as I do the Family of the Deceased, who died as a probable result of being murdered by the apartheid police, the Court should consider the impact the granting of the application would have on our family. My father died at the age of 95 years, heartbroken and still trying to find out the truth about his son's death. A precedent should not be created that murder has an extinctive prescription period for criminal proceedings and civil claims

17. I submit that it will not be in the interest of justice if the application sought by Mr Rodrigues is granted on the grounds of lapse of time. My family, and the families of all those whose relatives died at the hands of the apartheid police, will be prejudiced in that the only opportunity we have to find out the circumstances surrounding my brother's death, and then pursuing those responsible who did not avail themselves at the truth and reconciliation process, will be taken from us.

18. A judgment in favour of the applicant in the above proceedings will affect the following Constitutional rights of the Family, and all other families with similar rights as the families of the victims, and as emotional victims themselves, of murders committed by the apartheid police namely:

18.1. The right of victims to equal protection and benefit of the law;

18.2. The right to have the dispute regarding the circumstances of the deaths in detention and the parties guilty of the crimes being resolved by the application of law decided in a fair public hearing before a court;

18.3. The right of the Family to have their dignity respected and protected by having access to the justice system to reveal the truth about the wrong that was caused to them by the murder of their family member and subsequent cover-up of the deed.

19. For all the reasons set out in this affidavit, I support the opposition by the First Respondent to the above application.

DEPONENT

Signed at ILLOVO on this 26th day of November 2018.

I certify that:

I. the Deponent acknowledged to me that :
   A. He knows and understands the contents of this declaration;
   B. He has no objection to taking the prescribed oath;
   C. He considers the prescribed oath to be binding on his conscience.
II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
III. the Deponent signed this declaration in my presence at the address set out hereunder on

ALICIA FELICITY DANIELS
Commissioner of Oaths (ex-officio)
Admitted Attorney of the High Court of South Africa
The South African Institute of Chartered Accountants
17 Fricker Road, Illovo, Johannesburg, 2196

COMMISSIONER OF OATHS

Designation and Area:
Full Names:

Street Address

ALICIA FELICITY DANIELS
Commissioner of Oaths (ex-officio)
Admitted Attorney of the High Court of South Africa
The South African Institute of Chartered Accountants
17 Fricker Road, Illovo, Johannesburg, 2196

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APP1 JLH1

UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL

Distr.
GENERAL
E/CN.4/1327/Add.2
27 February 1979
Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Thirty-fifth session
Agenda item 16

IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

Note by the Secretary-General

The information reproduced in the annex to this note relevant to the preparation of the list of individuals, organizations, institutions and representatives of States alleged to be responsible for crimes enumerated in article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid has been received from the Special Committee against Apartheid in accordance with resolution 7 (XXXIV) of the Commission on Human Rights.

GE.79-11018

JPP 1-390

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS: ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE: PO 230-SOAF (2-2-1) 20 February 1979

Sir,

The Special Committee against Apartheid has been gravely concerned over the continuing crimes of the apartheid régime of South Africa and its officials, despite the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid by the General Assembly on 30 November 1973 and the coming into force of the Convention on 18 July 1976.

The brutality of the apartheid régime has, infact, escalated since the liberation of Angola and Mozambique and the Soweto massacre of 18 June 1976, as it attempted to stem the advance of the struggle of the oppressed people for liberation.

The Special Committee hopes that the Commission on Human Rights will soon prepare a list of individuals, organizations, institutions and representatives of States who are guilty of the crime of apartheid in terms of the International Convention and take appropriate action to secure the punishment of criminals.

In accordance with the International Convention and the requests of the Commission, the Special Committee has undertaken, with the assistance of an expert consultant, a study of the torture and murder of detainees in South Africa in recent years in order to assist the Commission in the discharge of its responsibilities under the International Convention. I have the honour to transmit herewith, for the attention of the Commission, a report on some cases, providing particulars on the persons - officers of the Security Police and magistrates - responsible for the crimes.

In this connexion, I wish to emphasize that the policy of apartheid has been recognized as a crime against humanity and all those who are concerned in the enforcement and administration of the laws of apartheid and the application of that policy are guilty of the crime of apartheid.

H. E. Mr. Yvon Beaulne
Chairman
Commission on Human Rights
Palais des Nations
Geneva

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IPP1 IPP1

UNITED NATIONS NATIONS UNIES

H. E. Mr. Yvon Beaulne 20 February 1979

While the present report only draws attention to the crimes of the Security Police and magistrates, criminal responsibility under the International Convention extends equally to the Ministers of Police and Justice, the Commissioners of Police, the Heads of Security Police, as well as judicial officers.

The Special Committee trusts that the Commission on Human Rights will study the attached report and take urgent action in accordance with the International Convention.

Accept, Sir, the assurances of my highest consideration.

Leslie O. Harriman
Chairman
Special Committee against Apartheid

A N N E X

SOME CASES OF MURDER, TORTURE AND DEPRIVATION OF LIBERTY

The accused and their victims

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CASE NO. A

THE ACCUSED: NATAL INLAND DIVISION, SECURITY POLICE, PIETERMARITZBURG, AND PORT NATAL DIVISION, SECURITY POLICE, DURBAN

All the persons named as the accused in Cases Nos. B and C

PARTICULARS:

CHARGE	DATE	VICTIM	WITNESS
Torture	30.11.1975 to ?	Michael Gumede	The victim
Torture	30.11.1975 to ?	Anton Fano Xaba	The victim
Torture	5.12.1975	William Fano Khanyile	The victim
Torture	5.12.1975 to ?	Russell Maphanga	The victim
Torture	5.12.1975 to ?	Harold Bekisisa Nxasana	The victim
Torture	December 1975 to ?	Mdelwa Frans Kunene	The victim
Torture	March 1976 ro April 1976	Cleophas Melayibone Ndhlovu	The victim
Torture	24.6.1977 to 7.10.1977	Sihle Khumalo	The victim
Torture	8.12.1977 to ?	Ernest Sabelo Ngobese	The victim

MATTHEWS MARWALE MABELANE (Age 23)

Matthews Marwale Mabelane was a former pupil of the Madibone High School, Diepkloof. He participated in the Soweto protests, and fled South Africa during the post-Soweto arrests. While re-crossing from Botswana back to South Africa on 27 January 1977 he was arrested. He died on 15 February 1977. An inquest was held on the next day. Police believed he was a right-hand man of the student leader, Tsietsi Mashinini, and had played a prominent part in the student protests. His arrest coincided with police-inspired press reports that underground cells ferrying young activists to Botswana had been smashed. He was believed to have received activist training.

Police version

Major General W. H. Kotze, Divisional Commissioner of Police, said he was being interrogated in a room with an un-barred window on the tenth floor at Security Police headquarters, John Vorster Square, Johannesburg, by Warrant Officer D. Jordaan, Warrant Officer Viljoen, and Detective Sergeant I. Cilliers, at about 9 a.m. on 15 February. Warrant Officer D. Jordaan left the room to answer a telephone call. A moment later, Mabelane jumped on to a chair, forced the window open, climbed on to a 130cm furrowed ledge that ran alongside the north side of the building and was walking on the ledge. The police were unable to stop him but called to him to come back. As he looked back he lost his balance and fell to his death. Senior police officers do not believe that he was attempting suicide when he went through the window. The other police officers in the room were taken by surprise. Mabelane had been sitting calmly at a table moments earlier.

Medical evidence

No medical evidence appears to have been given at the inquest.

Result of inquest

Mr. W. P. Dormehl, the inquest magistrate, found that Mabelane fell accidently and died of the multiple injuries he sustained as a result of the fall. No person was to blame.

Some remarks

1) It is probably correct that Mabelane climbed out of the window, walked along the ledge and fell to his death. Any passer-by might have seen this.

2) A passer-by might also have seen the policemen at the window. He could not have heard whether Mabelane was being called back or told to go further.

3) The magistrate did not address himself to the reason why Mabelane climbed out of the window. It would be absurd to suggest that he attempted to escape through a window of the tenth floor of a building. There is no suggestion of an attempted suicide. There is a strong and in the circumstances, irrestible inference that he was forced to climb out of the window while he was being tortured.

4) No medical evidence was submitted at the inquest. It does not appear that a post mortem examination was carried out. The inquest court had no information before it as to whether any injuries were present on the body that could have been caused other than by the fall, or earlier than the time of the fall.

5) The speed with which the inquest was disposed of is extremely significant. The family could not engage a pathologist or retain counsel. On this score alone the innocent explanation of how he came to be on the ledge and his accidental fall becomes unacceptable.

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JPP1. JLM2

A.G. 1/4/3/1/216/77 /JJ

O.F.S.(1811)—1975-76—200(000)—(14-5) 1/56

No. 287 1977

INQUEST: ACT 58 OF 1959
GEREGTELIKE DOODSONDERSOEK: WET 58 VAN 1959

Holden at JOHANNESBURG in the district of JOHANNESBURG
Gehou te in die distrik

by W.P. Dormehl esquire, Magistrate for the said district
voor mnr. Landdros van genoemde distrik en

with as assessor(s) on the 14th day
met as assessor(s) op die dag

of April 1977, into the circumstances attending the death of the person mentioned below.
van aangaande die omstandighede in verband met die dood van ondergenoemde persoon

Findings in terms of section 16 of the Act:
Bevindings ingevolge artikel 16 van die Wet:

(a) Identity of the deceased person MATHEWS MABELANE
Identiteit van die oorledene

Bantu male 22 Years Unknown
(State full name, race, sex, age and occupation/Meld volle naam, ras, geslag, ouderdom en beroep.)

(b) Date of death 15.2.77
Datum van sterfgeval

(c) Cause or likely cause of death MULTIPLE INJURIES - Sustained the deceased whilst
Oorsaak of waarskynlike oorsaak van dood

questioned by the police jumping through a window and walking along a ledge on the outside of the building at the 10th floor loosing his balance and falling to the ground below - Accidental.

(d) Whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person
Of die dood veroorsaak is deur 'n handeling of versuim, wat 'n misdryf aan die kant van iemand insluit of uitmaak

No

Date 14-4-1977 14.4.77.
Datum

W.P. Dormehl
Magistrate/Landdros

NOTE.—Section 16 (3) of the Act provides that if the Magistrate is unable to record any of the findings set out above he shall record that fact.
OPMERKING.—Artikel 16 (3) van die Wet bepaal dat indien die Landdros nie in staat is om enige van die bevindings hierbo vermeld aan te teken nie, hy die feit moet boekstaaf.

THE ATTORNEY-GENERAL,
DIE PROKUREUR-GENERAAL,

PRETORIA

In terms of section 17 (1) of the Inquests Act, 1959 (Act 58 of 1959), I submit herewith the record of proceedings.
Ingevolge artikel 17 (1) van die Wet op Geregtelike Doodsondersoeke, 1959 (Wet 58 van 1959), word die notule van verrigtinge hiermee voorgelê.

Date 14-4-77.
Datum

W.P. Dormehl
Magistrate/Landdros

The record is returned herewith for filing. My reference number is
Die stukke gaan hiermee terug vir lêsterling. My verwysingsnommer is

Date
Datum

Chief Clerk to the Attorney-General
Hoofklerk van die Prokureur-generaal

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JPP1

VOLUME FIVE

Truth and Reconciliation Commission of South Africa Report



Victims of gross violations of human rights

INTRODUCTION

The list which follows was taken from the database of the Truth and Reconciliation Commission (the Commission) on 30 August 1998. It contains the names of all those people who, by that date, had been found by the Commission to have suffered a gross violation of human rights. The cut-off date of 30 August was necessary in order that the list could be checked and prepared for inclusion in this report.

If people do not find their name on this list, there is no cause for concern. There are thousands more names to come, because the process of making finding and of dealing with queries, reviews and appeals has continued beyond that date. In addition, there will be further victims of human rights violations who will be identified through applications for amnesty.

It is the intention of the Commission to publish a complete list at a later date, as an addendum to this report. At that stage, the list will include not only names, but a brief summary of the finding made in every case.

AARON, Thabo Simon
ABRAHAM, Nzelseko Christopher
ABRAHAMS, Achmat Fardiel
ABRAHAMS, Annalene Mildred Ann
ABRAHAMS, Ashraf
ABRAHAMS, Derrek
ABRAHAMS, John
ABRAHAMS, Moegsien
ABRAHAMS, Moegsien
ABRAHAMS, Rashid
ABRAHAMS, Toyer
ACKERMAN, Marita
ADAMS, Koos
ADAMS, Magadien
ADAMS, Noel
ADAMS, Sandra Joyce
ADAMS, Zwelinzima Sidwell
ADONIS, Jacques
ADONIS, Sandra Noreen
ADOONS, Phineus Zenzile
ADRIAANSE, Noel John
AFRIKA, Anna
AFRIKA, Jan
AFRIKA, Pieter
AGGETT, Neil Hudson
ALA, Wazeka Getrude
ALBERT, Nombuyiselo Francis
ALFRED, Nomthandazo Amelia
ALLAM, Ernest
ALLAM, Joyce
ALLAM, Nozipho
ALLIE, Abdurahman
ALSET, Walter Titus
AMTHENJA, Billy Veli
ANDERSON, Cynthia Valerie
ANDERSON, Kid
ANDERSON, Peter
ANDREAS, Niklaas
ANDREWS, Lavona
ANDREWS, Piet September
ANDREY, Karl
ANGLESS, Edwin
APHANE, Dolly Elizabeth
APHANE, Karl Maisela
APHANE, Tiny
APIES, Katriena
APLENI, Sicelo Wellington
APOLOSI, Khobone Vernon
APPIES, David
APPOLS, Simphiwe
APRIL, Cecil Patrick
APRIL, Doreen
APRIL, Gibson Mxolisi
APRIL, Lindile
APRIL, Lungephi Lunga
APRIL, Ngubeni Stanley
APRIL, Ntsundu

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KHUZWAYO, Sigana
KHUZWAYO, Simema
KHUZWAYO, Sindisiwe Thulelani
KHUZWAYO, Siphiwo James
KHUZWAYO, Sphe
KHUZWAYO, Sthembiso
KHUZWAYO, Sthomba Lillian
KHUZWAYO, Terrosso Ntombifuthi
KHUZWAYO, Thembinkosi Enock
KHUZWAYO, Thembisile Agnes
KHUZWAYO, Thokozani
KHUZWAYO, Tholakele
KHUZWAYO, Vusi
KHUZWAYO, Vusumuzi
KHUZWAYO, Vusumuzi Vincent
KHUZWAYO, Winnifred
KHUZWAYO, Xolani Eric
KHUZWAYO, Zazi
KHUZWAYO, Zwi
KHWELA, Balokile
KHWELA, Bonga Dominic Boysie
KHWELA, Jabulani Timothy
KHWELA, Makhosazana Ethel Makho
KHWELA, Mandlakayise Barthemius
KHWELA, Mzwamenke Cyprian
KHWELA, Patricia Themba
KHWELA, Richard Mpuvele
KHWELA, Thandanani Siphiwe
KHWEZI, Mabita Ju
KIBI, Bhutiki John
KIKA, Theophulis
KIKABE, Sharon Raymond Lethusang
KILANI, Mbuzeli Robbie Norontose
KILANI, Nomonde Sylvia
KILANI, Toto Lawrence
KILI, Jerry Simmango
KILIBANE, Zolisa
KILLEEN, Peggy Shona
KIMBILI, Stoto
KING, Dorothy
KING, Gerard Quintin
KING, Gwen
KING, Russel
KINIKINI, Lulamile Patrick
KINIKINI, Luvuyo Stanley
KINIKINI, Mzoxolo
KINIKINI, Qondile
KINIKINI, Silumko Welcome
KINIKINI, Thamsanqa Benjamin
KINIKINI, Zamuxolo Eric
KIRSTEN, Rene
KIVITI, Mxolisi Desmond
KLAAS, Buyisile Nicholus
KLAAS, Livingstone Pawulezi
KLAAS, Mbuyiseli Sidwell
KLAAS, Phumelelo
KLAAS, Sillo Joseph
KLAAS, Thembisile John
KLAAS, Vuyelwa
KLAASEN, Boetman Matanzi
KLAASEN, Johanna Aleta
KLAASEN, Nombulelo Mina
KLAASSEN, Andile Amos
KLAASTE, Aubrey
KLAASTE, Gerald
KLAASTE, Rubin
KLEIN, Brenda
KLEINBOOI, David
KNOUWDS, Salomon Jacobus
KOAHO, Lalula
KOAHO, Moya Kleinbooi
KOAPENG, Johannah Refilwe
KOBE, Andile Anton
KOBESE, James
KOBOKA, Bubele
KOBOLA, Phaladi Phineas
KODISANG, Shadrack
KODISANG, Sipho Adam
KOEE, Aobakwe Gilbert
KOELMAN, Bernard
KOELMAN, Noma-Efese Nielmary
KOEN, Chrissie
KOENA, Anna
KOHL, Alston Phillip
KOHLAKALI, Ntontle
KOHLI, Qalisile John
KOITENG, Moses Mothuphi
KOKA, Ben France
KOKI, Mamokgale Roslyn
KOKOME, Betty Onini
KOLA, Elizabeth
KOLA, Thomas
KOLE, Ntafi David
KOLISANG, Daniel Khopotso
KOLISANG, Petrus Lepekola
KOLISANG, Tsepiso Faith
KOLISI, Tatana
KOLISILE, Gampimpi Doctor
KOLITI, Nontla
KOLO, Tomas
KOLOBE, Henry Malaplle
KOLOI, Kenathatha Alice
KOLOI, Machaya Phineas
KOLOI, Ohentse Richard
KOLOTI, Elvis Radimakatso
KOLOTLA, James Madebe
KOLWANE, Eliyot Mosimanegape
KOM, Gladys Nomgcobo
KOMANE, Nombuselo
KOMANI, Brian
KOMANI, Nonesi Nocawa
KOMANI, Vumile
KOMAPE, Mosima Elisa
KOMAPE, Phaka Maphuti
KOMAPE, Phuti Elsie
KOMETSI, Isaac Modikeng
KOMO, Bashintshile
KOMO, Bonakabi
KOMO, Reginald Wonder
KOMSASI, Sikade Council
KONDILE, Gcinisizwe
KONDLO, Thembekile
KONE, Mmbengeni Bernard
KONGO, Lawrence Thobile
KONILE, Zabonke John
KONTYO, Siphiwo Hendry
KONYA, Tom
KONYANE, Paphala Richard
KONYANE, Ralepheto Jackson
KOPELE, Philemon
KOPELEDI, Kebarileng Hagai
KOPOLO, Albert Magayiva
KOPUNG, Paulos
KORDOM, Kerneels
KOROTSOANE, Franscis Tahlaho
KOTA, Mzolisi Simon
KOTA, Vuyo
KOTANE, Tumeleng Ernest Lebalda
KOTELO, Mathabo Johannes
KOTLOLO, Walesela Daniel
KOTO, Andries Odrie
KOTOPE, Motsamai Albert Zapu
KOTOTSI, Mosipili Pauline
KOTSELE, Zwelandile Simon
KOWA, Phangiwe Irene
KOZA Kasbay
KOZA, Mandla Aaron
KOZA, Tembani Ntombinkulu
KRATSHANE, Tswinana Alfred
KRATSHI, Mandlenkosi
KRECKIE LEKONE, Sonny
KRECKIE, Loot Peter
KRECKIE, Rocky
KRIEL, Ashley James
KROLI, Phumzile Samuel
KROMA, Sipho
KROMBERG, Anita Helen
KRUGER, Franz
KRUGER, Ryan Christopher
KRUSER, Gary John
KUAPE, Mantwa Lydia
KUBAYI, Solomon Muzamane
KUBEKA, Zamokwakhe
KUBEKA- MODISE, Abigale Sibongile
KUBHEKA, Albertina
KUBHEKA, Amos Bongani
KUBHEKA, Bongani
KUBHEKA, Bool
KUBHEKA, Clement
KUBHEKA, Dumisani
KUBHEKA, Dumisani Wilfred
KUBHEKA, Elvis
KUBHEKA, Fakazi Jerome
KUBHEKA, Jefrey
KUBHEKA, Joshua
KUBHEKA, Linda Bathuel
KUBHEKA, Mondi Petros
KUBHEKA, Mphikeleli Kenneth
KUBHEKA, Ndoda
KUBHEKA, Nkosinath
KUBHEKA, Percelval Mlamuli
KUBHEKA, Phumelele Beula
KUBHEKA, Piet
KUBHEKA, Pijone John
KUBHEKA, Sabatha
KUBHEKA, Siphiwe Patrick
KUBHEKA, Sipho Hamilton
KUBHEKA, Solomon Mandla
KUBHEKA, Swenki Autry
KUBHEKA, Thandi Anna
KUBHEKA, Themba Petros
KUBHEKA, Thoko Tryphina
KUBHEKA, Thusi Hezekiel
KUBHEKA, Vusumuzi Joseph
KUBHEKA, Zozo Jerry

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VOLUME TWO

Truth and Reconciliation Commission of South Africa Report



detainee who had just been returned to the prison after a session of interrogation, "Hy het dit seker nodig gehad" *(He probably deserved it).*

Deaths of detainees held in terms of security legislation

166 The Commission was told of a number of cases where the victim died while detained under security legislation.

'Suicides'

167 In the following cases the police said the death was the result of suicide:

a Mr Looksmart Ngudle [CT00504/GAU; also see EC0127/96/CCK] died on 5 September 1963 in Pretoria, allegedly a suicide by hanging, following electric shock torture.

b Mr Suliman Saloojee [JB01711/01ERKWA] died on 24 January 1964 after allegedly jumping from a window.

c Mr James Thabiso Lenkoe [JB00092/01GTSOW] died in Pretoria Central prison on 10 March 1969. Police claimed he had committed suicide by hanging. A pathologist report established that he had been tortured and possibly killed.

d Mr Ahmed Timol [JB00173/03WR] died on 27 October 1971 at John Vorster Square in Johannesburg. According to the police, he committed suicide by leaping out of the window of a tenth-floor office.

e Mr Luke Mazwembe [CT00516/FLA; EC1249/96BUT; CT01307/KAR] died in detention in Cape Town in 1976, after allegedly "hanging himself with a blanket".

f Mr Mapetla Mohapi [EC0007/96PLZ] died at Kei Road police station, East London, on 5 August 1976. Ms Mohapi was told by the police that her husband had hanged himself with his jeans. However, a 'suicide note' from Mohapi was apparently not in his handwriting.

g Mr Hoosen Haffajee [KZN/NG/006/DN] died in Brighton Beach police cells, Durban, less than twelve hours after having been detained, on 3 August 1977.

h Mr Mxolisi Johannes 'Dikkie' Jacobs [CT04205/UPI] died in Upington police cells on 22 October 1986, another alleged suicide by hanging.

i Mr Phakamile Harry Mabija [CT00135/KIM; also see CT00635/KIM and CT04513/KIM] died in detention in Kimberley on 7 July 1977 in an alleged suicide: he "jumped out of a window" on the sixth floor.

j Mr George Botha [EC1587/97PLZ] died in security police custody in Port Elizabeth on 15 December 1976, allegedly "suicide through jumping down a stairwell" of the Sanlam Building, the offices of the Port Elizabeth Security Branch offices.

k Mr Lungile Tabalaza [EC0002/96PLZ & EC2607/97PLZ] died at 15h00 on 10 July 1978, allegedly after jumping from the fifth floor window of the Sanlam Building in Port Elizabeth. At the inquest, the government pathologist acknowledged that several bruises and lacerations could have been sustained before the fall. A magistrate, Mr Lubbe, who saw Tabalaza less than an hour before his 'suicide', expressed regret for having failed to investigate Thabalaza's fears that he would be beaten if he did not make a statement when he was taken back to the Security Branch offices.

l Mr Neil Hudson Aggett [CT00410/FLA] was detained in November 1981 and died on 5 February 1982, allegedly having committed suicide by hanging.

168 The security police suggested that detainees had received instructions from the ANC to commit suicide rather than talk. Some claimed that they committed suicide in order to malign the Security Branch. Mr TJ '*Rooi Rus*' Swanepoel was quoted in a November 1982 press article as saying: "It is a communist plot. If they commit suicide, they can cast doubts on the security forces."[13]

169 The Commission has taken into consideration the evidence of victims of torture which could well have led to death, especially those cases in which similar forms of torture *did* lead to death. A number of cases were recorded of detainees having their heads bashed against the wall and of detainees who were suspended by their feet outside windows of buildings of several storeys, raising the strong possibility that at least some of those detainees who allegedly committed suicide by jumping out of the window were either accidentally dropped or thrown.

172 Mr Mfene Simon Yoyo [EC0653/96QTN] told the Commission that, during his detention in East London in April 1963, his interrogating officer said: "This person does not want to tell the truth. Then I think let's throw him out of the window ...". Yoyo said they lifted him up and hung him out of the window, threatening to let go.

174 Mr Vusumzi Johnson Nyathi [JB02097/03WR], a detainee in the Bethal trial of *the State v Mothopeng and seventeen others*, survived after he was allegedly thrown out of the window during an interrogation session. Nyathi, who suffered spinal injuries, was later charged and found guilty of trying to escape from custody. By

13 *Rand Daily Mail*, 6 November 1982.

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the time the Bethal trial opened in December 1977, four persons detained in connection with the trial had died in detention. They were Mr Naboath Ntshuntsha, Mr Samuel Malinga, Mr Aaron Khoza and Mr Sipho Bonaventura Malaza. Nyathi later sued the Minister of Police without success.

175 The Commission also heard evidence of *bona fide* cases of suicide and accounts from detainees who said they had contemplated or attempted suicide. Mr Prema Naidoo spoke of his wish to commit suicide after revealing information after six days of unremitting torture: "I contemplated suicide, not because I was hurt or anything but because I felt I had betrayed the cause, the cause which I believed in."

176 The Commission is of the opinion that, given the extensive evidence of physical as well as psychological torture, suicides under conditions of detention should be regarded as induced suicide for which the security forces and the former government are accountable.

'Accidental deaths'

177 In at least three cases which came before the Commission, the police claimed accidental death. Mr Nicodimus Kgoathe [JB00113/03NWRUS] and one of his co-accused, Mr Solomon Modipane, both died in detention under the Terrorism Act in February 1969. The police explanation for Kgoathe's death was "bronchial pneumonia after slipping in the shower" and for Modipane's death, "fatal injuries from slipping on a bar of soap".

178 Mr Joseph Mdluli [KZN/KM/999/DN], one of the accused in the case against Harry Gwala and nine others, died in detention in Durban on 19 March 1976. The official explanation for his death was "injury to neck after falling against a chair". While Judge Howard rejected allegations of torture made by detainees during the court case, he indicated in his judgement that the injuries sustained by Mdluli could not have been self-inflicted or caused accidentally, and found that most, if not all, of the injuries had been inflicted by the security police. In October 1976, four security police, namely Captain David van Zyl, Andy Taylor, Detective Sergeant H Makhanya and Detective Sergeant Z Mkhize, were charged with culpable homicide. All were later acquitted. In March 1979, the state admitted liability for the death of Mdluli and an out-of-court settlement of R28 616 was paid to his widow.

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'Natural causes'

179 In the following cases police claimed death from natural causes:

a Mr Mzukisi Melvin Nobadula [EC0662/96PLZ] died in detention in Port Elizabeth in December 1977. His brother identified his body in the mortuary and saw that there were scars, burn marks and blood on it. At the *post mortem*, however, the district surgeon, Dr Laing, said he had died of natural causes.

b Mr Caleb Mayekiso [EC0644/96/PLZ] died in detention in Port Elizabeth in 1969 while being held under the Terrorism Act.

c Mr Elijah Loza [CT00257/FLA] died in Cape Town in 1977, allegedly of a stroke. His family believes he was "tortured to death".

d Mr Stanza Bopape [JB00500/02NPPTB] was reported at the time of his dis appearance to have escaped while being transported. Amnesty applications received by the Commission indicate that he died in detention, following electric shock, but allegedly from 'natural causes' (see below).

e Mr Paris Malatji [JB0409/01GTSOW], an AZAPO activist, was shot at point-blank range when in custody in 1983 at Protea police station. Sergeant January Harm van As was convicted and sentenced to ten years' imprisonment for the shooting, the first conviction for the death of a detainee.

f Mr Andries Raditsela, a member of the Chemical Workers' Industrial Union (CWIU) and executive member of the Federation of South African Trade Unions (FOSATU), was detained and assaulted so severely at Tsakane police station on 4 May 1985 that he died of head injuries two days later May in Baragwanath hospital, after his release.

Deaths in detention under security legislation

180 The Commission is aware of the following deaths of detainees held under specific security laws, excluding those detained under emergency regulations. The attributed cause of death is included:

1964: *Mr James Tyitya, Port Elizabeth: 'suicide by hanging';*

1965: *Mr Nengeni Gaga, Transkei: 'natural causes'; Mr Pongolosha Hoyo, Transkei: 'suicide by hanging';*

1966: *Mr James Hamakwayo, Pretoria: 'suicide by hanging'; Mr Hangula Shonyeka, Pretoria: 'suicide'; Mr Leong Yun Pin, Pretoria: 'suicide by hanging'; Mr Ah Yan, Silverton: 'suicide by hanging';*

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1967: *Mr Alpheus Maliba, South West Africa/Northern Transvaal: 'suicide by hanging';*

1968: *Mr Jundea B Tubakwe, Pretoria: 'suicide by hanging';*

1969: *Mr Michael Shivute, South West Africa: 'suicide'; Mr Jacob Monakgotla, Pretoria: 'natural causes'; Imam Abdullah Haron, Cape Town: 'slipped down stairs'; Mr Mthayeni Cuthsela, Transkei: 'natural causes';*

1976: *Mr William Tshwane, Modderbee: 'shot while trying to escape'; Mr Dumisani Mbatha, Modderbee: 'natural causes'; Mr Fenuel Mogatusi, Johannesburg: 'natural causes'; Mr Jacob Mashabane, Johannesburg: 'suicide by hanging'; Mr Edward Mzolo, Johannesburg: 'undisclosed'; Mr Ernest Mamasile, Transkei: 'suicide by hanging'; Mr Thabo Mosala, Transkei: 'natural causes'; Mr Wellington Tshazibane, Johannesburg: 'suicide by hanging';*

1977: *Mr Nabaoth Ntshuntsha, Leslie: 'suicide by hanging'; Mr Lawrence Ndzanga, Johannesburg: 'natural causes'; Mr Elmon Malele, Johannesburg: 'natural causes'; Mr Twasifeni Joyi, Transkei: 'undisclosed'; Mr Mathews Mabelane, Johannesburg: 'fell out of window'; Mr Samuel Malinga, Pietermartizburg: 'natural causes'; Mr Aaron Khoza, Pietermaritzburg: 'suicide by hanging'; Mr Hoosen Haffajee, Durban: 'suicide by hanging'; Mr Bayempini Mbizi, Durban: 'suicide by hanging'; Mr Stephen Bantu Biko, Port Elizabeth: 'head injuries'; Mr Sipho Bonaventura Malaza, Krugersdorp: 'suicide by hanging';*

1981: *Mr Manana Mgqweto, Transkei: 'unknown';*

1982: *Mr Ernest Dipale, Johannesburg: 'suicide by hanging';*

1983: *Mr Simon Mndawe, Nelspruit: 'suicide by hanging'; Mr Paris Malatji, Johannesburg: 'shot in the head';*

1984: *Mr Samuel Tshikudo, Venda: 'natural causes'; Mr Mxolisi Sipele, Transkei: 'unknown'; Mr Ephraim Mthethwa, Durban: 'suicide by hanging';*

1985: *Mr Andries Raditsela, Johannesburg: 'head injury';*

1986: *Mr Makompe Kutumela, Lebowa: 'police assault'; Mr Peter Nchabaleng, Lebowa: 'police assault';*

1987: *Mr Benedict Mashoke, Burgersfort: 'suicide by hanging'; Ms Nobandla Elda Bani, Port Elizabeth: 'natural causes';*

1988: *Mr Sithembele Zokwe, Transkei: 'shot by police'; Mr Alfred Makaleng, Johannesburg: 'natural causes';*

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1990: *Mr Clayton Sizwe Sithole, Johannesburg: 'suicide by hanging'; Mr Lucas Tlhotlhomisang, Klerksdorp: 'natural causes'; Mr Donald Thabela Madisha, Potgietersrus: 'suicide by hanging'.*

181 The Commission received statements about the following deaths in police custody. Although the Commission made a positive victim finding in these cases, it was not able to establish the exact legislation under which they were held at the time of their deaths.

a Political activist Colenso Ninase Mnyane [EC0735/97ETK] died in detention in Tabankulu on 5 November 1967, either of heart failure or of injuries from a fall.

b Mr Rocky James [EC0144/96/NWC] was shot dead while in custody in Cradock on 9 November 1977, allegedly while "trying to escape". A statement from a municipal policeman, Michael Adams, said James was severely beaten by a white policeman. When James pleaded for help, Adams attempted to intervene. During the scuffle with the white policeman, James attempted to run away and was shot dead. Adams subsequently lost his job. The family heard that James had been instructed by the police to run away and had then been shot in the back.

c Mr Ephraim Thami 'Papi' Mthethwa [KZN/ZJ/146/DN], a UDF member, was detained and died two months later on 24 August 1984 in Lamontville. He was held in solitary confinement at Sentela police station. Police claimed he had hanged himself.

d Congress of South African Students (COSAS) activist Sipho Mutsi [KZN/ZJ/115/BL] was detained and died on 14 May 1985 in Odendaalsrus, Orange Free State after being severely beaten.

e In August 1985 Mr Thembelakhe George [EC0846/96/KWT] was assaulted by police, first at his home during his arrest in connection with the consumer boycott in Ginsberg, and then at the police station in King Williams Town. His family later found him in hospital where he died from injuries sustained from the assault. The inquest magistrate noted that the head injuries which caused his death could have been inflicted by the police.

f Mr Amos Dendeng Sonnyboy Mokoena [JB00264/01GTSOW] died in detention in Pilgrims' Rest on 16 August 1985. The police told his mother he hanged himself in his cell. While the police allege that Mokoena was arrested on criminal charges, his mother alleges that he was politically active and had fled to Pilgrims' Rest to escape detention.

g Mr Tota Alex Mfazwe [EC1363/96PLZ] was arrested in Queenstown on 5 July 1986, severely assaulted, and is alleged to have committed suicide by hanging himself at Queenstown police station on 6 July. The family reported that there were bruises and a big scratch on his face and that his clothes were badly torn.

h Mr Nopola Njatu [EC0427/96/NEC] died after being beaten up in police custody in Sterkstroom in November 1986. Police alleged death due to an epileptic fit; but his family noted an open wound on his forehead. The inquest found that the cause of death was 'not determined'.

i Mr Eric Ndondela Nongqo [EC1515/97NWC] died of neck injuries after being arrested and beaten up at the police station in Steynsburg on 18 July 1987.

j Mr Paulus Radebe [KZN/ZJ/169/WE] was detained in 1987 in Welkom. He was tortured to death at the Odendaalsrus police station on 31 October 1987.

k Mr Anthony Melville Smiles [EC0313/96/ALN], a political activist, was arrested in Dordrecht in 1988, allegedly for being drunk in the street. The police alleged that he had committed suicide in police cells by hanging himself with his overalls. The inquest report indicated that, while suicide was possible, death by other means could not be ruled out. The *post mortem* recorded that either the victim had attempted to loosen the overalls himself or that he had first been strangled and then hanged after death.

182 The Commission has received a substantial number of further cases of deaths in police custody. In many inquest reports, magistrates ruled that no one could be held accountable for the deaths of detainees.

183 The Commission received amnesty applications in respect of the deaths of only three detainees, namely Mr Stephen Bantu Biko, Mr Sizwe Kondile and Mr Stanza Bopape.

184 Stephen Bantu Biko died in police custody in Pretoria on 12 September 1977. He was detained by the Security Branch in Port Elizabeth twenty-four days earlier, and was subjected to interrogation, during which he sustained serious brain injuries. He was examined by both a district surgeon and a medical specialist (see Volume Four, chapter on the health sector hearing). He was then transported naked in the back of a police van from Port Elizabeth to Pretoria. He died from brain damage in a prison cell shortly after his arrival in Pretoria. On hearing the news of his death, Minister Kruger said: "It leaves me cold." He implied that

Biko had died as a result of engaging in a hunger strike. At the inquest, the security police claimed that Biko had "become violent" during interrogation and had to be "subdued" by the interrogation team, in the course of which he hit his head against the wall.

185 Mr Harold Snyman [AM3918/96, Mr Gideon Nieuwoudt [AM3920/96], Mr Daniel Petrus Siebert [AM 3915/96], Mr Ruben Beneke Marx [AM3521/96] and Mr Jacobus Johannes Oosthuizen Beneke [AM6367/97] applied for amnesty for Biko's death. Brigadier Piet Goosen, head of the Security Branch in the Eastern Cape at the time of Biko's death, is deceased. Amnesty applicants held fast to the explanation they gave at the inquest. The Biko family did not make a statement to the Commission and are opposed to the granting of amnesty.

186 Mr Stanza Bopape [JB00500/02NPPTB] was arrested at around midnight on 9 or 10 June 1998, together with his flatmate Mr Bheki Nkosi [JB00500/02NPPTB] at their flat in Hillbrow. About twenty men, armed with guns, bush knives and bullet-proof vests and led by Lieutenant CA Zeelie [AM3751/96], jumped into the room. Zeelie asked Bopape whether he was 'ST' or 'Walk Tall', MK names by which Bopape was known. Bopape was then punched in the stomach. The last Nkosi saw of Bopape was at the Roodepoort police station. Nkosi himself was later subjected to electric shock torture.

187 After several queries from Bopape's lawyers as to his whereabouts, the SAP informed them that he had escaped. On 13 July 1988, then Lieutenant General Johan van der Merwe, head of the Security Branch, informed the lawyers that Bopape had "wilfully escaped" while "being escorted by motor vehicle to Vereeniging, where certain police investigations were in process. A flat tyre en route necessitated that the police vehicle stop and whilst the spare tyre was being fitted, your client made good his escape." Van der Merwe said that this escape had not been publicised for fear of jeopardising a sensitive police investigation regarding the movement and activities of trained "terrorists".

188 In an article that appeared in *Business Day* on 26 April 1989, Minister Vlok was reported to have announced that Bopape had been seen in an area where an act of terror took place. Similarly, on 15 June 1989 the *Sowetan* quoted Brigadier Leon Mellett of the SAP as saying that Bopape had been seen by a former colleague, whose name was not disclosed. On 19 June 1990, Vlok reported to Parliament that the investigation into Bopape's disappearance was continuing. He refused to disclose the names of the officers in whose care

Bopape had been at the time of his disappearance, but indicated his preparedness to do so if the Harms Commission wished him to. The Harms Commission decided that there were insufficient grounds for holding a hearing.

189 Bopape's disappearance remained unresolved until amnesty applications were received from Lieutenant Charles Zeelie [AM3751/96], Mr HAB Mostert [AM4403/96], Major AP van Niekerk [AM4353/96] and Mr JL du Preez [AM4404/96] for their role in his death. In addition, the head of the Security Branch, Lieutenant General JV van der Merwe [AM4157/96], Colonel S Visser [AM5000/97], Captain Leon van Loggerenberg [AM5010/97], Witwatersrand divisional commander Major-General GN Erasmus [AM4134/96], and Major General PL du Toit [AM4131/96] applied for amnesty for their role in covering up the death.

190 The amnesty applications reveal that a meeting was held on Saturday, 11 June at the offices of the Krugersdorp/West Rand Security Branch. The meeting was attended by about fifteen Security Branch members, including officers Mostert and Colonel Van Niekerk from Johannesburg. They were told that Bopape had been trained by MK member Odirile Maponya, and had been involved in and/or planned several terrorist attacks. Maponya's group, Mr MRA Toka and eleven others, had stood trial on several charges of murder and bombings in Pretoria.

191 On Sunday, 12 June 1988, Bopape was taken from his cells to the offices at John Vorster Square for questioning by Mostert and S/Constable Engelbrecht. After Bopape refused to co-operate, Van Niekerk, Zeelie, Mostert and Engelbrecht together decided that Bopape needed to be given a "little fright" to persuade him to co-operate. Colonel Van Niekerk approved the use of the electric shock instrument. A Sergeant du Preez brought the instrument from Sandton where it was kept. Van Niekerk relates:

> *We decided to tie Mr Bopape to a chair ... His shirt was removed, his hands were tied to the supports of the chair and his feet to the legs ... Sergeant du Preez had the shock device in his hand ... There were two cords running from the device and at the tip of it, these cords, there were two pieces of cloth which were wrapped around the tips of the cords. This device was turned three or four times by Sergeant du Preez and whilst he was turning it, Mr Engelbrecht pushed these cords against his body ... It didn't take very long, maybe two to four minutes, the device was turned, then it was stopped, then someone asked him if he wanted to say something and if there was no reaction to that, then the machine was turned again and this must have happened about three times. By the third time, Mr Bopape's*

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head fell forward and I realised there was something wrong. We immediately untied him, placed him on the floor and Sergeant du Preez gave him mouth-to-mouth resuscitation. It seemed that he was dead already and I think that all of us standing there ... all thought that he was dead.

192 The five officers discussed the possible consequences of Bopape's death and decided that they could be extremely serious. Aside from the negative publicity around yet another section 29 death, June 16 was only a few days away and the Security Branch feared that the news of his death could spark off violence. Colonel Van Niekerk reported the matter to his divisional commander, who discussed the matter with Lieutenant General Johan van der Merwe and they agreed that a fake escape should be arranged. Brigadier Schalk Visser, head of the Eastern Transvaal Security Branch, would assist with the disposal of the body.

193 As night fell, Stanza Bopape's body was secreted out of the police station. Members of the Johannesburg Security Branch met members of the Eastern Transvaal Security Branch next to a highway near Bronkhorstspruit, where they handed over the 'sensitive package' to Captain van Loggerenberg. Van Loggerenberg could see that it was a human body covered in plastic. He drove directly to a crocodile hole in the Komati River close to Komatipoort, near a picnic spot frequented by police officers. He pushed the body partially into the hole and it sank away. On his return he reported to Visser.

194 The applicants claimed that they only "turned the instrument two or three times" and that this was not sufficient to cause death in a healthy human being. They said that Bopape had previously been treated for a heart complaint at the Princess Clinic, that they had been unaware of this, and that his death must have occurred as a result. The Princess Clinic no longer exists and corroborating records are not available. However, Bopape's girlfriend claims that his treatment at the Princess Clinic was in connection with a nasal complaint.

195 Odirile Maponya, who is alleged to have trained Bopape, was blown up while allegedly laying a limpet mine in Pretoria in 1988. Maponya's brother was abducted and interrogated about his brother's network and killed (see below).

Applications for amnesty

196 While the Commission received thousands of statements alleging torture, few amnesty applications were received specifically for torture. Amnesty applicant

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Case number: I01/ 2017

In the matter of:

REOPENED INQUEST: LATE AHMED TIMOL

PIERS ASHLEY PIGOU

I, the undersigned

PIERS ASHLEY PIGOU

do hereby make oath and state:

1. I am an adult male residing in Johannesburg. I am the International Crisis Group's Senior Consultant for Southern Africa. Formerly, from 2011 I was Crisis Group's Southern Africa Project Director, overseeing the organisation's research and advocacy activities in South Africa, Zimbabwe, Madagascar and Angola.

2. I hold an M.A. in Southern African Studies from York University and a B.A. (Hons) in Politics from Portsmouth Polytechnic.

3. Before joining Crisis Group, I was:

   3.1. the Program Manager at the Foundation for Human Rights,

   3.2. a Senior Associate for Southern Africa at the International Center for Transitional Justice,

   3.3. Director of the South African History Archive,

   3.4. Research and Advocacy Coordinator at the Institute for Democratic Alternatives in South Africa/

   3.5. Researcher at the Center for the Study of Violence and Reconciliation;

   3.6. Investigator for the Truth and Reconciliation Commission in South Africa,

   3.7. International Advisor to the Truth Seeking Division of the East Timorese Truth, Reconciliation and Reception Commission.

4. I was attached to the investigation unit of the Gauteng office of the Truth and Reconciliation Commission.

5. During 1996 and 1997 I was asked to investigate the detention and death in custody of Ahmed Timol. I was able to identify and collate records from a range

of state and private archives relating to Timol and others arrested during the sweep on activists during 1971.

6. During this period I spoke with the daughter of Joao Rodrigues, the police officer who, according to official records had been in the room with Timol when he allegedly jumped from the 10th Floor. I had been informed that Rodrigues' daughter has been encouraging her father to engage with the TRC.

7. As a result of this interaction, I was able to locate and speak with Mr Rodrigues who at the time was working for SanParks. We arranged to meet in Pretoria at the SanPark offices. He indicated when we spoke telephonically that he was willing to discuss the case. Several days later I drove to Pretoria as arranged and met Mr Rodrigues at his place of work.

8. However, at this meeting he was no longer amicable nor was he willing to cooperate. He came across as reticent and insisted that our entire interaction be recorded with a voice recorder. He was not willing to talk to me about what has happened with Timol and our interaction was concluded rather quickly.

9. I indicated that the TRC needed to hear his version of events directly, and I informed him that I would be advising the TRC to subpoena him in terms of Section 29 of the TRC Act. I subsequently made such a recommendation to the Commission, but this was not done.

10. It appeared to me that between the time of my initial contact with Mr Rodrigues and the time we actually met, he had either by himself or as a result of the intervention of another, decided not to cooperate with the TRC.

11. As far as I am aware Mr Rodrigues never approached the TRC in order to disclose what he knew about the death of Ahmed Timol.

PIERS PIGOU

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and affirmed before me at LONDON on this the 4th day of AUGUST 2017.

COMMISSIONER OF OATHS

FULL NAMES: Nagendran Kandiah.

DESIGNATION: Solicitor

ADDRESS:

MTC & Co Solicitors
3 Masefield House,
Stafford Road,
London, NW6 5YU,
0207 6244300

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NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
CAPE TOWN
2016 -11- 03
CAPE TOWN
OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

MINISTERIAL MEMORANDUM

TO : T. M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FROM : ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT : REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT, 58 OF 1959 TO REOPEN THE INQUEST INTO THE DEATH OF AHMED TIMOL

DATE : 25 OCTOBER 2016

1. PURPOSE

The purpose of this memorandum is to request the Honourable Minister of Justice and Correctional Services to invoke the provisions of Section 17A of the Inquest Act 58 of 1959, by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge to reopen the inquest into the death of Ahmed Timol ('*Timol*').

MINISTER: JUSTICE AND CORRECTIONAL SERVICES
PRETORIA
2016 -11- 07
PRETORIA
MINISTERIE VIR JUSTISIE EN KORREKTIEWE DIENSTE

2. BACKGROUND

2.1. In **Timol v The Magistrate of Johannesburg 1972(2) SA 281 (T)**, the Court *inter alia* held that:

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"... the Inquest must be so thorough that the public and interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".

2.2 Timol was a member of the Communist Party who was detained on 22 October 1971 by the Security Branch of the then South African Police at the notorious John Vorster Square Police Station.

2.3 On 27 October 1971 he died in detention while under interrogation by members of the Security Branch.

2.4 According to his interrogators, Timol is alleged to have committed suicide by jumping out of a window on the 10th floor of the John Vorster Square Police Station building in Johannesburg.

2.5 The then Attorney General, Johannesburg, declined to prosecute and a formal inquest was held before a Johannesburg Regional Court Magistrate under reference Johannesburg 2361/71, which handed down a verdict that Timol had committed suicide and that the Police were not responsible for his death. The Inquest commenced in late April 1972 and concluded on 22 June that same year.

2.6 The evidence comprised almost entirely of the Police Officers involved in his arrest, detention and interrogation, along with the medical evidence.

2.7 Due to the prevailing situation at the time, persons who were in detention or in exile did not testify. This resulted in the Regional Magistrate finding that Timol had committed suicide and had not been assaulted or ill-treated by the Police prior to his death.

2.8 The Regional Magistrate's finding was criticised by human rights organisations. Notwithstanding this, no further action was taken.

2.9 In addition, no one applied for amnesty for Timol's death during the Truth and Reconciliation Commission ('*TRC*').

2.10 As a result of representations received by the Priority Crimes Litigation Unit ('*PCLU*') in my office, the Directorate for Priority Crime Investigation ('*DPCI*') were requested to reopen the investigation into Timol's death.

2.11 It would appear that there is compelling new evidence relating to the torture, which if considered could result in a different finding.

2.12 In this regard, Dr Salim Essop ('*Essop*'), who was arrested with Timol on 22 October 1971, and who was subjected to severe torture at the hands of the self-same members of the Security Branch, was never permitted to testify at the ~~in the~~ inquest into Timol's death.

2.13 In short, Essop, who had been subjected to severe torture at John Vorster Square Police Station to the extent that he was rendered unconscious on numerous occasions, collapsed again on the morning of 26 October 1971, whereafter he was examined by a district surgeon. Whilst unconscious he was taken to the General Hospital in Johannesburg by ambulance where he received emergency medical treatment. Although still in an extremely fragile condition, he was thereafter taken to HF Verwoerd Hospital in Pretoria.

2.14 Essop was later taken to Pretoria Central Prison where he was held *incommunicado*. He was thereafter secretly admitted into hospital and later to a prison hospital where he remained until his first court appearance in the Johannesburg Magistrate's Court on 8 March 1972 whereafter he was remanded in custody. On 13 June 1972 he was indicted on terror related charges along with three other co-accused in the Pretoria Supreme Court (as it was known then).

2.15 Essop's trial ended on 31 October 1972 when he and his co-accused were convicted on terror related charges and sentenced to five years' imprisonment.

2.16 At no stage did Essop present the facts of his torture during any judicial proceedings in the Republic of South Africa, nor was he afforded the opportunity to do so.

2.17 Recently, in a 37-page affidavit dated 14 October 2016, Essop extensively explains the circumstances of his and Timol's arrest and his subsequent harrowing brutal torture and inhumane treatment at the hands of members of the Security Branch.

2.18 Essop's eye witness account of Timol's condition at the time of their arrest, his own torture and assault at the hands of the Security Branch Police, contradicts the version of the members of the Security Police in so far as their treatment of Timol and the injuries sustained by him.

3. THE RELEVANT LEGISLATION

3.1 Although there is more than one section of the Inquest Act 58 of 1959 that can be used to reopen an Inquest, the most applicable is Section 17A, which reads as follows:

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> *"(1) The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court to designate any judge of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."*

3.2 There are compelling reasons as summarised above along with the high public interest in this matter to motivate for the reopening of the said inquest.

3.3 Essop is a very credible and relevant witness who was not afforded an opportunity to provide his evidence during any judicial proceedings. The probability exists that there is a real likelihood that his version could result in a court coming to a different finding as to the circumstances surrounding the death of Timol than that of the Regional Magistrate Johannesburg in 1972.

3.4 As such, the interests of justice would justify the reopening of the inquest into the death of Ahmed Timol.

3.5 The Acting Special Director of Public Prosecutions and Head of the PCLU have consulted with the Directors of Public Prosecutions (DPPs) of South and North Gauteng in terms of the provisions of Section 24(3) of the National Prosecuting Authority Act 32 of 1998. Both DPPs are in agreement and have recommended that the Honourable Minister be requested to invoke the provisions of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South

Africa to designate a judge to reopen the Inquest into the death of Ahmed Timol.

4. RECOMMENDATION

4.1 It is recommended that the Honourable Minister of Justice and Correctional Services invoke the provision of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge of the High Court to reopen the Inquest into the death of Ahmed Timol.

4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.

Yours sincerely

ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 25-10-2016

PARAGRAPH 4: SUPPORTED /NOT SUPPORTED

VUSI MADONSELA, Esq
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 02/11/2016

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4. RECOMMENDATION

4.1 It is recommended that the Honourable Minister of Justice and Correctional Services invoke the provision of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a Judge of the High Court to reopen the inquest into the death of Ahmed Timol.

4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.

✓

PARAGRAPH 4: RECOMMENDED/ NOT RECOMMENDED

MR J. JEFFERY, MP
DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 3/11/16

PARAGRAPH 4: APPROVED/NOT APPROVED

LETTER NOT SIGNED; IT NEEDS AMENDMENT

T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
DATE:

JPP 4 423

MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA
Private Bag X 276, Pretoria, 0001, Tel: (012) 406 4689: Fax: (012) 406 4680
Private Bag X 265, Cape Town, 8000, Tel: (021) 467 1700, Fax: (021) 467 1730

Judge President D Mlambo
Gauteng Provincial Division
Private Bag X67
PRETORIA
0001

Dear Judge President Mlambo

REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT 58 OF 1959 TO APPOINT A JUDGE TO REOPEN THE INQUEST INTO THE DEATH OF AHMED ESSOP TIMOL:

JOHANNESBURG INQUEST NUMBER 2361/71

1. Section 17A(1) of the above Act reads that:

   "The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."

2. In reference to the above, I attach hereto a copy of a memorandum received from the National Director of Public Prosecutions ("National Director"), requesting that I invoke the provisions of Section 17A(1) of Act 58 of 1959 in pursuance of reopening the inquest into the death of Mr Ahmed Essop Timol.

3. I have carefully considered the request by the National Director and I am satisfied that the interests of justice would be best served by the reopening of the inquest as contemplated in Section 17A(1).

4. I would be most grateful if you could designate a judge within your division to reopen the inquest into the death of Mr Ahmed Essop Timol.

JPP 4/2

5. The National Director will ensure that a prosecutor and all the evidence is made available once a judge has been appointed.

Yours sincerely

T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE & CORRECTIONAL SERVICES
DATE: 17/01/2018

425

JPP 5

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
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INTERNAL MEMORANDUM

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South Africa

Tel: X126431

TO	:	DR JP PRETORIUS SC ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS: PCLU
FROM	:	ADV RC MACADAM SDDPP: PCLU
DATE	:	4 FEBRUARY 2016 (Opinion requested on even date)
SUBJECT	:	OPINION: REOPENING TIMOL/AGGETT INQUESTS
REF	:	10/3/1/PCLU

Dear Torie

1. This opinion is provided arising from a meeting between members of the NPA and Messrs Varney, Dutton and others. An oral presentation was given, motivating the reopening of both inquests.

2. In order to address the request, it is necessary to briefly refer to the relevant provisions of the Inquest Act:

   2.1 Section 5 requires that an inquest be held in respect of each natural death where the deceased is suspected of having died of unnatural causes.

   2.2 Section 16 requires the inquest Magistrate to make findings as to:

      2.2.1 the identity of the deceased
      2.2.2 the date and cause of death
      2.2.3 whether the death was caused by a criminal act on the part of any person

   2.3 Section 17 requires the Magistrate to refer the inquest to the DPP in the event of either not being able to determine the death or in the event of a finding of criminal liability. He is also required to refer the matter to the DPP irrespective of his findings if so requested.

2.4 Section 17(2) empowers the DPP at any time [my emphasis] after receipt of the inquest request the Judicial Officer to reopen the inquest and take further evidence.

2.5 Section 17A(1) also empowers the DPP to request the Minister to request the Judge President to appoint a Judge to reopen the inquest.

3. Sections 17(2) and 17A(1) both empower the DPP to cause inquests to be reopened on the basis of further evidence. The sole difference is whether the Minister and the Judge President must be involved and whether the inquest would be reopened by the original Inquest Court or by a Judge appointed by the Judge President. The invocation of section 17A(1) would be a more time-consuming process and would also place a burden on the High Courts which are under pressure with their existing civil and criminal rolls.

4. In my view, it would be appropriate to invoke section 17(2) where the new evidence would lead to certain of the original findings being amended, but would have no other public interest consequences, e.g. a prosecution or in a transparent manner to test the new evidence orally. Section 17A(1) would in my view be appropriate if there was high public interest in the new evidence, but the DPP was of the view that it should first be tested before instituting a prosecution.

5. It has to be stated that if the DPP is of the view that new evidence justifies the institution of a prosecution, then there is no need to first reopen the inquest before instituting the said prosecution.

6. The background to the two cases is as follows:

6.1 **Achmed Timol**

6.1.1 He died in detention in Johannesburg in October 1971 while under interrogation by the Security Branch having been arrested on charges linked to his involvement with the SACP.

6.1.2 The then Attorney General declined to prosecute and a formal inquest was held in the Johannesburg Regional Court, which handed down a verdict that he had committed suicide and that the police were not responsible for his death.

6.1.3 Shortly after the establishment of the PCLU in 2003, Mr Timol's nephew (a member of the NIA) approached the unit and indicated that he had established that the inquest record and docket were not available. (Governmental archive directives require the destruction of documentation after a certain period.)

6.1.4 He however alleged that the daughter of Sergeant Rodriques (who had been alone with the deceased immediately before he fell to his death) had approached Ivor Powell (then a journalist) and informed him that her father had confessed to her that the deceased had been murdered. The NDPP had directed that the DSO must assist the PCLU with the investigation of TRC matters. The DSO reported that the journalist had been interviewed, denied the allegation and produced the newspaper article which he had written, which contained no confession or new evidence. In the circumstances the DSO deemed it inappropriate to approach Rodriques or his daughter. The nephew was satisfied with this explanation and the matter was not taken further.

6.1.5 In late 2015, I however asked the DPCI to register an enquiry due to extensive publicity given to the matter by the media and as a result of statements made by Adv Bizos SC and the family.

6.2 **Neil Aggett**

6.2.1 Dr Aggett died in police custody in Johannesburg in 1982 after a lengthy period of detention and interrogation by the Security Branch.

6.2.2 The then Attorney General declined to institute a prosecution and a formal inquest was held before a Regional Court Magistrate in Johannesburg. He handed down a verdict to the effect that the deceased had committed suicide and that the police were not responsible.

6.2.3 In 2013, a group of Dr Aggett's friends submitted a petition to the President and Minister of Justice, calling for the prosecution of the police officials responsible for his death.

6.2.4 As a result of this petition, the PCLU requested the DPCI to open an enquiry.

7. The status of the PCLU/DPCI investigations:

7.1 **Achmed Timol** (I/O Captain Ben Nel)

7.1.1 It has been established that the original inquest and docket are not available.

7.1.2 A copy of the inquest donated by the family attorney to Wits has been downloaded. It is missing 652 pages, which include the evidence and cross-examination of all the police officers involved. However, on the remaining evidence it was possible to establish who the witnesses were and what the issues in dispute were.

7.1.3 Captain Nel has been requested to canvas the availability of all the witnesses, i.e. the police officials, medical doctors and members of the deceased's family.

7.1.4 It has been established that other detainees who were never called as witnesses could possibly shed light on the matter. The first is a Mr Mohammed Essop, who was arrested at the same time as Timol. The second is Quentin Jardine, whose identity, it is alleged, led to the deceased deciding to commit suicide. The third is a Mr Pahad, whom it is alleged was arrested arising from Timol's interrogation. Ms Fullard has been tasked to uplift the detention files from DoJ&CD so that Captain Nel can conduct the necessary investigations in this regard.

7.1.5 It has been established that the TRC appointed a journalist, Piers Pigou, as an investigator and he dealt with the Timol matter. He has indicated that he is available for an interview when he returns to the country. As a matter of interest, it was in fact he who approached Sergeant Rodriques and not Ivor Powell. His notes reflect that Rodriques stood by his original statement. It may therefore be that Timol's nephew confused the two journalists and what Rodriques said.

7.1.6 It has been established that Gordon Winter published a book in which he claimed to have first-hand knowledge of the Timol incident. Ms Fullard has undertaken to establish whether he is alive and where he is residing.

7.1.7 A Methodist priest in the UK made public statements to the effect that when Timol's body was viewed in the mortuary, it showed signs of gross mutilations. This claim would have to be followed up although it is in conflict with the evidence of the three doctors who testified at the inquest, including a pathologist, appointed by the family.

7.1.8 What also has to be followed up is whether the police, who were involved in the incident, were involved in other cases, which could have a bearing on their version in this matter. It would also have to be established whether there were other incidents involving detainees which would be relevant.

7.2 Neil Aggett (I/O Col Sam Mahlangu)

7.2.1 Col Mahlangu indicated that he was unable to locate the original inquest and docket.

7.2.2 He however established that a copy of the inquest was available on the Wits website and requested the PCLU to peruse it and to thereafter indicate whether further investigations were required.

7.2.3 The record is in the regional of some 8 500 pages and has been uploaded in blocks, which makes online reading time-consuming. Obviously downloading 8 500 pages would place an extreme burden on the office's printing facilities.

7.2.4 It has however been established that Adv Bizos SC, who acted for the family, conceded that there was no evidence to justify the conclusion that the deceased had been murdered. (Adv Bizos SC was assisted by a private pathologist and other medical experts.) He however submitted that Whitehead and Cornwright (the two officers responsible for Aggett's interrogation) should be prosecuted for culpable homicide. If the learned advocate is in fact correct, then the crimes prescribed in 2002 and no prosecution is feasible as requested by the deceased's friends.

7.2.5 The matter is however complicated by the fact that the former Deputy Judge President of the KZN High Court (Nicholson DJP) has published a book, alleging that the facts of the Aggett matter demonstrate unequivocally the crime of murder by induced suicide. If the learned Judge is correct, then the NPA would still have jurisdiction to prosecute on a charge of murder.

7.2.6 It has been established that Goosen, Pollock and Erasmus applied for amnesty on charges relating to breaking into the house of Aggett's parents, looking for evidence to support the claim that he had committed suicide. The TRC material has been uplifted and has been perused.

7.2.7 Aggett's detention file was also uplifted, but it contains no relevant information.

7.2.8 Deborah Quin was given the list of witnesses, who testified at the inquest and was requested to establish their availability, present whereabouts and

also whether any of them were connected to other incidents which would be relevant. She is also looking into the issue of whether there were other deaths in detention at the same time, which could be relevant. She has already indicated that Cornwright is deceased and that Auret van Heerden, who was in detention in close proximity to Aggett, is currently in an old age home in the USA.

8. Currently the two matters are not receiving the attention of the PCLU due to firstly, operational constraints which arose since October 2015. (Adv Bukau was given an urgent espionage-related case and uncertainty surrounded Adv Macadam's position due to the NDPP on 8 October 2015, indicating that he had not cancelled his appointment as the OECD Foreign Bribery Prosecutor.) In a meeting with Adv Macadam in September 2015, the NDPP raised the issue as to whether the TRC matters should be taken away from the PCLU. As a result of all these uncertainties, a memorandum was prepared in January 2016, requesting the NDPP to confirm whether the PCLU should continue to deal with TRC cases or whether they should be referred to the DPPs. A response to this memorandum is still outstanding.

9. In my view, a decision on the request made by Messrs Dutton *et al* cannot be taken solely by the NPA.

9.1 Both are the subject of enquiries being conducted by the DPCI and clearly the views of the relevant senior managers within the DPCI should be canvassed.

9.2 In the Aggett matter a group of his former colleagues has formed an association, *"Friends of Neil Aggett"*, which has called for the prosecution of the police officials involved. The request to reopen the inquest runs contrary to the group's position. The group has a direct interest in the matter and its view should be consulted.

9.3 Also in regard to the Aggett matter, although Cornwright is dead, Whitehead is still available and would clearly be affected by the reopening of the inquest. He would be entitled to legal representation, access to relevant material and the right to challenge any new evidence.

9.4 In the Timol matter, it still has to be established whether any of the police involved in his interrogation are still alive and whether any new evidence could result in a prosecution of them on a charge of murder.

10. In my view, it would be inappropriate at this stage to reopen the two inquests. On what has been placed before me it would not appear that Mr Dutton has conducted a comprehensive investigation which would justify all the relevant factors which would have to be taken into consideration by both the NPA and the presiding officers of the inquests.

10.1 The original inquests are not available and consequently the NPA would have to request Wits to make available its originals and to pay for all the relevant copies to be made.

10.2 A decision would have to be taken as to whether to invoke section 17(2), 17A(1), which would require a determination as to whether the witnesses and suspects are available, whether a charge of murder is feasible, whether a *viva voce* hearing, which would involve having to provide the suspects with legal representation, is necessary.

10.3 In my view, a Presiding Officer and the Judge President (if section 17A(1) is invoked) would be reluctant to reopen the inquests, to receive only Dutton's evidence and before the police have concluded their investigations and the NPA decided that there are no prospects of a successful prosecution. This would be particularly apposite in

the Aggett matter where there are 8 500 pages of evidence to be perused, numerous witnesses who would be required to be recalled and where Whitehead could still be prosecuted.

11. In my view therefore, it would be inappropriate to accede to the request prior to the conclusion of the DPCI investigations and the NPA deciding not to prosecute. I am of the view that even if a decision not to prosecute is taken, then there would be new evidence which would justify the reopening of the inquests. At this stage it is not possible to predict what the consequences of this new evidence would be and therefore it cannot be predicted:

11.1 whether the additional statements should simply be placed before the Regional Court, which could in chambers consider them and elect to amend the original Magistrate's findings

11.2 whether a Judge should be appointed to hear the additional evidence *viva voce*

12. Having said that, it has to be, in the strongest possible terms, stated that it is imperative that the NDPP make a decision as to whether the TRC cases must remain with the PCLU or not. It will serve no purpose to decline the request, but to be placed in the position that two or more years down the line the cases have not been finalised because either the DPCI or NPA or both are unable to commit the necessary resources to finalise the matters timeously. It has to be emphasised that the Aggett matter requires a considerable amount of work due to the volume of evidence to be assessed, which may include an MLA request to the USA to interview Van Heerden. In the Timol matter there are also indications that evidence may be located in the UK, which would also have to be accessed through an MLA process.

13. Currently a member of the PCLU could give almost fulltime attention to the two matters. However, it is only to be anticipated that this will not be the case when shortly the unit's current workload will increase.

14. It is recommended that you:

14.1 advise the NDPP not to accede to the request to reopen the inquests until the investigations have been concluded and a decision taken not to prosecute

14.2 request the NDPP to, as a matter of urgency, make a decision as to whether the TRC matters must remain with the PCLU.

Kind regards

ADV RC MACADAM

A31

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

FILING SHEET

DOCUMENT: Replying affidavit in response to first respondent's answering affidavit

Nature: Opposed Motion

Filed by:

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TO: **THE REGISTRAR OF THE HIGH COURT**
PRETORIA

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

REPLYING AFFIDAVIT IRO FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JOAO RODRIGUES

do hereby declare under oath as follows:

1.

1.1. I am an adult pensioner presently residing at 835 Eleventh Avenue, Wonderboom South, Pretoria, Gauteng. I have been residing at the address for the past 54 years.

1.2. The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary, and are both true and correct.

2.

I have read the answering affidavit deposed to on behalf of the First Respondent and wish to indicate, already at this stage, to the Honourable Court that I dispute the correctness of such allegations insofar as these allegations are inconsistent to what I have stated in the founding affidavit. I again confirm the correctness of the allegations contained in the founding affidavit.

AD ANSWERING AFFIDAVIT: FIRST RESPONDENT:

3.

AD PARAGRAPH 1 THEREOF:

Apart from denying that all the factual allegations contained in the affidavit are correct in all respects I take note of the further allegations contained in these paragraphs.

4.

AD PARAGRAPHS 2.1 TO 2.8 THEREOF:

4.1. I do not dispute that this application must be considered with due regard to the context of all relevant facts.

4.2. It is correct that I did not apply for amnesty with the Truth and Reconciliation Commission ("TRC"). The reason for my decision was the fact that I did not conduct myself in any unlawful manner and therefore I had no basis for an application for amnesty before the TRC.

4.3. Insofar as the suggestion is that the First Respondent is entitled to prosecute me because I have not received amnesty without further

consideration of other relevant issues, I vehemently deny the correctness of these allegations. I am advised and respectfully submit that I am clearly still entitled to a fair consideration of all facts despite the fact that I did not apply and/or receive amnesty from the TRC.

4.4. The objective facts are that already in the mid 90's the authorities, including the TRC, were aware of the relevant facts including my alleged involvement and my whereabouts. Despite that knowledge they still waited a further 21 years before taking any steps relating to the death of the late Mr Timol. The First Respondent in this regard miserably failed to comply with its obligations in terms of the Constitution and/or other relevant Legislation. This failure is even worse when having regard to the futile attempts by the family of Mr Timol over decades to persuade the First Respondent that there was evidence available and to take further steps.

4.5. The above material delay is not properly explained by the Respondents.

4.6. I agree that the person who ultimately suffered in this instance was the late Mr Timol. The fact is, however, that I deny that I was involved in the causation of the death of Mr Timol and that Mothle J found in the re-opened inquest that I was not involved in the causation of his death and/or part of the interrogation that subjected him to pain and suffering after his arrest.

5.

AD PARAGRAPHS 2.9 AND 2.10 THEREOF:

5.1. I find the allegations to the effect that the plight and suffering of the family of Mr Timol cannot be ignored quite cynical.

5.2. The objective facts are that the First Respondent is indeed the cause of the material delay in the finalisation of this incident. The First Respondent was approached by family members of Mr Timol for literally decades in order to persuade the First Respondent to take further steps in the matter without any success.

5.3. The re-opening of the inquest after numerous attempts by the family of Mr Timol to persuade First Respondent to commence with these

proceedings indeed presented everybody with an interest in the matter with the opportunity to hear the evidence relating to this incident and/or to participate in these proceedings by people with an interest in the matter.

5.4. Mothle J prepared a very detailed and lengthy judgment following hearing evidence in this matter over a lengthy period.

5.5. I therefore deny that justice demands further proceedings in this matter, especially under circumstances where it would clearly infringe my fundamental rights relating to a fair trial.

6.

AD PARAGRAPHS 2.11 TO 2.13 THEREOF:

6.1. I take note of the fact that it is alleged that all relevant evidence had not been presented during the first inquest proceedings. I was not responsible for and/or involved in the inquest proceedings apart from the fact that I was called as a witness to testify.

M.M

6.2. It is not correct that the State could not prosecute any person. The prerogative to decide to prosecute or not to prosecute clearly remained with the First Respondent at all relevant times.

6.3. Not only did the State fail to institute a prosecution after they learned that there was evidence available to the effect that Mr Timol did not commit suicide but they also failed to set the proceedings in motion to re-open the inquest in terms of the relevant legislation. At that stage, all the people who were involved in the death of Mr Timol, according to the findings of Mothle J, were still alive and could be prosecuted. The total blame for not proceeding at that stage clearly lies at the door of the First Respondent and there is not even an attempt to properly explain the failure to do so.

6.4. Mothle J found that the Prosecuting Authority back in 1972 protected the State and that they betrayed and demeaned their oaths and intentionally concealed the atrocities committed by the Security Branch. It is submitted in paragraph 2.11.7 that the finding of the Magistrate should have raised the red flags as it was without any rational basis. The office of the First Respondent is therefore to

M.M

blame for this situation and one would have expected from them to act much earlier, more particular in view of the fact that the family of Mr Timol approached them on a number of occasions indicating that they have evidence to prove that the Magistrate's decision was wrong.

7.

AD PARAGRAPHS 2.14 TO 2.24 THEREOF:

7.1. The improper motive by the First Respondent is clearly demonstrated in paragraph 2.18 of the answering affidavit. The deponent stated under oath that the criminal trial against me is intended to serve the purpose of an inquest. I am advised and respectfully submit that this is clearly a wrong and improper approach. The objective facts are that there was already a re-opened inquest where a Judge of this Honourable Court heard and evaluated all relevant evidence and received all evidential material that could remotely assist in deciding the relevant issues. In this regard I am advised that the Presiding Judge was entitled and indeed went much further in this investigation then what a Judge

would have been entitled to do and/or will be entitled to do during a criminal trial.

7.2. Following the receipt of all evidential material relating to the issues Mothle J indeed prepared a very detailed judgment and made clear findings to all the relevant issues.

7.3. I am therefore advised and respectfully submit that the present approach by the First Respondent to subject me to a criminal trial almost 50 years after the incident under the above circumstances is not fair and would infringe my rights to a fair trial.

7.4. I further deny the allegation that there would be no purpose of assisting families affected by the death of their relatives if the relief is granted that I seek in the notice of motion. Every case should clearly be assessed on its own merits.

7.5. Apart from the material time delay my case is also based on the fact that First Respondent decided to prosecute me on a count of murder

M.M

under circumstances where Mothle J emphatically found that I was not involved and/or present at the time of the death of Mr Timol.

7.6. I therefore submit that it is indeed in the interest of Justice that this Honourable Court grant me the relief that I seek in the notice of motion.

7.7. I deny that this case is a simple one where two mutually destructive versions are the main issue. On all versions, both my own as well as the findings by Mothle J I was not responsible for and/or involved in the murder of Mr Timol.

8.

AD PARAGRAPHS 3.1 TO 3.8 THEREOF:

I deny the allegations contained in these paragraphs and submit that a proper case to establish the violation of my fundamental rights had indeed be made out in the founding affidavit and persist with the request for an order as set out in the notice of motion.

M.M

9.

AD PARAGRAPHS 3.9 TO 3.11 THEREOF:

9.1. I find it difficult to understand on what basis it can be alleged that it was only ascertained that I was alive shortly prior to the commencement of the re-opened inquest. I also refer the Honourable Court to the unequivocal concession by the deponent in paragraphs 8to 8.7 to the effect that I did not take any steps to evade justice or to cause any delay in the criminal trial.

9.2. I again wish to refer the Honourable Court to the fact that I have been living in the same residence for the past approximately 55 years. This is the same address that I had when I was indeed a member of SAPS and allegedly involved in the incident that forms the subject of this application.

9.3. I deny that I had been utilising a different name at any stage. This is the name that I had been known throughout my career as a Policeman and thereafter. It is also significant that the TRC had no

difficulty to trace me and indeed to approach me for an interview in the mid 1990's.

9.4. I further maintain the correctness of what I have stated in the founding affidavit and deny any allegation in the answering affidavit that contradicts what I have stated in the founding affidavit.

10.

AD PARAGRAPHS 3.12 TO 3.19 THEREOF:

10.1. I deny the allegations contained in these paragraphs and more in particular the correctness of the approach adopted by the First Respondent. It is clearly incorrect to suggest that the unreasonableness of any delay should be assessed with reference to the time after I had been charged with murder.

10.2. Even if one does not emphasise the first years following the finding by the initial inquest it is clear that the First Respondent's unexplained conduct since the mid 1990's constitutes a very material failure to comply with their obligations in terms of the Constitution. I refer *inter alia* to the following:

M.M

10.2.1. The family of Mr Timol consistently for the past more than 20 years attempted to persuade First Respondent to reconsider the position relating to the death of Mr Timol.

10.2.2. They emphatically informed the First Respondent that they had evidential material indicating that Mr Timol had not committed suicide.

10.2.3. The TRC investigated the matter and heard oral evidence during the mid 1990's.

10.2.4. There is not even an attempt to explain the failure by the First Respondent to take action under these circumstances. In this regard it must be emphasised that there is no explanation from the First Respondent for the delay from 1972 to 2017 - therefore including the period 1994 to 2017. I respectfully submit that this is a material failure in the answering affidavit that goes to the root of this Application.

M.M

11.

AD PARAGRAPH 3.20 THEREOF:

11.1. I deny that a proper reading of section 35(3)(d) of the Constitution provides that the reasonable time referred to can only be assessed with reference to the date on which the accused person was charge. Legal argument will be addressed in this regard to the Honourable Court at the hearing of this application.

11.2. I submit that an unreasonable delay in taking the decision to prosecute clearly falls within the ambit of section 35 of the Constitution as well.

11.3. I maintain that the First Respondent was clearly failed to comply with its obligations in terms of the Constitution and caused a material delay in commencing the prosecution against me. This clearly infringed my Constitutional right to a fair trial. I refer the Honourable Court again to what I have stated in the founding affidavit in this regard.

M.M

12.

AD PARAGRAPH 3.21 THEREOF:

I deny that I failed to set out facts indicating an unreasonable delay by the First Respondent and/or facts indicating that First Respondent neglected to commence the prosecution within a reasonable time. I again refer to what I have stated in the founding affidavit in this regard.

13.

AD PARAGRAPH 3.22 THEREOF:

13.1. I agree that it is possible that I may testify in the envisaged trial against me. I, however, repeat that my ability to testify is seriously hampered by the extreme time delay.

13.2. It is common cause that the persons who were responsible for the interrogation and investigation of the case against Mr Timol have passed away in the meantime. It appears further to be common cause that all the pathologists and other medical experts who had the opportunity to examine the body of Mr Timol have passed away in the meantime as well.

M.M

14.

AD PARAGRAPHS 3.23 TO 3.24 THEREOF:

14.1. The deponent again makes the bold allegation that there was no unreasonable delay in commencing this trial without even attempting to explain the substantial time delay even if one calculates this delay only as from 1994, the time when our new democracy became a reality.

14.2. I deny that there is no irreparable trial prejudice and refer the Honourable Court to what I have already stated in this regard in the founding affidavit.

15.

AD PARAGRAPHS 2.25 TO 3.29 THEREOF:

15.1. I again emphasise that this application is an application in terms of section 35 of the Constitution. Legal argument will be addressed to the Honourable Court at the hearing of this application in this regard.

15.2. I again submit that I will be materially prejudiced because of the enormous time delay caused by the First Respondent.

16.

AD PARAGRAPHS 3.30 TO 3.34 THEREOF:

16.1. It is correct that the relief sought is drastic but I submit that a proper case for the drastic relief has been made out in the founding papers.

16.2. I submit that it is indeed in the interest of justice to prevent an unfair trial against me. This is even more appropriate where the material time delay was caused by the First Respondent and there is not even an attempt to explain this extreme time delay caused by the failure of the First Respondent.

16.3. I deny that my failure to appear before the TRC is relevant to this application.

16.4. Although I agree that murder is a very serious offence the seriousness of the offence can clearly not take away the right to a fair trial.

M.M

16.5. I further have to emphasise again that the deponent fail to take in consideration the finding by Mothle J in the re-opened inquest to the effect that I was not involved in the assault and/or murder of Mr Timol.

16.6. I maintain that insofar as the Timol family had been denied justice this must be laid at the door of the First Respondent for the reasons already mentioned.

17.

AD PARAGRAPHS 4.1 TO 4.8 THEREOF:

17.1. I again confirm the correctness of the allegations contained in the founding affidavit.

17.2. I maintain that the trial will indeed infringe my Constitutional right to a fair trial.

17.3. I therefore maintain that a proper case has been made out for the relief sought.

18.

AD PARAGRAPHS 4.9 TO 4.12 THEREOF:

I again emphasise that this application is primarily an application in terms of section 35 of the Constitution providing for a fair trial.

19.

AD PARAGRAPHS 5.4 TO 5.7 THEREOF:

19.1. The deponent fails to deal with the specific finding of Mothle J to the effect that I was not involved in the murder of Mr Timol and/or even present at the time of his death.

19.2. My legal representatives will deal with the legal issues raised in these paragraphs at the time of the hearing of the application.

20.

AD PARAGRAPHS 5.8 TO 5.9 THEREOF:

I deny the allegations in this regard. The judgment of Mothle J speaks for itself. Legal argument will be addressed to the Honourable Court in this regard at the hearing of this application.

M.M

21.

AD PARAGRAPHS 5.10 TO 5.13 THEREOF:

21.1. The deponent fails to refer to the fact that Mothle J, after hearing all available evidence, indeed found that I was not part of the interrogation team and that I did not participate in the killing of Mr Timol and/or was not even present at the time.

21.2. The deponent now alleges that I was the only person who was with Mr Timol at the exact date and time shortly before he died. The facts are, however, that the deponent personally lead evidence at the re-opened inquest to the effect that I was not present at the time and that the death of Mr Timol occurred hours before I came to John Vorster Square Police Station.

21.3. The findings by Mothle J was then also to the effect that I was not present at the relevant time. This finding was based on the evidence of a number of witnesses that the deponent, as the evidence leader, presented to the Court at the inquest.

M.M

21.4. I deny all further allegations in this regard insofar as it is inconsistent to what I have stated in the founding papers.

22.

AD PARAGRAPHS 5.14 TO 5.17 THEREOF:

22.1. I deny that I am abusing the process in order to test the strength of the State's case. The totality of the evidential material available to the State has been presented to Mothle J during the re-opened inquest proceedings. I am therefore fully aware of the content of the State's case.

22.2. I am advised that his is not the forum to test the strength of the State's case. The fact is, however, that the findings by Mothle J was to the effect that I was not involved in nor present at the time when Mr Timol fell to his death.

22.3. I deny all further allegations contained in these paragraphs insofar as they are inconsistent with what I have stated in my founding papers and hereinbefore.

M.M

23.

AD PARAGRAPHS 6.1 TO 6.9 THEREOF:

I take note of the allegations that Mr Timol was assaulted whilst in detention. I, however, again deny that I was involved in the interrogation and/or any assault and/or other unlawful conduct against Mr Timol. I was not part of the investigating team and/or the interrogation team that question Mr Timol and/or investigated any activities against Mr Timol.

24.

AD PARAGRAPHS 6.10 TO 6.12 THEREOF:

24.1. It is correct that I refused to take any responsibility in relation to Mr Timol's death - the simple reason is that I did not participate in any unlawful conduct that led to his death.

24.2. I find the allegation to the effect that if I made full disclosure to the TRC that Messrs Gloy and Van Niekerk could be prosecuted because they were still alive at that stage quite informative. This illustrates that I am now prosecuted for something that the First Respondent know that I did not do but apparently as a punishment for the fact that I did not attend the proceedings before the TRC.

M.M

Apparently, the approach is that someone must be prosecuted even though First Respondent realised that I was not involved in the murder of Mr Timol.

25.

AD PARAGRAPH 6.13 THEREOF:

I indicated to Mr Pigou that I was willing to discuss the matter with him but only if he provided me with the previous relevant evidential material relating to the incident i.e. my evidence before the first inquest. The reason was that this interview occurred 25 years after the incident and I felt it necessary to refresh my memory before I would be willing to participate in a detailed interview.

26.

AD PARAGRAPH 6.20 THEREOF:

I wish to emphasise that all the alleged "new" evidence that was available during the inquest proceedings was also available to the First Respondent prior to the request to re-open the inquest proceedings.

M.M

27.

AD PARAGRAPH 6.23 THEREOF:

I maintain that the reply to the request for further particulars was clearly not adequate and did not comply with the obligations of the prosecution team in this regard. It is correct that this issue will still have to be adjudicated by the Trial Court.

28.

AD PARAGRAPH 6.25 THEREOF:

I do not understand on what basis the deponent maintains that there was no unreasonable delay in the commencement of the prosecution against me. The objective facts are speaking for itself in this regard. In therefore deny the allegations contained in this paragraph.

29.

AD PARAGRAPHS 7.9 TO 7.11 THEREOF:

29.1. The full judgment of the findings is available and this Honourable Court can draw its own conclusions in this regard. The Court clearly found that I was not involved nor present at the time when Mr Timol fell to his death. It is correct that the Court made adverse credibility

findings against me i.e. to find that I indeed lied when I said that I was present.

29.2. I deny that the First Respondent carefully assessed the evidence before concluding that I was involved in the murder. It is significant that the deponent does not provide the Honourable Court with the evidential material that led them to this decision. My legal team was assured that a complete copy of the docket was made available to them. There is clearly no evidence in this docket indicating my involvement in the murder of Mr Timol.

30.

AD PARAGRAPHS 7.12 TO 7.15 THEREOF:

30.1. I deny that the alleged new evidence is extremely important and that the State must be given an opportunity to place it before a Criminal Court.

30.2. The question is not how Mr Timol came to his tragic end but whether I was involved in unlawful conduct causing his death. I again refer the Honourable Court to the fact that Mothle J in clear terms found

M.M

that I was not present and/or did not participate in the causation of Mr Timol's death.

31.

AD PARAGRAPHS 7.16 TO 7.23 THEREOF:

I again submit that a proper case has been made out for the relief sought in the notice of motion. I deny that there is sufficient and admissible evidence to provide a reasonable prospect of success in a prosecution against me.

32.

AD PARAGRAPHS 7.24 TO 7.27 THEREOF:

I submit that the deponent fails to appreciate that the First Respondent must comply with all its obligations in terms of the constitution including to ensure that any accused person will receive a fair trial.

33.

AD PARAGRAPHS 7.28 TO 7.31 THEREOF:

33.1. I do not suggest that the First Respondent is bound by the findings of the Inquest Court but clearly in order to act fair there must be a

sound basis for acting contrary to findings of an Inquest Court. This is particularly so where the Inquest Court was a High Court and where the findings followed a very detailed and comprehensive investigation into the death of Mr Timol.

33.2. The approach of the First Respondent to the effect that a person may be charged at any time after an incident if such crime has not prescribed clearly fails to appreciate the Constitutional rights of an accused person. Section 35(3)(d) of the Constitution will have no practical value if such an approach is adopted by our Courts.

34.

AD PARAGRAPHS 7.32 TO 7.36 THEREOF:

I again confirm the correctness of what I have stated in the founding affidavit. I deny the allegations in these paragraphs insofar as they are inconsistent with what I have stated in the founding affidavit.

m.m

35.

AD PARAGRAPHS 7.37 TO 7.38 THEREOF:

As already mentioned, I submit that the deponent is clearly wrong with his submission that the right to a fair trial only entitles me to be tried within a reasonable time from the date of which I am charged with the offence. I refer the Honourable Court to what I have already stated in this regard above.

36.

AD PARAGRAPHS 7.41 TO 7.57 THEREOF:

36.1. I again refer the Honourable Court to what I have stated in the founding affidavit in this regard and confirm the correctness thereof.

36.2. I deny all these allegations insofar as they are inconsistent with what I have stated in the founding affidavit.

37.

AD PARAGRAPHS 8.1 TO 8.3 THEREOF:

37.1. I again deny that the delay contemplated in section 35(3)(d) of the Constitution can only be assessed from the time of the accused

person has been charged. I refer the Honourable Court to what I have already stated in this regard above.

37.2. The issue to be considered is whether the trial at this stage will constitute a fair trial. What is further important in this regard is the deliberate delay by the First Respondent to comply with its obligations in terms of the Constitution and to proceed with criminal prosecution against me if they indeed wished to do so already decades ago.

38.

AD PARAGRAPHS 8.5 TO 8.7 THEREOF:

38.1. I take note of the fact that the State does not suggest that I took any steps to evade justice or to cause any delay in the criminal trial. This is to some extent in contradiction to what has been stated later in the statement. I, however, agree with this statement by the deponent.

38.2. I deny that these facts are "completely relevant" to the question whether there was an unreasonable delay.

m.m

39.

AD PARAGRAPHS 8.8 TO 8.18 THEREOF:

39.1. I repeat that First Respondent clearly failed to act diligently in coming to the decision to prosecute me. I refer the Honourable Court to what I have already stated in this regard in the founding papers.

39.2. I again refer to the fact that the deponent is with respect wrong in its approach that the calculation of a delay should only commence at the time when a decision has been taken to prosecute.

39.3. With reference to the rhetoric question

"why should the families of victims suffer"

it must again be emphasised that the First Respondent is clearly responsible for this situation.

39.4. It is with respect opportunistic to now rely on the Constitutional values under circumstances where the whole situation was caused

M.M

by the failure of the First Respondent to comply with its obligations in terms of the Constitution.

39.5. The deponent fails to deal with the material delay in complying with its obligations by the First Respondent since the mid 1990's when the family of Mr Timol on numerous occasions approached the First Respondent personally and assured him that they had convincing evidence available to the effect that Mr Timol did not commit suicide.

40.

AD PARAGRAPHS 10.1 TO 10.7 THEREOF:

40.1. I repeat my allegations in the founding affidavit to the effect that my right to a fair trial had been compromised by the conduct of the First Respondent.

40.2. I again submit that the deponent's approach to the commencement of the delay to begin with a prosecution is wrong.

40.3. I deny that I am disrespectful to the family of Mr Timol either as alleged or at all.

M.M

41.

AD PARAGRAPHS 10.8 TO 10.9 THEREOF:

I repeat what I have already stated in this regard in the founding papers.

42.

AD PARAGRAPHS 10.10 TO 10.17 THEREOF:

I repeat what I have already stated in this regard hereinbefore and deny the allegations insofar as they are inconsistent with what I have stated. I also refer to what I have stated in the founding papers in this regard.

Ad Opposing Affidavit: Johannes Lasch Mabelane:

43.

I took note of the content of the Supporting Affidavit of J L Mabelane on behalf of the Mabelane family.

44.

m.m

It is indicated in the affidavit that the deponent indeed deposed to the affidavit personally and on behalf of the Mabelane family.

45.

The Mabelane family is not a party to these proceedings and I deny that they have an interest in this matter. There is presently an application on behalf of the family to be joined as *amicus curiae* in these proceedings. They have not been joined and this stage and I therefore do not intend to deal with any of the allegations contained in this affidavit.

46.

I deny, in any event, that the allegations contained in this affidavit are relevant to the present application.

Ad Affidavit Piers Ashley Pigou ("Pigou"):

47.

I confirm that I saw Pigou during 1996/1997. He introduced himself as an investigator on behalf of the TRC.

48.

I confirm that I insisted that our conversation be recorded with a voice recorder. The reason for my request was to ensure that there would be no disputes later as to the content of our conversation.

49.

I further confirm that I was not willing to provide him with a statement relating to the relevant issue unless he would provide me with a copy of my evidence at the previous inquest proceedings. The reason for my request was the fact that the incident occurred, at that stage, more than 25 years prior to the interview. I deemed it necessary to appraise myself of all detail relating to the issue before I would agree to provide him with a statement relating to the issue.

50.

I deny that my daughter encouraged me to engage with the TRC.

51.

It is, however, significant to take note of the fact that Pigou had no difficulty to locate me and arrange for an interview at that stage. Clearly First

M.M

Respondent and/or SAPS would have had no difficulty to locate me either if they deemed it necessary.

WHEREFORE I persist with the Application and beg the Honourable Court for the relief sought in the Notice of Motion.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 14 day of DECEMBER 2018 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

14-12-18 C87 Rogathi

COMMISSIONER OF OATHS

FULL NAMES: Rogathi M.M
BUSINESS ADDRESS: 586 17th Avenue
AREA: Pretoria
DESIGNATION: C87

SUID-AFRIKAANSE POLISIEDIENS
HUMAN RESOURCE MANAGEMENT
2018 -12- 14
PRETORIA MOOT
SOUTH AFRICAN POLICE SERVICE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO 76755/18

PH NO 342

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT that the Fourth Respondent, hereby files his answering affidavit in the main application and the supporting affidavit of Piers Ashley Pigou:

Dated at **Johannesburg** on this 8th day of January **2019**.

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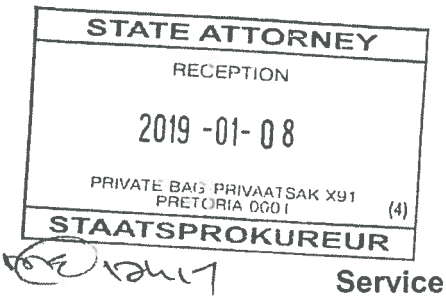
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A73

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

A74

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TA

I, the undersigned,

IMITIAZ AHMED CAJEE

do hereby make oath and state:

INTRODUCTION

1 I am the nephew of the late Ahmed Timol ("**Ahmed**" or "**Timol**"), who was brutally tortured and murdered by members of the erstwhile South African Police's ("**SAP**") notorious Security Branch ("**SB**") on 27 October 1971.

2 The judgment of Mothle J in the Re-Opened Inquest into the Death of Ahmed Essop Timol (Case Number: IQ01/2017, Gauteng Division) ("Reopened Inquest") found that my late uncle had not committed suicide but had been murdered after he was thrown from the 10th floor or the roof of John Vorster Square ("**JVS**"). In particular, Mothle J found that the applicant ("**the accused**" or "**Rodrigues**") lacked all credibility as a witness and had fabricated a version to conceal the real truth (*First Inquest Judgment* para 315).

3 The accused has since been charged with Timol's murder as well as defeating and/ or obstructing the administration of justice. He now seeks a permanent stay of this prosecution.

4 I am the fourth respondent in this matter. Despite the Timol family's obvious interest in the accused seeking a stay of prosecution, the accused did not cite me as a party and thereby sought to exclude my family from participating in this matter. I had to bring a substantive application to intervene in these proceedings and satisfy this Court that my family had a direct and substantial interest worthy of legal protection.

5 On 19 December 2019, this Court by way of an *ex tempore* ruling found that we had the necessary interest to participate in this matter and ordered that I be admitted in these proceedings.

6 The facts herein contained are, save where otherwise stated or appears from the context, within my own personal knowledge and belief, and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I accept as correct.

7 Where I make use of headings in this affidavit, I do so for convenience only and do not thereby intend to limit anything stated under a particular heading only to that topic. I pray that this affidavit be read as a whole. Certain references are made to the record of the Reopened Inquest (also referred to as the "second inquest") but in order not to burden these papers it has not been attached but can be made available on request.

8 Confirmatory affidavits from Advocates Vusumzi Patrick Pikoli and Anton Rossouw Ackermann SC, Frank Kennan Dutton, Moray Hathorn and Piers Ashley Pigou will be filed in due course.

STANDING

9 I sought leave to intervene, and oppose the application, in the interests of:

9.1 myself and that of the Timol family, as victims of my uncle's murder, as contemplated in section 38(a) of the Constitution.

9.2 the memory of my late uncle, who was brutally murdered, and/ or whose torture and murder was covered up by the accused, as contemplated in section 38(b) of the Constitution;

9.3 the victims of apartheid era crimes, of which my uncle's cruel and brutal murder is tragically but a single example, as contemplated in section 38(c) of the Constitution; and

9.4 members of the South African public, who were abused and dehumanized by the apartheid regime and for whom prosecuting those responsible for apartheid era crimes represents an essential part of national reconciliation, healing and unity, as contemplated in section 38(d) of the Constitution.

OVERVIEW

10 Prior to our first democratic elections in 1994, South Africa was a country brutalized by the apartheid government's pathological obsession with race. To suppress freedom fighters, the apartheid government enlisted a legion of enforcers. They took their orders from the highest echelons of power and did whatever was necessary to quell dissent. They acted without restraint; carrying

out large numbers of enforced disappearances, acts of torture, murders and other heinous acts – all with complete impunity.

11 Rodrigues was one such person. A police officer, formerly employed by the notorious Security Branch (SB), on his own version, he placed himself as the only person in the company of Timol in room 1026 in the moments before his death and the last person to see him alive. Given the wholescale lying and deception of the SB it is hardly surprising that he has been charged with Timol's murder. Indeed, it was forensically demonstrated in the second inquest that the version of Rodrigues (and the police) was physically impossible. Rodrigues did not make the slightest effort to rebut such evidence, even though his legal expenses were paid by the State.

12 We now know that prior to his murder, Timol was badly, perhaps mortally injured following more than 4 days of unrelenting torture and interrogation at the hands of the SB. He did not take his own life as the first inquest court found but was pushed with "*such act having been committed with dolus eventualis as the form of intent and prima facie amounting to murder*". Before the Inquest Court's historic findings our family and South Africa had to endure the official lie that Timol committed suicide– a pain that we had to bear for forty-five years.

13 The preamble of our Constitution acknowledges that South Africa, as a people "*recognise the injustices of our past*" and "*honour those who suffered for justice and freedom in our land*". Together, we seek to "*heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*" and build a "*democratic and open society*" in which

"*every citizen is equally protected by law*". In opposing the applicant's application for a permanent stay of prosecution we rely on these principles.

14 Having been betrayed by the very state institutions that the Constitution mandated to give effect to our constitutional compact, the Timol family seeks justice for his murder and cover-up at the hands of the accused.

15 For the Timol family, the 12th of October 2017 was a profoundly emotional day. On this day the judgment of the second inquest Court, together with its recommendations that the accused face prosecution, vindicated our decades' long quest for truth and justice. It was a powerful step in restoring my uncle's legacy, along with my family's pride and dignity.

16 The accused now applies to this Court to declare the criminal proceedings instituted against him to be an infringement of his constitutional rights and – flowing from this – a permanent stay and the withdrawal of the criminal proceedings in respect of the charge of murdering Timol.

17 The gist of the main application is that—

> *"it is inherently unfair and infringes my fundamental rights to a fair trial to charge me on a count of murder after the lapse of more than 47 years and under circumstances where a High Court, after a very detailed investigation and evaluation of all relevant evidence in this regard, found that I [the accused] was not involved in or even present at the time of the murder of the deceased."*

18 The application must be seen against the backdrop of the near total impunity for apartheid era perpetrators. Those behind the heinous acts of violence committed against Nokuthula Simelane, Neil Aggett, Moses Mabelane, the

Cradock Four, Steve Biko, Hoosen Haffejee, Dulcie September, the Pebco Three, Victoria Mxenge, Suliman "Babla" Saloojee, Fabian and Florence Ribeiro and countless others have been shielded from justice for decades. These are but a few of the lives that were brutally taken by apartheid security forces and have since captured the hearts and minds of a nation that cries out for justice. In total some 73 political detainees died whilst in detention at the hands of the SB and hundreds more were murdered and enforceably disappeared in other circumstances.

19 Most of the perpetrators, including Rodrigues, refused to participate in the truth and reconciliation process. If they had they could have provided the families and the nation with much needed answers and closure. My family extended an open hand to Rodrigues and the surviving police witnesses in the 2017 inquest. We went on record to say that we were only interested in the full truth. We sought no vengeance or retribution. We advised that if the full truth was disclosed we would not seek a prosecution. Our plea was spurned by the police witnesses, particularly Rodrigues.

20 The accused continued with his cover-up before the 2017 inquest court and persists with his charade today. In the circumstances, my family and I seek justice against Rodrigues who we firmly believe played a pivotal role in the murder of my uncle and the cover-up of multiple serious crimes committed against him.

THE STRUCTURE OF THIS AFFIDAVIT

21 The remainder of this affidavit is structured as follows:

21.1 First, I provide this Court with the background to my uncle's story;

21.2 Second, I deal with the respondents' historical failure to hold the accused to account;

21.3 Third, I detail my family's stance to the application;

21.4 Fourthly, I respond *ad seriatim* to the affidavits filed by the accused and the first respondent (also referred to as the National Prosecuting Authority or "**the NPA**").

BACKGROUND TO TIMOL'S STORY

22 My uncle's story is a story of great injustice. It is the story of unbridled brutality meted out to detainees held on the 10th floor of John Vorster Square. It is the story of ugly collusion between police officers, who were meant to uphold law and order, but instead who covered up crimes of torture and murder. It is the story of a thoroughly corrupt investigating officer; as well as a story of a magistrate, his assessor, and a senior public prosecutor engaging in a charade of justice, happily playing their part in suppressing the truth. They all provided the imprimatur of legitimacy to the murderous conduct of the police. It is a story of how dark forces were able to suppress the truth of what happened to Timol for some 46 years.

23 It is sadly, also a shameful story of great neglect, as the authorities in our new democratic order failed or declined to act while the key suspects were still alive. This was an inexcusable lapse. It regrettably points to a design on the part of the authorities in post-apartheid South Africa to permit the perpetrators of the past to avoid a reckoning with the truth and escape justice.

24 My uncle's story, however, is also one of great inspiration and perseverance. My family never gave up their quest for justice. Our efforts resulted in the re-opening of the inquest which culminated with a judgment that exposed the truth following 46 years of deceit and neglect.

Timol's Detention and Death

25 At the age of 29, Timol met his untimely death on 27 October 1971 after being arrested and detained for almost 5 (five) days at the then John Vorster Square in Johannesburg. He was a teacher at the then Roodepoort Indian High School. Timol had recruited a young medical student, Salim Essop ("**Essop**"), to help him distribute South African Communist Party ("**SACP**") literature. On Friday, 22 October 1971 at 23h00, Timol and Essop were stopped at a roadblock by at least 5 uniformed members of the South African Police (SAP), including, including Sergeant Leonard Kleyn and Constable Adam Thinnies, on Fuel Road, near the then Coronationville Hospital, Johannesburg.

26 The police discovered many political pamphlets and several of Timol's letters in the boot of the car, where after he and Essop were arrested and taken to

Newlands Police Station ("**Newlands**"). Essop (and most likely Timol) was assaulted at Newlands and later transferred to John Vorster Square.

27 In the early morning of 23 October 1971, Lt Colonel Van Wyk summoned Captains Johannes Hendrik Gloy ("**Gloy**") and Johannes Zacharias van Niekerk ("**Van Niekerk**") to report to JVS (First Inquest, Van Wyk affidavit, Vol B, p8, para 9). Both had a reputation for brutality, as is evident from the personal file of Van Niekerk which disclosed multiple complaints of torture against him and Gloy, including assaults with an iron rod. Van Niekerk had already killed a detainee, but the charge of culpable homicide was reduced to assault (Second Inquest, Van Niekerk police file, Vol J2 pp8, 25 and 139.)

28 Van Niekerk and Gloy were called in to quickly and viciously break Timol during the 24 – 72 hours period before others connected to Timol could escape or hide. Warrant Officer Neville Els conceded under cross examination in the second inquest that it was a tactic of the SB to extract as much information in this initial period through "*intense questioning*" in order to go after "*collaborators*" (Vol 9B, p ZZZ (673), line 13 - p AAAA (673), line 23). This was corroborated by ex SB member, Paul Erasmus, at the re-opened inquest of 2017.

29 In the light of the compelling similar-fact evidence of Essop; Dr Dilshad Jetham ("**Jetham**"); and Professor Kantilal Naik ("**Naik**"), who were arrested and detained at John Vorster Square around the same time as Timol we now know that my uncle was savagely tortured until he was most likely beaten into a state of unconsciousness.

30 On his arrival at John Vorster Square on Saturday 23 October 1971, Essop was viciously tortured until he collapsed into a coma on the morning of Tuesday, 26 October 1971. He had to be rushed in a comatose state to hospital. It subsequently emerged in the 2017 inquest that Essop was so severely tortured that he had to learn to walk again. Although held incommunicado in a Pretoria hospital, Essop's father was tipped off by a nurse and obtained an urgent and well publicised interdict restraining the police from perpetrating further violence against his son (Second Inquest, Essop affidavit, Vol C, paras 29 – 67).

31 Just as Essop's torture commenced at JVS upon his arrival on Saturday 23 October 1971, the situation was equally traumatic for Naik. Naik's torture was so severe that he needed physiotherapy treatment for almost four months to repair the acute damage sustained to the muscles in his hands. This serious damage to his hands resulted from the brutal method of torture known as "the helicopter treatment", which was inflicted upon him by the SB while at JVS (Second Inquest, Prof Naik affidavit, Vol C, pp108 – 110, paras 14 – 25).

32 Jetham was detained and tortured at JVS from Saturday 23 October 1971 until the morning of Wednesday 27 October 1971. On the evening of Sunday 24 October 1971, Jetham heard Timol screaming from a nearby room in the south wing of the tenth floor of John Vorster Square (where room 1026 is situated). On the evening of Monday 25 October 1971, she again heard Timol screaming nearby on the tenth floor. As the night of Tuesday 26 October 1971 wore on, Timol's screams grew louder and became more desperate. He was shouting and crying, begging his torturers to stop. According to Jetham, at

dawn of Wednesday 27 October 1971, Timol's screams suddenly stopped. (Second Inquest, Dr Jetham affidavit, Vol C, pp90 – 104).

33 It is based on the evidence of the aforesaid witnesses, read with the new medical reports, that the 2017 Inquest Court concluded that Timol must have been brutally tortured. Given that he was regarded as "the big fish" (Translated De Villiers Finding, First Inquest, p 3, Vol A) he must have endured considerable more brutality than his fellow detainees and was probably tortured to the point where he was rendered entirely incapacitated.

34 The SB claimed that following a length interrogation Timol elected to dive or jump out of the 10th floor window of JVS in the presence of Rodrigues, who was apparently there to deliver pay cheques to Gloy and Van Niekerk. According to the accused, Timol committed suicide after hearing the supposedly dramatic news that the whereabouts of Quinten Jacobsen, Henry Jacobsen and Martin Cohen had been discovered. It was amply demonstrated at the second inquest hearing that this story was part of the cover-up fabricated by the SB to explain the claimed suicide.

35 On the accused's own version, he saw Timol allegedly "dive" or "jump" out the window of room 1026 and then saw Timol lying in the garden ten storeys below. There was accordingly an overwhelming legal duty on Rodrigues, more than anyone else, to pick up the phone and immediately call for an ambulance. This is what anyone else would have done, let alone a police officer in whose care Timol was left. When asked under cross-examination whether an ambulance should have been immediately summoned, Rodrigues answered:

> "*What I would say is that it would have been the logical thing to have been done but I do not know why they did not do that.*" (Rodrigues oral testimony transcript, Vol 19, p 793, lines 12 – 19).

36 It is no answer to say that Timol could not have survived the fall. Indeed, he did survive the fall and might have lived had he received urgent medical attention and not been clumsily moved by the police on a blanket to the 9th floor. He was moved despite Rodrigues and the police knowing that persons with likely spinal or neck injuries should be stabilised pending medical attention. Indeed, Rodrigues knew this all too well, stating under cross examination: "*That is general knowledge in actual fact*" (Rodrigues oral testimony transcript, Vol 19p 793, lines 8 – 11). While the odds of survival are not high, there are numerous examples of people surviving falls considerably higher than 10 floors and onto harder surfaces than soil and grass. A list of such examples is annexed hereto marked "**IC1**".

37 The failure of Rodrigues to call an ambulance, together with his moving of the critically injured Timol to the 9th floor, is entirely consistent with his intent to ensure that Timol would die. Rodrigues accordingly had the requisite intention to kill in the form of *dolus eventualis*. He is responsible for the murder of Timol on this basis alone.

38 The police investigation of Timol's death proved to be a cover-up from start to end. There was not even the slightest attempt to comply with the most basic standards of investigation (Reopened Inquest, Frank Dutton affidavit, exhibit H7; Transcript, Vol 8, pp 614 – 671). On 1 December 1971, a formal inquest

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into Timol's death commenced at the Johannesburg Magistrates Court ("**the original inquest**" or "**the first inquest**") presided over by Magistrate J J L de Villiers ("**the Magistrate**"). The original inquest was concluded on 22 June 1972 when the Magistrate's found that Timol committed suicide and that no living person was to blame for his death.

39 The transparently false version advanced by the SB as to how my uncle met his death was accepted without question by the first inquest court. This became the official version that my family and the public had to contend with for more than 4 decades.

Events Following the First Inquest – A Family's Quest for Justice

40 With the advent of democracy in 1994, my family hoped that the truth would finally surface as to what really happened to Timol.

41 Our family participated in the Truth and Reconciliation Commission ("**TRC**") process. On 30 April 1996, my maternal grandmother, Hawa Timol ("**Hawa**"), testified in a 'victims' hearing' before the TRC. She explained my family's plight at losing Timol and our refusal to accept the finding in the original inquest. She expressed her desire to know who killed her son and strongly rejected the claim that he took his own life. A copy of the hearing transcript can be made available on request.

42 Hawa's testimony at the TRC at the Central Methodist Church in Johannesburg filled me with emotion. At that moment I made a silent vow to preserve my

uncle's legacy from that day onwards. I was no longer going to just talk about Uncle Ahmed, but I was going to do something constructive. I wanted the full truth to be exposed.

43 I have expressed my feelings about the TRC process in my book *Timol a Quest for Justice*, a narrative written in tribute to my uncle which details his life and our struggle to obtain justice for his murder. In the book I remarked that "*I felt it was worthwhile because the process would now take its course*". My assumption was that the TRC process would finally shed light on the truth of what happened to my uncle and justice would come of his death.

44 But, following the amnesty process it quickly became clear that none of the perpetrators behind my uncle's torture and murder were willing to come forward to tell the truth and acknowledge their roles. In particular, Rodrigues refused to participate in the TRC's process or to apologise to our family or demonstrate any sense of remorse for the pain caused to us.

45 In this regard, in 1996 TRC investigator Piers Pigou met Rodrigues in Pretoria. However, at this meeting, he refused to cooperate with the TRC and declined to make a statement and declined to appear in a hearing. Pigou asked the TRC to subpoena the accused but regrettably this did not happen. Pigou filed an affidavit to this effect with the second inquest court which was not disputed by Rodrigues.

46 I was angered by the refusal of Rodrigues and others to cooperate. I remarked in my book that, "*while my grandmother was testifying, Joao Anastacio*

Rodrigues, Johannes Hendrick Gloy, Johannes Zacharia van Niekerk and all the others simply continued with their normal life unperturbed by their role in Ahmed's death".

The TRC process and the failure to prosecute

47 In its Final Report released on 21 March 2003 the TRC stressed that the amnesty should not be seen as promoting impunity; and highlighted the imperative of "*a bold prosecution policy*" in those cases where amnesty was not applied for in order to avoid any suggestion of impunity, or of South Africa contravening its obligations in terms of international law (Vol 6, Section 5, Ch. 1, para 24).

48 I am advised that there is nothing in the constitutional and statutory design of the TRC process which contemplated the extension of the rights of perpetrators to further leniency or indemnity from prosecution. Indeed, it was specifically envisaged that criminal investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims.

49 An examination of the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("**the Interim Constitution**") reveals no direct or inferred suggestion that the TRC process would open the door to further opportunities for perpetrators to escape justice outside of the TRC's amnesty's provisions.

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

51 The principles set out in the postscript were reflected in the design of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the TRC Act**"). Perpetrators who were granted amnesty received amnesty or immunity from criminal prosecution and immunity from civil law actions. Conversely, those perpetrators who were refused amnesty or who chose not to approach the TRC were meant to face criminal prosecutions.

52 South Africa's truth and reconciliation design as encapsulated in the postscript to the Interim Constitution and the TRC Act necessitated the sacrifice of the fundamental rights of victims to advance national unity and reconciliation. In so doing the State entered into a compact with victims. This compact required the State to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied. It is with great sadness that I must note that the State has done little to meet its legal and moral obligations.

53 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept.

54 The failure to investigate and prosecute those who were denied amnesty or who spurned the process represents a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure stands as a betrayal of victims who have been waiting for the criminal justice process to take its course and has added considerably to their trauma. Indeed, the policy or approach to allow perpetrators to escape justice adds insult to the suffering endured by victims.

55 Above all, the failure stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

Post TRC efforts

56 Following the TRC process, my family and I made attempts to persuade the NPA to investigate and launch criminal proceedings against those responsible for Timol's death, including the accused.

57 I started my investigations by reading and analysing the newspaper collection of all articles kept by the family; identifying and locating individuals linked to Uncle Ahmed. Sadly, my grandmother, Hawa, did not get the answers she hoped for. Her death in February 1997 inspired me to continue my investigations.

58 This led me to meet with TRC investigator, Piers Pigou, in 2001 who confirmed that Rodrigues had refused to participate in the TRC process. During my research, I engaged with numerous individuals who were detained with Ahmed. I worked closely with the Steve Biko Foundation which continues to support my initiatives to preserve the legacy of Uncle Ahmed.

59 I even went as far as calling the perpetrators I suspected were responsible for killing my uncle. On 27 September 2002, I gathered the courage to call Gloy. I confronted him with the results of my own investigation indicating that I knew that he was in the room at the time that Timol allegedly 'jumped'. Gloy denied that he was in the room and referred me to the finding in the first inquest that had exonerated him.

60 During my investigations, I ascertained that a number of police officials, directly involved in the interrogation of my uncle were still alive. This included Gloy and Van Niekerk.

60.1 I had three telephonic conversations in 2002 with Gloy. He played a leading role in the interrogation of Uncle Ahmed. During the first conversation, Gloy insisted that I had to look at the inquest records and that the case was closed.

60.2 In our second conversation, Gloy stated that he was advised by his lawyer not to conduct an interview with me. He claimed that my grandparents had come to court with a bunch of lies about torture that was rejected by the court.

60.3 In our final conversation with Gloy claimed that he had no reason to apply for amnesty when the inquest court had already ruled. He threatened to obtain a court order against me if I continued calling him.

60.4 I attempted again to contact Gloy on 21 November 2002 requesting that we meet. Gloy refused to meet me again and it was clear that he was not going to cooperate with me or my family to assist us in reaching the truth.

60.5 I refrained from contacting him again but the overriding urge to hear the truth overwhelmed me. I wrote a letter to Gloy in 2007 pleading with him that it was almost 36 years since Timol's death; and since he was approaching the end of his life he may want to speak the truth. My appeal was for us to meet and find closure. I received no response from him.

61 In 2003 it had become clear that the TRC process had not led to results. My own investigations had been met with resistance. I accordingly approached the NPA's Priority Crimes Litigation Unit ("**PCLU**") (which was charged with investigating and prosecuting so called political cases) and asked them to investigate my uncle's case.

62 On 25 February 2004, Advocate R C Macadam of the NPA's PCLU ("**Macadam**") wrote to me advising of "*negative results*" of the investigation that had purportedly been launched. A copy of this letter is annexed hereto marked "**IC2**" On 29 November 2006, the NPA's task team assigned to investigate my uncle's case produced its internal report, titled: "***Report of the Progress made***

by the Task Team on TRC Cases", confirming that it had closed my uncle's case. In material part, the report stated that:

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

63 I was extremely disappointed that the NPA had closed its investigation into my uncle's murder. I doubted that any actual investigation had ever been launched. It is quite apparent from Macadam's affidavit dated 15 August 2017 (exhibit Q1 before the 2017 inquest) that apart from contacting one journalist, nothing else was done. Indeed, not even the most basic investigative steps that one would have expected were taken. In this regard I annex hereto marked "**IC3**" an online newspaper report titled "*History, suppressed: What didn't get revealed at the Timol inquest*" by Kevin Bloom published in the Daily Maverick on 22 September 2017.

Suppression of the political cases

64 I was very disappointed by the approach of the NPA which I believed to be cavalier and uncaring. I fell into a debilitating depression fearing that the truth would forever remain concealed.

65 I learned later through the case of ***Nkadimeng & Others v The National Director of Public Prosecutions & Others*** **(TPD case no 32709/07)** ("**the Nkadimeng case**") that something sinister was going on at this time. This case

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brought by Thembi Nkadimeng, the sister of the slain heroine, Nokuthula Simelane, and the widows of the Cradock Four, (the young freedom fighters brutally murdered by a police hit squad), to set aside amendments to the NPA's Prosecution Policy (made in terms of section 179(5)(a) and (b) of the Constitution), which provided for a backdoor amnesty for political offenders.

65.1 During the Nkadimeng case the National Director of Public Prosecutions ("**NDPP**") was forced to disclose a secret 2004 government report titled "***Report of the Amnesty Task Team***". It was revealed that on 23 February 2004 the government's Director-General's Forum appointed a secret "Amnesty Task Team" ("**ATT**") to address "*the absence of any guarantee that alleged offenders will not be prosecuted*". Its report explored ways of avoiding the state's responsibilities to prosecute offenders denied amnesty by the TRC or who had not applied for amnesty. A copy of the aforesaid report is annexed hereto marked "**IC4**". (The annexes to this report have not been attached but can be supplied on request).

65.2 On the recommendation of the ATT the NPA was required to amend its prosecution policy to facilitate impunity for apartheid era criminals. In striking down the amendments to the Prosecution Policy as "absurd" and unconstitutional. Judge Legodi held 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."* (*Nkadimeng & Ors v National Director of Public Prosecutions* [2008] ZAGPHC 422)

65.3 Also, on the recommendation of the ATT, former President Mbeki introduced a political pardons program to further accommodate perpetrators. Civil society organisations had to approach the high court urgently to stop these pardons being issued in the absence of any inputs by victims and others (*CSVR & Others v President of the Republic of South Africa & Others,* Case no. 15320/09, North Gauteng High Court). The Constitutional Court confirmed that it was irrational and a violation of the rule of law to exclude victims from the process (*Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC)).

65.4 Notwithstanding the ruling of Judge Legodi in the Nkadimeng case the family of Nokuthula Simelane and the widows of the Cradock Four are still waiting for justice. Out of sheer frustration the family of Nokuthula Simelane was forced to file an application before the Gauteng Division of the High Court in Pretoria in the matter of ***Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Case Number 35554/2015** on 20 May 2015. In this application they sought orders compelling the South African Police Service ("**SAPS**") to finalize their investigations and an order compelling the NDPP to make a prosecutorial decision or refer the case to an inquest.

65.5 This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former NDPP, Adv Vusumzi Patrick Pikoli ("**Pikoli**") and Anton Rossouw Ackermann SC, former Special Director of Public Prosecutions in the Office of the

NDPP and former head of the PCLU ("**Ackermann**"), and explained how the political cases from the past were deliberately suppressed. The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases. Copies of the notice of motion filed in the aforesaid matter and the affidavits of Pikoli and Ackermann are annexed hereto marked "**IC5**", "**IC6**" and "**IC7**". The full papers can be supplied on request.

Reopening the Inquest

66 I took all my research, thoughts, emotions and investigations and penned my book entitled, "***Timol – A Quest for Justice***". It was launched at JVS on 30 January 2005. As there remained numerous unanswered questions I continued conducting research for my second book which is at an advanced stage.

67 Ahmed's brother, Mohammad Timol, had over the years reminded me that it was important for us to reverse the findings of Magistrate de Villiers. The family never accepted this finding as we remain convinced that the first inquest was a complete farce and cover up.

68 I contacted former TRC Commissioner Yasmin Sooka in 2009 to discuss the Timol matter. After delaying for several years, due to my depression, I finally arranged to meet Advocate Howard Varney, Frank Dutton and Yasmin Sooka at a meeting on 6 February 2015. At this meeting I was advised by the aforesaid to seek the reopening of the inquest to reverse the finding of

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Magistrate De Villiers. Frank Dutton was appointed to investigate and uncover new evidence.

69 Dutton uncovered considerable evidence and a meeting was convened with the NDPP, Adv. Shaun Abrahams on 19 January 2016 at the NPA offices in Pretoria. Dutton presented compelling new evidence that was not before the first inquest. My lawyers made representations that it was in the interests of justice to reopen the inquest. Advocate George Bizos SC was invited to this meeting and he too made representations. The NDPP announced on 26 October 2016 that he had accepted our application to re-open the inquest.

The 2017 Inquest Finding – A Historical Moment

70 In its judgment, the 2017 Inquest Court firmly rejected the police version, finding that it was a fabrication from start to end. The Court found that my uncle, Salim Essop and others were viciously tortured and that the police murdered Timol to cover up the torture.

71 History will now reflect the official finding of the second Inquest Court that—

71.1 "at the time Timol was pushed either out of the window of room 1026 or at the roof top, he was in the company of members of the Security Branch in charge of his interrogation on duty";

71.2 "the push occurred during interrogation under circumstances where the Security Branch involved, resorted to torture";

71.3 it was "probable, on the evidence, that the Security Branch foresaw that their methods of interrogation carried the risk of death occurring, but nevertheless persisted unrestrained with the torture, appreciating that death might well occur"; and

71.4 "Timol did not jump as alleged. He was pushed by someone and there is thus a case that members of the Security Branch conducting interrogation at that time had to answer. Timol was in their custody as a detainee. They had complete control over him and they thus owed him a duty of care, for which they should have been held to account."

72 The upshot was that the Court concluded that:

> *"Timol's death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder. There is prima facie evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time he was pushed to fall to his death. Rodrigues, [the accused] on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He [the accused] should accordingly be investigated with a view to his prosecution."*

73 The Court was particularly scathing of Rodrigues:

73.1 He contradicted himself in his testimony and affidavit before the first inquest (para 296); and he gave different and conflicting accounts of the events that transpired in room 1026 (para 297);

73.2 His evidence was contradicted, and he could not provide explanations for the contradictory evidence of others (para 298);

73.3 He belatedly introduced a new version (para 299). And, that:

> *"The impression gained by the Court from this statement was that Rodrigues wanted to paint a picture of a person who is independent and not easily influenced. He clearly fabricated this version so as to bolster the credibility of his evidence. He could not satisfactorily explain why he had not disclosed this aspect of his evidence in the affidavit, to the 1972 inquest or at any time thereafter. It seems to the court that this version was intended to bolster the credibility of its own story and to present him as a person who was stating the truth and being intolerant of any influence. This version is contradicted by his own statement that Buys asked him to add in his statement that Timol was not assaulted to which he agreed. The Court is of the view that there was no need for him to agree to any statement on assault as he was an officer from Compol Building in Pretoria who was employed as a salary clerk and therefore would not have known, on his own version, what goes on in the interrogation. He had repeatedly told the Court that he was not allowed to go into the area of interrogation as what goes on there was "uiters geheim" (utmost secrecy)."*

73.4 Rodrigues made material contradictions in his evidence that cast serious doubts on his credibility (para 301); and his version was filled with "*contradictions and improbabilities*" (para 306);

73.5 "[T]here is no merit or credibility in the evidence of Rodrigues... The version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version." (para 315);

73.6 If he had been brought to office 1026, he "*was brought there to legitimise the cover up narrative*" (para 320.8);

73.7 "Rodrigues placed himself on the scene as a party to the cover up to conceal the truth. He thereby prima facie, by his conduct became an accessory after the fact of murder" (para 331);

73.8 "Rodrigues should be investigated for making contradictory statements whilst under oath. He has a previous conviction on perjury" (para 334); and

73.9 "Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution" (para 335(d)).

Timol Has Captured the Hearts and Minds of South Africans

74 As I have submitted, I bring this application not only in the interests of myself and my family, but in the interests of all victims of apartheid era crimes and in the interests of the South African nation, which our Constitution prescribes is founded on the values of national reconciliation and unity.

75 My uncle's case has remained squarely in the public domain as a matter of profound public interest. In this regard, I attach a table marked as "**IC8**" that summarises a small number of the numerous media articles that demonstrate the public's sustained interest in following my uncle's case, including:

75.1 Thirty articles published between 1997 and 2015 and published in local, provincial and national newspapers. These articles pay tribute to my uncle, question the circumstances surrounding his death and recognise my family's quest for justice.

75.2 Twelve articles published between 2016 and 2018 in local newspapers and online. These articles demonstrate the public's desire to see justice done for my uncle's murder.

75.3 Two full-length documentaries that have been aired on national television and have been published online. The first, *Indians Can't Fly*, was aired in 2015. The second, *Someone to Blame – The Ahmed Timol Inquest* premiered on SABC 3 on 14 October 2018.

76 I submit that there has been, and remains overwhelming national interest in my uncle's case, including the pending prosecution of the accused.

THE APPLICATION SHOULD BE REFUSED

77 Rodrigues currently faces two charges:

77.1 First, murder read with section 51(1) of the Criminal Law Amendment Act, 51 of 1997 (as amended) ("**the CPA**");

77.2 Second, Defeating and/or obstructing the administration of justice read with section 256 of the CPA.

78 The accused hopes to escape the murder charge by seeking the following relief in the main application as set out in his notice of motion:

78.1 A declaratory order that the criminal proceedings instituted against him constitute an unfair trial against him in terms of section 35(3) of the Constitution;

78.2 A declaratory order that the criminal proceedings instituted against him constitute an infringement to his fundamental rights to a fair trial in terms of section 35(3) of the Constitution read with section 342A of the CPA;

78.3 A permanent stay of the charge of murder in the criminal proceedings against the accused relating to the death of Timol;

78.4 The first and second respondents are prohibited from proceeding with the criminal prosecution against the accused on a charge of murder relating to the death of Timol;

78.5 The first and second respondents are ordered to withdraw the criminal proceedings against the accused relating to the death of Timol.

79 Rodrigues alleges that the prosecution against him will violate a number of his constitutional rights. He claims that his rights in terms 35(3)(a)(d) and (i) of the Constitution as well as his rights to remain silent and not incriminate himself have been violated. He claims that he is also seriously prejudiced by the fact that a prosecution has been instituted against him some 47 years after Timol's death.

80 I set out below my consideration of the merits of the accused's case, with reference to the following themes:

80.1 First, I deal with the issue of delay, including the reasons for the delay and the length thereof;

80.2 Second, I deal with the evidentiary issues raised by the accused;

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80.3 Third, I discuss the accused's age and health; and

80.4 Finally, I analyse the accused's allegations that his rights have been infringed and that a stay is appropriate.

Delay

81 I am advised that when considering the question of delay that a "*balancing act*" must take place in which both the conduct of the prosecution and the accused are weighed. The following considerations are considered when performing this balancing act, including:

81.1 the reasons the government assigns to justify the delay;

81.2 the length of the delay; and

81.3 the accused's assertion of his right to a speedy trial; and the prejudice to the accused.

Reasons for the delay

82 Under apartheid the police, in particular the SB, could not have been expected to investigate themselves. Indeed, it would be safe to assume that all murders and crimes carried out by the SB, probably without exception, were covered up. Moreover, prosecutors and magistrates routinely did the bidding of the SB or simply turned a blind eye to the atrocities. This naturally explains the inaction between 1971 and 1994.

83 The TRC and the amnesty process, which eventually wound up in 2002, perhaps explains the delay post 1994. It is the subsequent period between 2002 and the reopening of the Inquest that requires examination ("**the post-TRC period**"). The failure of the NPA and the police to explain the delay in this period is conspicuous, if not downright suspicious.

84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "**TRC cases**"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.

85 This policy or approach is evidenced by various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases as reflected in the documents described below:

85.1 The 2004 secret government 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), which made proposals, most of which were

accepted, to guarantee impunity for apartheid-era perpetrators (annex "**IC4**").

85.2 An affidavit made by Adv. Pikoli, filed in *T P Nkadimeng v National Director of Public Prosecutions & Others*, (Case No.: 3554/2015, Gauteng Division), in which he sets out how the independence of his office was seriously compromised (annex "**IC6**"). Pikoli details how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. B S Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases. When he ultimately decided to proceed with one case (the attempted murder of the Rev. Frank Chikane by the SB) he was suspended by President Mbeki on 23 September 2007. (The Chikane matter led to a soft plea bargain with former Minister Adriaan Vlok, former Commissioner Johann van der Merwe and others on 17 August 2007).

85.3 A secret memorandum addressed by Pikoli to Minister Mabandla titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007. In this memorandum Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. Since this document was entered into evidence in the Enquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions (also known as the Ginwala

Enquiry) it is in the public domain and is accordingly annexed hereto marked "**IC10.**".

85.4 An affidavit made by Adv. Ackermann SC which was also filed in the aforesaid Nkadimeng case (annex "**IC7.**"). In this affidavit Ackermann explains in detail how he was stopped from pursuing the investigation and prosecution of the TRC cases. He recounts that following the suspension of Pikoli in September 2007 he was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP, who advised him that he was relieved of his duties in relation to the TRC cases with immediate effect.

86 Both Pikoli and Ackermann state that it was no coincidence that there has not been a single prosecution of any TRC matter since September 2007. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case in which an order was sought compelling the NDPP to make a prosecutorial decision or refer the case to an inquest.

87 It is of great significance that in those proceedings ((Case No.: 3554/2015, Gauteng Division) the NPA and SAPS never filed an answering affidavit. They never went on the public record to dispute the averments of the political suppression of the TRC cases, notwithstanding the considerable publicity that the case attracted. As an example of the publicity, I annex hereto a newspaper article dated 31 May 2015 authored by Ms Zenzile Khoisan in the Weekend Argus marked "**IC11**". Those proceedings were held in abeyance following the

issuing of indictments against four SB officers who were accused of murdering Nokuthula Simelane.

88 I submit that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, constitutes bad faith, is irrational, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Perpetrators, such as Rodrigues, have directly benefitted from such unlawfulness since the closure of the TRC.

89 This is the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic era. After being protected from investigation and prosecution in the post TRC years, Rodrigues now seeks to use this delay to permanently stay the prosecution.

90 Until the 2015 Nkadimeng case referred to above, victims of apartheid crimes were entirely unaware of the state policy to suppress the political cases of the past. This pernicious and illegal strategy should not be held against the Timol family and the other the families of apartheid-era atrocities.

91 Staying the prosecution would serve to validate the position taken by perpetrators in political cases. It would also serve to validate and reward the interference orchestrated by dark political forces and executed by subservient, unethical and dishonest police officers and prosecutors.

92 Families and victims would be punished for the political interference and inaction by the authorities, when they took no part in such obstructions and were entirely oblivious of such machinations. This would be iniquitous and unjust, particularly in circumstances where families, such as mine, have been persistently and diligently campaigning for justice for decades.

93 I submit that staying the prosecution in such circumstances would play into the hands of unscrupulous elements who have engineered near total impunity for apartheid era crimes. This is precisely the perverse outcome that they have sought. It would stand as a deep betrayal of the sacrifices made by victims such as Timol, Biko, Simelane and others. It would also be deeply offensive to our constitutional order.

94 I should add that the third respondent, the Minister of Police, has chosen not to take part in these proceedings. The role of the police in the post-TRC years has been equally shameful. The conduct of the late Commissioner Jackie Selebi, who led the charge to suppress the TRC cases, was nothing less than disgraceful. Even today it appears that the police remain, to some extent, captured by forces from the past:

94.1 An additional 9 deaths in SB detention, as well another 11 cases dealing with murder, kidnapping and torture (in which all the suspects were former SB members who had not been amnestied, which includes Cradock 4 and Pebco 3 murders), were placed before the Directorate for Priority Crimes Investigations ("DPCI" or "the Hawks") and the NPA in January 2018.

94.2 Astonishingly, two former SB officers were appointed to lead these investigations. One of the investigators, indeed the senior investigator in charge, was implicated in the torture of a detainee in the 1980s. This detainee, together with his wife, were subsequently shot dead by the SB, after he sued the SAP for damages.

94.3 Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that absolutely no progress has been made in any of these 20 cases. In addition, the team members appear to be complacent and unwilling to rise to the challenge. All the above leads me to conclude, that in relation to the TRC cases, it is still business as usual.

94.4 Finally, I note that it is no surprise that the real decision makers behind the atrocities committed by the SB have not been investigated and prosecuted. Individuals, such as Eugene de Kock and those recently indicted in the Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible is inexcusable and speaks volumes about the state of our criminal justice system.

Length of delay

95 There is no doubt that the long delay in prosecuting Rodrigues is unfortunate and regrettable. As mentioned above there was no prospect of any meaningful investigations of SB crimes under apartheid. The Timol matter is a case in

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point. The investigating officer, Major General Buys, who was the head of the Criminal Investigation Department ("**the CID**") of the SAP, was appointed to investigate Timol's death in police custody. On 31 October 1971, before the investigation had been completed, Buys proclaimed to the media that Timol had committed suicide. He was little more than the SB's sweeper.

96 Post the advent of democracy in 1994 it was open to Rodrigues to come forward to the TRC and come clean about his role and claim his amnesty. Had he done so, he would have earned my gratitude and that of my family. He chose not to, notwithstanding the fact that that he was specifically invited to come forward. Rodrigues chose to stay silent and keep my family in persistent pain and trauma. Moreover, once it was announced that the inquest was to be reopened Rodrigues did not come forward. Our investigator, Frank Dutton, had to track him down. Remarkably, even the investigating officer and the NPA assumed that he was dead.

97 Post the TRC, the story of post-apartheid justice in South Africa is a shameful story of terrible neglect. Both the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid era cases. Even though the TRC had handed over a list of several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for (hereinafter referred to as the "**TRC cases**").

98 In respect of the TRC cases the SAPS and the NPA became captured by political forces. The few prosecutors with the courage to stand up to the political interference were either removed from their positions or frozen out from these cases. The rest acquiesced and ensured that the TRC cases never saw the light of day.

99 Notwithstanding the neglect of these state institutions, there is considerable precedent for the bringing of prosecutions in respect of serious crimes even many decades later. Courts, both domestic and foreign, have grappled with prosecutions in adverse circumstances and instituted prosecutions after extended periods. Examples include:

99.1 In 2016, former South African tennis champion Bob Hewitt was successfully prosecuted for the rape and sexual assaults of three teenage girls dating back to the 1980s. He was sentenced to six years imprisonment. I attach the relevant media report as "**IC12.**"

99.2 A 94-year-old former SS guard presently faces trial in November 2018 charged with complicity in mass murders at the Nazi concentration camp Stutthof during World War II. According to regional court prosecutors at Muenster he stands accused of complicity in the murders of several hundred camp prisoners between 1942 and 1945, more than seven decades after the end of World War II. I attach the relevant media report as "**IC13.**"

99.3 In 2016, 95 year old Reinhold Hanning, who was an SS guard at the Auschwitz concentration camp in occupied Poland from 1942 to 1944,

was convicted in the Detmold court as an accessory to 170 000 murders. He apologized for participation in Holocaust atrocities saying "*I am ashamed that I saw injustice and never did anything about it, and I apologize for my actions*". Hanning was sentenced to five years in prison and died while an appeal to the Federal Court of Justice was pending. I attach the relevant media report as "**IC14.**"

99.4 According to German media reports, as at June 2017, some 28 prosecutions were still under way against alleged war criminals and concentration camp guards. The accused are generally over 90 years old (annex "**IC14.**").

99.5 In July 2018 eight retired Chilean military officers were sentenced to 15 years in prison for the murder of popular folk singer, Victor Jara, during the 1973 coup that installed late dictator Augusto Pinochet in power. A judge handed down the sentences after a long-running inquiry into Jara's death on 45 years ago. A ninth suspect was jailed for five years for his role in covering up the killings. I attach the relevant media report as "**IC15.**"

99.6 In May 2016, former Argentine junta leader, Reynaldo Bignone, was sentenced to 20 years in prison for multiple kidnappings and murder committed under Operation Condor - a conspiracy between South America's dictators in the 1970s. Bignone and 14 other military officers were found guilty by a court in Argentina after a three-year trial. I attach the relevant media report as **"IC16.";**

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99.7 In 2016, the former head of the Argentine Air Force, Brigadier Omar Graffigna, went on trial in a Buenos Aries provincial court for forced disappearances during the military rule that took place from 1976 to 1983. He was 90 years old at the time. I attach the relevant media report as **"IC17.";**

99.8 In 2018, four former high-ranking Guatemalan military officers, once considered untouchable, were convicted of crimes against humanity, including forced disappearance and sexual abuse that took place in 1981. A sentence of fifty-eight years' imprisonment was imposed. I attach the relevant media report as "**IC18.**"

100 In addition to these cases, several high-profile prosecutions have taken place across the world where former military and police officials have been convicted for crimes committed during pre-democratic regimes. Examples include:

100.1 In Spain, Adolfo Scilingo, a former Argentine naval officer, was convicted in 2005 for torture and crimes against humanity committed between 1979 and 1983. He was sentenced to 640 years in prison. I attach the relevant media report as "**IC19.**"

100.2 In France, Alfredo Astiz, a former Argentine naval intelligence officer, was convicted in 2011 for torture and enforced disappearances committed between 1976 and 1983. He is serving a life sentence in prison in Argentina. I attach the relevant media report as "**IC20.**"

Accused's assertion of his fair trial rights

101 Rodrigues claims that his rights contained in sections 35(3)(a), 35(3)(d), 35(3)(i) of the Constitution as well as his rights to remain silent and not incriminate himself have been infringed.

102 The accused's fair trial rights must be balanced against the profound social interest in bringing a person charged with a serious criminal offence to trial. Society benefits as a whole when a prosecution takes place in a structured legal system before a public forum and where the liability of the accused is resolved.

103 Considerations of the accused's claimed violation of rights must be juxtaposed against the societal demand that those accused of serious offences, such as murder, must stand trial. This is one of the reasons why the crime of murder in South Africa never prescribes, no matter how old the crime is.

Evidentiary Issues

104 The accused complains about various evidentiary issues that arise from the delay in prosecuting him, including material disputes relating to the circumstances of Timol's death, the unavailability of medical experts, the impairment of witnesses' memories and the destruction of crucial records.

105 However, the accused's complaints are without foundation.

105.1 First, in criminal proceedings, it is not the accused but the prosecution that bears the evidentiary *onus*. Moreover, the standard of proof is an onerous one – the guilt of the accused must be established beyond reasonable doubt.

105.2 Second, any prejudice that the accused claims may arise from an absence of evidence may be remedied by the accused applying for a discharge in terms of section 174 of the CPA at the end of the prosecution's case.

105.3 Third, judicial officers have the expertise to assess the credibility and reliability of witness testimony, and to assess this holistically.

Accused's Health

106 Rodrigues who is 79 years old alleges he will "*suffer serious prejudice to my health should this trial proceed*", including adversely affecting his health. He claims that he is suffering from multiple ailments.

107 At the outset, I must point out that the accused's claim of fragile health is an entirely bald claim. He puts up no evidence to support this claim. No medical reports or doctor's certificates accompany the founding affidavit. If Rodrigues was genuinely in poor health, it would have been a simple matter to put up basic proof. The accused's claim is most likely false.

108 In any event I submit that there is considerable domestic and international precedent for prosecuting elderly and unwell accused. I have pointed to

several examples where prosecutions were brought after a thirty-year plus delay and some even more than 70 years. In all these cases, the accused were elderly, several in their 80s and 90s.

109 It would send a terrible and counter-productive message if this Court were to signal that those who have managed to evade justice for decades would be accordingly rewarded. Rather, perpetrators of all crimes, particularly serious crime, should know that they will have to account for their actions, no matter how old they are.

Stay of Prosecution and Withdrawal of Charges

110 My family opposes the permanent stay of prosecution sought by the accused. I am advised and submit that the factors that a court will consider when granting a permanent stay are:

110.1 The nature of the prejudice suffered by the accused;

110.2 The nature of the case;

110.3 Systemic delay.

Prejudice

111 While having to face justice at an advanced age is unpleasant, Rodrigues brought this situation onto himself. As mentioned above, Rodrigues had several opportunities to come clean and simply provide the truth in exchange for his

freedom. He chose however to remain obstructive and un-cooperative and to prolong my family's pain.

112 In any event it is open to Rodrigues to raise his age and any special circumstances at mitigation of sentence, should he be convicted.

Nature of the case

113 Rodrigues faces serious charges, including murder and defeating and/ or obstructing the administration of justice. Both crimes are very serious, particularly that of murder.

Systemic delay

114 I have already analysed the delay occasioned in prosecuting the accused. Moreover, such delay does not outweigh the special circumstances of this case together with the interests of justice and the overwhelming public interest in seeing justice done.

Interests of justice

115 Our highest court has held that the ultimate consideration in granting a stay is the "*interests of justice*", which denotes an equitable evaluation of all the circumstances of each case. Having regard to everything I have set out, I submit that the present case is of the exceptional sort where the interests of justice cry out for a prosecution to proceed against the accused.

AD SERIATIM RESPONSE TO THE APPLICANT'S FOUNDING AFFIDAVIT

116 I set out below my answers to the individual averments made by the applicant in his founding affidavit. To avoid undue repetition, everything I have set out above must be read as an answer to the contentions advanced by the applicant.

117 Ad paragraphs 1 to 5

117.1 The contents of these paragraphs are noted. I point out that despite my family possessing an obvious and clear interest in this application, the accused elected not to cite the family in the application. This forced us to bring a substantive application to intervene in these proceedings, thereby causing further delay and costs.

118 Ad paragraph 6

118.1 I note the form of the relief sought by the accused but deny that the accused is entitled to this relief. I point out that despite the accused's criminal prosecution pending before the Johannesburg High Court, he elected to institute the application in piecemeal fashion before the Pretoria High Court.

118.2 In my intervention application, I originally sought to declare this to be an abuse of this Court's process but have since not pursued this relief in view of the matter being subject to case management by the Johannesburg High Court in which it will be heard.

119 Ad paragraphs 7 and 8

119.1 I note the various rights relied upon by the accused. While the accused is entitled to assert his fair trial rights, I repeat that these must be juxtaposed against the societal demand that those accused of serious offences, such as murder, must stand trial.

119.2 I deny that the accused has made out any case for an infringement of his rights in terms of section 12 of the Constitution. Despite pleading this right, Rodrigues has failed to provide any factual and legal basis to demonstrate any actual or threatened arbitrary deprivation of his freedom, detention without trial or cruel or inhumane punishment.

120 Ad paragraphs 9 and 10

The contents of these paragraphs are noted.

121 Ad paragraphs 11 to 13

I have no knowledge of how the first respondent framed the charges against the accused, however the genesis of the prosecution against the accused was the judgment of the Reopened Inquest, which made serious credibility findings against Rodrigues (para 315).

122 Ad paragraph 14

122.1 The contents of this paragraph are denied. The attempt by Rodrigues to make something of the removal of section 257 is based on a misreading of sections 18 and 257 of the CPA. Section 18 provides

that the NPA's right to institute a prosecution in respect of murder does not prescribe by effluxion of time. Chapter 26 of the CPA (which includes section 257) empowers a court to grant competent verdicts in the alternative to a main charge if a main charge, such as murder, cannot be proven. Section 257 accordingly does not have the effect of creating an offence, but merely permits a court to convict an accused as an accessory after the fact to murder if it cannot be proven that the accused himself meets all the requirements for criminal liability in respect of murder.

122.2 Rodrigues not only participated in the cover up of Timol's murder in the first inquest, but doggedly persisted with the cover up before the 2017 re-opened inquest. This was a specific finding made by the re-opened inquest court noted in its judgment. While Rodrigues can no longer be held criminally liable for his cover up before the 1972 Inquest he can be held liable for pursuing the cover-up before the 2017 Inquest.

123 Ad paragraphs 15 to 16

123.1 The contents of these paragraph are denied. The accused claims that the re-opened inquest court concluded in its findings that he was not involved in the causing the death of the deceased; and at worst he was only found to be an accessory after the fact to murder. However, a close reading of the judgment discloses not a single reference or finding anywhere in the judgment to Rodrigues playing no role in the death of the Timol.

123.2 Indeed the fact that the Inquest Court found that the fall had taken place in the morning not the afternoon and that the version of Rodrigues on this point "*was fabricated and stage-managed as part of a cover up to conceal the facts around the death of Timol*" (paras 245 and 320.8) can only mean that the Court left the door wide open to the possibility that he was involved in the criminal program a lot earlier, making him an accomplice or co-conspirator.

123.3 Once it is accepted that the fall took place in the morning not the afternoon then everything stated by Rodrigues in relation to what happened on 27 October 1971 is, without exception, patently false.

123.4 It can be safely concluded, at the very least, that Rodrigues continued to conceal the commission of multiple offences in the second inquest and in so doing, he continued to single-mindedly defeat the course of justice. Through his cover-up in both inquests he associated himself with the main offences of torture and murder, with knowledge of their commission.

123.5 Rodrigues willingly allowed himself to be used as a pawn of the SB interrogators. By his own admission he knew Gloy and Van Niekerk "*very well*" and even shopped for their groceries and transported their children when they were away (Rodrigues evidence, Vol 9, p 744, line 14 – p 745, line 12; p 746, lines 7 – 15, Reopened Inquest).

123.6 It is probably no coincidence that Rodrigues was recruited into the SB by the notorious Brigadier Theunis Jacobus 'Rooi Rus' Swanepoel

("Rooi Rus Swanepoel") who he knew "*very well*" (Rodrigues testimony, Vol 9, p 687, lines 15 – 20, Reopened Inquest). Rooi Rus Swanepoel was deeply implicated by the TRC in several crimes committed against detainees, including the demise of Suliman "Babla" Saloojee who fell to his death in 1964 from the 7th floor of Gray's Building, then HQ of the Johannesburg SB (TRC Final Report pp 540-541, Exhibit H12). Gloy accompanied Rooi Rus Swanepoel to France in 1968 to receive training in "*interrogation and counter-interrogation techniques*" (TRC Report Vol 2 Ch. 3 subsect. 14, para 125).

123.7 Rodrigues admitted, for the first time at the 2017 inquest, that he stopped short of pretending that he had a fight with Timol, to explain away the torture injuries, when asked to do so by Major General Christoffel Andries Buys ("**Buys**"), the investigating officer (and Gloy and Van Niekerk). Presumably he realised that such a fabrication would open himself to taking the blame for the multiple non-fall injuries on Timol (Rodrigues oral evidence, Vol 9, p 675 line 10 – p 677, line 10; p 683, line 12 – p 684, line 9; p 719, line 22 – p 720, line 10)

124 Ad paragraph 17

124.1 The contents of these paragraphs are denied. Rodrigues, on his own version, spent time with Timol in room 1026, indeed the moments before Timol died. Not counting the time Rodrigues was left alone with Timol he spent some 20 minutes in the office with Timol, Gloy and Van Niekerk (First Inquest finding, p 5 of translated version). Rodrigues was unable to explain why he spent so much time in the interrogation room

when, on his version, his only task was to drop off pay cheques and a secret envelope; and he was not drinking any beverage (Rodrigues testimony, Vol 9, p 690, 696 – 697; Vol 10, p 768 – 769). It is yet another tall story that only a compliant and corrupt magistrate would buy.

124.2 According to expert evidence placed before the re-opened inquest, Rodrigues must have observed considerable injuries on Timol, including bruising and swelling of his upper lip, left wrist and hand; abrasions on his forehead and neck; fracture of his left upper jaw posterior and fracture of his left lower jaw at the angle of jaw (Reopened Inquest, evidence of Dr S Holland read with the post mortem report). This was also a finding made by the inquest court in 2017.

124.3 The claim of Rodrigues that Timol was injury free when he saw him in room 1026 on 27 October 1971 is manifestly false. The veracity of his various denials is for a criminal court to finally determine.

125 Ad paragraph 18

125.1 The contents of this paragraph are denied. The accused claims that he was stationed at SB HQ in Pretoria and would go to SB offices to attend to administrative issues such as salary and payment enquiries. Rodrigues attempts to give the impression that it was routine practice to attend at SB branches to deliver pay cheques, so his presence at JVS

on the fateful day was nothing out of the ordinary. This was yet another patently transparent lie.

125.2 Rodrigues testified at the re-opened inquest that his visit on 27 October 1971 was in fact his very first visit to JVS (Rodrigues testimony, Vol 10, p 777). Indeed, on his own version he had no idea where to go on arrival at the building. JVS was in fact the biggest SB branch office with the most members outside of Pretoria, yet he had never been there before. This is even more incredulous given that at the time he had been a Paymaster Clerk at Security Branch HQ for nearly 2 years.

125.3 It is quite apparent that Rodrigues was not called over to JVS for administrative purposes. He was called over to collaborate in the crimes to be committed by Gloy, Van Niekerk and others. Ultimately, he was to be used to shield Gloy and Van Niekerk from scrutiny as to what happened in room 1026. In this, he was a willing participant.

125.4 Rodrigues further asserts that "*it would have been regarded as a very serious breach of security should I have involved myself in any operational issues and/ or should anybody have allowed me to participate in operational matters*". And yet this is precisely what happened, at least on his version, on the afternoon of 27 October 1971.

125.4.1 Firstly, Rodrigues claimed he was asked to transport a secret document in an envelope to Gloy and Van Niekerk. It is a fabrication. He had no security clearance to carry out such a task and it is quite obviously not the job of a paymaster clerk.

125.4.2 Secondly in room 1026 in JVS, Rodrigues was supposedly asked by Gloy and Van Niekerk to guard Timol on his own. On the police version, Timol was the SB's most important detainee in years. This was an operational matter for which Rodrigues was not trained or authorised to do. Indeed, in his haste to rebut the case against him he concedes that his version of what took place on 27 October 1971 was a "*very serious breach of security*". It is a scenario that is simply not believable, especially since at JVS at the time there would have probably been a hundred or more SB and SAP members available to guard a detainee. Such inconsistencies invariably emerge when a version is concocted.

126 Ad paragraphs 19.1 to 19.6

In the accused's overview of events, he notably fails to mention that the investigating officer, Buys, and the interrogators, Gloy and Van Niekerk, asked him to fabricate a version, namely to pretend that he and Timol had fought in room 1026. He never disclosed this to the first inquest and indeed kept it secret until the re-opened inquest in 2017. Rodrigues could have come disclosed it to the TRC but specifically chose not to.

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127 Ad paragraph 19.7

It is difficult to believe that the accused did not possess the TRC's report on Timol's death. The TRC report is a public document that is freely available on several websites and is accordingly easily accessible.

128 Ad paragraph 19.8

Rodrigues notably omits to mention that he flatly refused to participate in the TRC process, including appearing before the TRC. He attempts to give the impression that had he been able to 'jog his memory' by reading his 'statement and/ or evidence' from the initial inquest he would have happily cooperated with the TRC. This is another false claim and is disputed by TRC investigator, Piers Pigou.

129 Ad paragraph 19.12

The accused did not agree to voluntarily testify before the re-opened inquest court. The learned Mothle J had to subpoena the accused to appear before the re-opened inquest court.

130 Ad paragraph 19.16

130.1 The contents of this paragraph are denied. Rodrigues attempts to mislead this Court by claiming that the only new evidence generated in the reopened inquest was the evidence of the two forensic pathologists and the aeronautical engineer, dealing with the trajectory of the fall.

130.2 While the forensic evidence was instrumental in demonstrating that the police version of Timol's death, and that of Rodrigues, was impossible to have occurred, it was far from the only new evidence. (It is worth noting that his legal team made no serious attempt to dispute the forensic evidence, notwithstanding that his expenses were paid by the State). The accused overlooks considerable other evidence including:

130.2.1 The similar fact evidence of horrendous torture endured by Dr Salim Essop, Dr Dilshad Jetham and Professor Kantilal Naik as well as some 11 affidavits setting out accounts of torture by the SB at JVS.

130.2.2 This similar fact evidence on torture and cover-ups was reinforced by the testimony of former SB officer, Paul Erasmus, and the expert evidence of Professor Don Foster who had extensively researched abuses in apartheid era detention.

130.2.3 The affidavit and testimony of the family's investigator, Frank Dutton, who demonstrated how the original investigation was a complete sham aimed at suppressing the truth and protecting the officers involved.

130.2.4 Professor Kenneth Boffard, Trauma Director and Academic Head at the Department of Trauma Surgery at Milpark Hospital, who testified that, following the fall, Timol should not have been moved until an ambulance arrived; that the police would have known this and that they knew the consequences of moving him and not calling an ambulance.

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130.2.5 Three unconnected civilian witnesses who testified as to what they saw and heard on 27 October 1971 and all put the timing of the fall at mid-morning.

130.2.6 Two witnesses who saw Timol not long before his arrest and saw him to be in good shape with no visible injuries.

130.2.7 Evidence from his brother, Mohammed Timol, who testified that his brother would not have opted for suicide; as well as the evidence of 3 associates in the underground who debunked the so-called 'suicide' document, '*Inkululeko Freedom No.2*', introduced surreptitiously into evidence by the SB in the first inquest, as a blatant forgery.

130.2.8 The personal police files of Timol, Naik, Jetham, Mohamed Timol and Quinten Jacobsen which demonstrated the round the clock system of interrogation to enforce sleep deprivation. One detainee could have up to 17 interrogators.

130.2.9 The police files of six SB officers, including Rodrigues, Van Niekerk and others. The file of Rodrigues disclosed that he had a prior conviction of perjury and had bizarrely received a letter of commendation 2 days before the first inquest finding was handed down. The file of Van Niekerk disclosed a conviction for 2 counts of assault (in which the victim died) and multiple complaints of torture against him and Gloy.

131 Ad paragraphs 23 to 27

131.1 The contents of these paragraphs are denied. The accused makes the remarkable claim that the NPA knew it would prosecute before the start of the second inquest. This claim is made without reference to any evidence or facts but simply on the basis that the NPA confirmed in its response to a request for further particulars that it had supplied all documentation and exhibits. No explanation is offered as to why this supposedly follows.

131.2 The claim of Rodrigues that he did not enjoy a right to silence in the inquest, suggests that he was placed at risk of incriminating himself. The right against self-incrimination is routinely invoked in inquests. The accused was represented by an attorney and counsel throughout the proceedings and he could easily have claimed his right against self-incrimination.

131.3 The procedure employed in the Reopened Inquest was in strict accordance with the Inquests Act 58 of 1959 ("**the Inquests Act**"). Nonetheless Rodrigues complains that the use of his testimony in the inquest proceedings in a prosecution infringes his constitutional rights. If this was a serious complaint, then he would have challenged the constitutionality of the relevant provisions of the Inquest Act. Rodrigues did not do so.

132 Ad paragraphs 27 to 28

The contents of these paragraphs are denied for the reasons already set out above.

133 Ad paragraphs 29 to 30 (including sub-paragraphs)

133.1 The contents of these paragraphs are denied and have been previously addressed. I further point out that the accused's allegations are nothing more than pure speculation. The true position is that the decision to reopen the inquest was made primarily on a consideration of a single statement, that of Salim Essop.

133.2 This statement was taken by the family's legal representatives and provided to the NPA. The bulk of the remaining evidence adduced in the inquest was procured after the decision to reopen the inquest.

134 Ad paragraphs 35 to 43

134.1 The allegations made in these paragraphs are largely repetitive and have been dealt with. The inquest court made no positive finding that Rodrigues was not involved in the murder of Timol. The NPA is in any event not bound by the findings or recommendations of an inquest court.

134.2 I point out that it is not the accused, but the NPA that bears the *onus* of establishing the accused's guilt beyond a reasonable doubt.

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Accordingly, the absence of witnesses, evidence and records does not prejudice the accused but places a greater burden on the NPA.

134.3 As mentioned above the accused's claim of fragile health (in para 41.5) is an entirely bald claim. If Rodrigues was in such poor health, it would have been elementary enough to put up basic proof.

134.4 The allegation that the Timol family was represented by senior counsel at the re-opened inquest (para 42.9) is untrue. The family was represented by junior counsel (who acted pro bono) and a baby junior counsel.

135 Ad paragraph 47

135.1 The allegations in this paragraph have been addressed previously. Rodrigues maintained his silence for 45 years. This is hardly the conduct of someone who always cooperated with investigators.

135.2 His wall of silence is particularly egregious since he knew that my family was campaigning for the truth. He notes in his founding affidavit at paragraph 49.1 that Timol's mother testified before the TRC in April 1996 and that her "*testimony, relating to the death of the deceased was widely covered, not only locally but also internationally, by the media.*" Rodrigues was well-aware of our plight but chose to remain silent. This is the same cruel modus operandi (the so-called code of silence) employed by virtually all former SB members.

135.3 I reiterate that, in 1996, when TRC investigator Piers Pigou met the accused in Pretoria, the accused refused to cooperate with the TRC and declined to make a statement or appear in a hearing. Again, this is hardly the conduct of a cooperative witness, let alone an honest one.

135.4 Pigou did not trace Rodrigues at his home but rather at his place of work at SanParks.

136 Ad paragraph 48

The contents of this paragraph are denied for the reasons already set out above. There were no proceedings until 2017. He took no steps to come clean or even to bring to the attention of the TRC or the authorities that he had been asked to cover up the torture of Timol by fabricating a version of a fight (which he only belatedly disclosed in the reopened inquest).

137 Ad paragraph 49 and subparagraphs

I have dealt with the various lapses of the SAPS and NPA elsewhere in this affidavit. These lapses have caused our family indescribable pain and hurt. I note with considerable irony that Rodrigues wishes to use the regrettable lapses of the police and prosecutors in pursuing apartheid-era cases, which directly benefitted him, in order to elude justice.

138 Ad paragraphs 50 to 66

138.1 The contents of these paragraphs have been addressed elsewhere in this affidavit and are accordingly denied to the extent necessary, alternatively it is for the NPA to respond to claims made in respect of the pre-trial process.

138.2 I point out again that it is not the accused, but the first respondent that bears the *onus* of establishing the accused's guilt beyond reasonable doubt. Until then his presumption of innocence will be respected by the criminal justice process.

138.3 As my legal representatives did in the reopened inquest, it is always open to the accused to adduce his own expert and forensic evidence in rebuttal, regardless of the delay.

138.4 I repeat that there is not a shred of evidence before this Court that the accused is of fragile health.

138.5 Rodrigues has not been charged either with assault or assault with intent to cause grievous bodily harm.

138.6 If the NPA's case is as flawed as Rodrigues claims, he is free to bring an application for discharge at the close of the State's case in terms of section 174 of the CPA.



S32

139 Ad paragraph 67.

The contents of this paragraph are denied. The accused's application should be dismissed with costs.

AD SERIATIM RESPONSE TO THE NPA's ANSWERING AFFIDAVIT

140 I set out below my answers to the averments made by the NPA in its answering affidavit. To avoid unduly burdening this affidavit I will not repeat background or answers already provided, but these should be read as an answer to the contentions advanced by the NPA's deponent.

141 Ad paragraphs 1.1 to 2.24

The contents of these paragraphs are noted. It is however particularly conspicuous that no explanation is provided for the near total inaction of the NPA in the post-TRC period (between approximately 2002 and the lead-up to the 2017 inquest.

142 Ad paragraphs 3.14 to 3.15 and 3.20 (including sub-paragraphs)

142.1 While I agree that the period in section 35(3)(d) of the Constitution refers to the period between the issuing of an indictment and the commencement of a trial, the period leading up to the decision to institute criminal proceedings cannot be ignored.

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142.2 I point out that the deponent has failed to mention that page 7 of the NPA's Prosecution Policy demands that the period between the committal of crime and the trial date be considered. The Prosecution Policy provides that:

> *"When considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including:*
>
> ...
>
> - *Whether there has been an unreasonably long delay **between the date when the crime was committed, the date on which the prosecution was instituted and the trial date**...."* (Emphasis added)

142.3 Accordingly, what transpired during this time-period must be explained by the NPA, which it has inexplicably chosen not to do. This gives rise to suspicion that the NPA is shielding itself from embarrassment as well as violations of its obligations and duties under the Constitution, the National Prosecuting Authority Act 32 of 1998 ("**the NPA Act**"), and its Prosecution Policy.

142.4 In the post-TRC period no investigation into my uncle's murder was conducted by the NPA or SAPS until 2016. This was notwithstanding my request to the NPA in 2002. Aside from speaking to one journalist in Cape Town nothing was done. This singular act does not constitute an investigation. So much more could have done.

142.5 At that time, the key role players were still alive, such as the investigating officer General Stoffel Buys and the two primary interrogators, Captain Johannes van Niekerk and Captain Johannes Gloy. None of these individuals were approached.

TA

142.6 Experienced investigator, Frank Dutton expressed his dismay at the approach of the NPA in the abovementioned article written by Kevin Bloom (annex "**IC3**"). It reads that:

> *"It is clear that the PCLU task team did not bother itself with 'studying' the Timol matter (which amongst other facts, disclosed several potential witnesses who had not been interviewed), before making an irrational recommendation (based on the report of a journalist rather than the facts contained in the filed material) not to prosecute and to close the matter without interviewing the potential witnesses.*
>
> ...
>
> *Chris Macadam followed a similarly unreasoned course of action (concerning himself only with the journalist, and not determining the facts of the matter or following up on the potential witnesses). He however also called on the Timol family to provide any additional relevant material in respect of the death so that the case could be reconsidered in light thereof. This was obviously a ploy to move the onus for investigation from the authorities to the Timol family. It effectively meant that if the family failed to provide additional material, the PCLU would not move, and the case would remain 'closed'.*
>
> *On 31 October 2006 Van Niekerk died; on 25 February 2007 Buys died; on 30 July 2012 Gloy died. Ultimately, Macadam had nearly 9 years to carry out the most elementary and basic investigation. He had nine years to interview Salim Essop (who was arrested with Timol and brutalised into a coma), as well as other detainees who could testify to their own torture as well as what they had heard and seen on the 10th floor. He had nine years in which to identify the whereabouts of police officers who had interrogated or guarded Timol. He had nine years in which to peruse the police files for evidence linking the latter to brutality. He had nine years to trace Rodrigues and interrogate his version of what transpired in room 1026. He had nine years in which to do a walkabout around the building to discover potential witnesses to the fall (which is how the family's lawyers discovered witnesses 45 years later). He had nine years to consult forensic pathologists and trajectory experts to determine whether the police version was possible or not. But Macadam did none of the above in these nine years."*

143 I will be calling for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.

IA

144 Ad paragraph 3.20.7

144.1 The impression is gained from this paragraph that it was smooth sailing from the moment that the NPA met with the family's representatives in January 2016. In fact, my lawyers had to threaten the NPA with litigation on several occasions to get the reopened inquest off the ground:

144.1.1 Following several earlier communications, my attorney, Moray Hathorn of Webber Wentzel ("**Hathorn**"), emailed the deponent on 21 June 2016 to remind him that the witnesses in the Timol and Neil Aggett cases were old, and their evidence may be lost if there was any further delay in reopening these inquests. Hathorn pointed out that this would have a devastating impact on the interests of justice and he called upon Advocate TP Pretorius SC to reach a decision in "*the next few days, or at the very latest within the next 2 weeks*". A copy of this email is attached as "**IC21**".

144.1.2 On 8 July 2016, Hathorn addressed a letter to the then NDPP, Adv Shaun Abrahams, in which he indicated that "[s]*hould a decision not be taken imminently our instructions are to take the necessary legal steps to secure such a decision.*" A copy of the letter is attached as "**IC22**".

144.1.3 A further letter was written on 11 August 2016 to the deponent, referring to communiques exchanged in July 2016, seeking an update on whether a recommendation had been made to the

TA

NDPP. The urgency of the matter was stressed with the letter concluding that "*[s]hould we not receive such advice by that time [17 August 2016] our instructions are to take appropriate action*". A copy of the letter is attached as "**IC23**".

144.1.4 Following on a telephonic conversation between the family's attorney of record and the deponent, a further letter was authored on 23 August 2016. In this letter it was pointed out that the NPA was palpably delaying the process and that the deponent did "*not have to finalize every last aspect of the investigations before these steps are taken*". It was placed on record that the delay was prejudicial. Detailed evidence was provided as to why the Timol and Aggett inquests were ripe for re-opening. The letter concluded with the following threat: "*In the circumstances we hereby demand that the necessary recommendations to the Minister of Justice in terms of section 17A of the Inquest Act 58 of 1959 to reopen the aforesaid inquests be made by no later than 30 September 2016.*" A copy of the letter is attached as "**IC24**".

145 Ad paragraph 6.12

While it is correct that if Rodrigues had made full disclosure to the TRC, Gloy and van Niekerk could have been prosecuted, it is equally true that if the NPA and the SAPS had conducted even the most basic investigation in 2002, when I

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requested them, then Buys, Gloy, Van Niekerk and others could have been prosecuted and held to account.

146 Ad paragraph 7.50

The NPA has omitted to attach the affidavit of the unnamed investigating officer marked "XX".

147 Ad paragraph 8.14

147.1 There is considerable irony to the claim made in this paragraph that "*it is not for victims to engage in investigations and prosecutions and that it will be a sad day in history if it's found that organisations seized with these mandates fail in their functions*". This is in fact precisely what happened.

147.2 If my family had not investigated my uncle's murder and, had we not engaged in intensive lobbying, the reopened inquest and these criminal proceedings would never have happened. It was the investigations of our private investigator, Frank Dutton, that opened the door to this case. The decision by the NPA to reopen the inquest was made on the back of his investigations.

147.3 The bulk of the investigations and preparation were carried out by the family's investigator and legal representatives.

147.3.1 Dutton located Salim Essop and it was our family's legal representatives that took his statement and presented same to the NPA.

147.3.2 The instrumental role of the family's representatives is starkly illustrated by the final exhibit list in the re-opened inquest (which can be supplied on request):

(a) Of the 30 documents listed in Volume C, 27 were prepared or obtained at the instance of our family's legal representatives.

(b) Of the 36 documents or bundles of documents in Volume H, 33 were prepared or obtained at the instance of the legal representatives of the Timol family.

(c) All 11 documents in Volume M were prepared or obtained at the instance of the legal representatives of the Timol family.

(d) In addition, all of the documents in Volumes N1 to N3, O, P, P1, R and T of the re-opened inquest were prepared by the legal representatives of the Timol family.

147.4 Not only did the "*organisations seized with these mandates fail in their functions*" in the post-TRC period, they purposely blocked the TRC cases on instructions from politicians. In this regard I refer to the abovementioned affidavits of Pikoli and Ackermann deposed to in the Nkadimeng case.

148 Ad paragraph 8.15

148.1 Adv Pretorius SC states that he '*obviously also consulted with Adv Macadam*" and he confirmed Macadam's affidavit attached as "JPP6" as far as it related to him. This presumably was in respect of the period prior to January 2016. However, Macadam's affidavit was not attached to the affidavit of Pretorius. This is a most curious and extraordinary omission since it means that the NPA has not dealt with the pre-January 2016. It is unclear whether this was a mere oversight or a deliberate decision to keep the information in Macadam's affidavit out of the public eye.

148.2 The deponent states that he interviewed Salim Essop in October 2016 and ensured that a statement was taken from him. This account does not reflect exactly what happened.

148.2.1 Frank Dutton located Dr Salim Essop who lives in the UK through a trusted intermediator, Mr Prema Naidoo. Dutton eventually met with Essop on 24 November 2015 when he visited Johannesburg on personal business. Dutton interviewed Essop and he reported that he had been severely tortured whilst detained in October 1971 by SB members.

148.2.2 Dutton requested Essop to return to South Africa again and he arranged a consultation between Essop and the Timol family's legal representatives on 6 October 2016. A further consultation took place between 10 and 12 October 2016 when my lawyers took a detailed statement from Essop.

148.2.3 On 11 October 2016 Advocate Pretorius was advised that the family representatives were taking an affidavit from Essop and he was asked whether he wished to see the affidavit before signature. A consultation was then arranged with Pretorius on the afternoon of 13 October 2016 at the NPA office in Pretoria. Essop signed the affidavit the following day at the Legal Resources Centre in Johannesburg and the affidavit was then submitted to the NPA.

AD SERIATIM RESPONSE TO THE APPLICANT'S REPLYING AFFIDAVIT

149 I set out below the answer to the individual averments made by Rodrigues in his replying affidavit. In order to avoid undue repetition, everything I have set out above must be read, where appropriate, as an answer to the contentions advanced by the accused.

150 Ad paragraph 25

The contents of this paragraph are denied. The claims made by the accused here and elsewhere that he was willing to engage with the TRC, if Mr Pigou provided him with "evidentiary material" from the first inquest to refresh his memory, are simply false.

151 Ad paragraph 30.2

The allegations made in this paragraph are denied. On the accused's own version, he was present at the murder scene. In any event, his physical presence is not a *sine qua non* for him to have played a role in Timol's murder.

COSTS

152 I oppose this application to permanently stay the prosecution of Rodrigues on behalf of myself, my family, victims of apartheid era crimes and in the public interest. I seek to vindicate the founding values of our Constitution and to promote the values of national reconciliation and unity. This Court has already confirmed that my family has a clear, direct and substantial interest in this application.

153 I submit that, in these circumstances, it was reasonable for me to oppose the relief sought by the accused. If the application succeeds I should be protected against a potentially ruinous costs order in circumstances where I have intervened in these proceedings in the public interest to vindicate constitutional rights and principles. I submit that I have acted *bona fide* and have made out a proper and motivated case for the relief sought.

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CONCLUSION

154 In conclusion, I submit that I have demonstrated that it would not be in the interests of justice to grant the application of the accused. My family and I seek no injustice or revenge against Rodrigues. We simply seek closure.

155 I pray that the application be dismissed with costs, including those of two counsel.

IMITIAZ AHMED CAJEE

I certify that the deponent has acknowledged that he knows and understands the content of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and affirmed to before me at ROSEBANK on this 08 of January 2019 the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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SUID-AFRIKAANSE POLISIEDIENS

S46

"IC1"

EXAMPLES OF PERSONS SURVIVING FALLS HIGHER THAN 10 STOREYS

1. It cannot be assumed that simply because Timol fell 10 storeys that death would automatically follow, hence the urgent need to summon emergency services. This is because there are recorded cases of people surviving falls well in excess of a height of 30m. Examples include:

   1.1. In January 2007, Joshua Hanson, fell 16 stories from a window in the Minneapolis Hyatt Regency landing onto an asphalt-covered overhang one floor above the street. He survived suffering two collapsed lungs and torn trachea.[1]

   1.2. Chris Saggers escaped with a broken elbow after falling 22 floors from the Salford Tower Block in England onto a car roof.[2]

   1.3. On 9 December 2007, Alcides Moreno, a window cleaner, survived a fall from the 47th floor of a Manhattan skyscraper. He survived and avoided paralysis even though his legs, right arm and wrist were broken in several places, he had a collapsed lung and a shattered vertebra.[3]

   1.4. In December 2006, parachutist Michael Holmes, survived a 14 000ft fall in New Zealand after landing in a blackberry bush. He suffered a collapsed lung and a broken ankle.[4]

   1.5. Skydiver Michael Holmes fell 15,000ft when his main chute tangled and his reserve failed. He broke an ankle. RAF Flight Sergeant Nicholas Alkemade survived an 18,000 ft. jump from a blazing Lancaster bomber in 1944.[5]

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[1] Fox News 'Man Thankful He Doesn't Remember 16- Story Plunge' *Fox News* 21 February 2007, available at http://www.foxnews.com/story/2007/02/21/man-thankful-doesnt-remember-16-story-plunge.html, accessed on 07 September 2017.

[2] Ed Pilkington 'Miracle on 66th street: window cleaner survives 47-storey fall' *The Guardian* 5 January 2008, available at https://www.theguardian.com/world/2008/jan/05/usa.topstories3, accessed on 07 September 2017

[3] *Id*

[4] John Springer 'Skydiving miracle: Man falls two miles' *Today* 13 February 2007, available at https://www.today.com/news/skydiving-miracle-man-falls-two-miles-2D80556106, accessed on 07 September 2017.

[5] Ed Pilkington 'Miracle on 66th street: window cleaner survives 47-storey fall' *The Guardian* 5 January 2008, available at https://www.theguardian.com/world/2008/jan/05/usa.topstories3, accessed on 07 September 2017

"IC2" S47 (a)

Office of the National Director of Public Prosecutions

The National Prosecuting Authority of South Africa
Igunya Sikelele Labetshutshisi baMacala Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

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25 February 2004

A/INV/5/03/TRC

Imtiaz Cajee
P O Box 1888
GARSFONTEIN EAST
0060

Dear Sir

INVESTIGATION INTO TIMOL CASE

I acknowledge receipt of your fax of 18 February 2004 and have to inform you hat the case is registered under the above reference number. Last year investigations were conducted into the allegations that former security branch officer Rodrigues head confessed to his daughter who in turn informed IVOR POWELL.

The investigations produced negative results. I confirm that you furnish me with the following documents:

i) Extract Bizos' book
ii) Article Powell
iii) TRC transcripts
iv) INPUT Detainee
v) Photographs

The testimony of a detainee who was held out of the window was not included.

I would be grateful if you would furnish me with a copy of it as well as any other relevant material, which you may have. The case will again be considered the light thereof.

Kind regards

RC MACADAM
DEPUTY HEAD: PCLU

S48
"162"
1 "1C3"

DAILY MAVERICK

MAVERICK INSIDER

South Africa

History, suppressed: What didn't get revealed at the Timol inquest

By Kevin Bloom• 22 September 2017



62 Reactions

Perhaps the most mind-boggling of the ANC government's unwritten rules is the one that states: "All apartheid-era political killers shall be let off the hook." In among the documents that didn't get presented as oral evidence during the re-opened Timol inquest in August 2017 was a showdown between a senior NPA advocate and a world-class police and investigations expert. Put it this way: it's another big loss for truth. By KEVIN BLOOM.

"*With the re-opening of this inquest, the National Prosecuting Authority has a wonderful opportunity to start afresh and to respond to the pleas of long-suffering families of apartheid-era victims searching for answers and justice.*"

Thus ends paragraph six of the family's expanded heads of argument in the re-opened inquest of the late Ahmed Timol. Compiled three weeks after the presentation of oral evidence,

during which Advocate Howard Varney dismantled the 46-year-old lie regarding the activist's suicide - here (at 47 minutes), for the viewing pleasure of the country, is the version that suggests Timol was tortured and murdered by the apartheid state — there is much in the 200-page document that was not argued in court in detail. For instance, the contention that the evidence of the civilian witnesses, who testified that Timol's "fall" happened in the morning of that distant day in 1971, should be preferred over police evidence that it happened in the afternoon. Or the contention that Joao Rodrigues, who was allegedly the last person to see Timol alive, should be charged with murder for his role as a collaborator *as well as* for his failure to call the medics. That said, for the purposes of saving the collective South African soul, by far the most significant addition is paragraph 6 as quoted above.

"(The Timol story) is sadly also a shameful story of great neglect," the paragraph begins, "as the authorities in our new democratic order failed or declined to take action while the key suspects were still alive. This was an inexcusable lapse. It regrettably points to a design on the part of the authorities to permit the perpetrators of the past to avoid a reckoning with the truth, and escape justice."

Yup, we are returning – as we must – to what is arguably the most mind-boggling of the ANC government's unwritten rules: the rule that states, "All apartheid-era political killers shall be let off the hook." *Daily Maverick* covered this uniquely South African hypocrisy in some depth last year, during the farcical proceedings that opened the Nokuthula Simelane murder trial (which is still waiting to hear its first witness), and now the past has come a-knocking with a fistful of receipts.

Remember Advocate Chris Macadam of the all-important Priority Crimes Litigation Unit (PCLU) in our much-beloved National Prosecuting Authority? The same Advocate Macadam who, since 2010, had been sitting on the docket that held evidence of Simelane's disappearance and alleged murder back in 1983? The same Advocate Macadam who, despite the fact that Simelane's security branch tormentors did not apply for amnesty for her murder, and had been denied amnesty for her torture by the Truth and Reconciliation Commission, sat on his hands forcing the family to approach the high court for an order compelling the NPA to make a decision? As it turns out, Advocate Macadam features in the reopened Timol inquest too.

Rewind to 2003, when Imtiaz Cajee, Timol's nephew, approached the then national director of public prosecutions (NDPP), Bulelani Ngcuka, informing him that none of the police officers implicated in Timol's death had applied for amnesty. At that time, the key role players were still alive, such as the investigating officer General Stoffel Buys (described by the Timol lawyers as "thoroughly corrupt"), and the two primary interrogators, Captain Johannes van Niekerk and Captain Johannes Gloy. Timol apparently committed suicide moments after these two stepped out of the room, allegedly leaving him under the control of pay clerk, Rodrigues. The matter was handed to Macadam to investigate.

On 15 August 2017, Macadam submitted an affidavit to the Timol inquest in response to the testimony of Cajee, which had been submitted the day before. Macadam complained that Cajee's testimony created the impression that his investigation into the alleged murder of Timol by the apartheid police—which had followed a complaint made to the NDPP—had produced "negative results". This, he stated, was "not a true reflection" of his involvement.

Here is where things get complicated. Macadam testified that he was not aware of any approach made to the national director, but that he was approached by Cajee himself, who informed him that the daughter of Rodrigues had gone to a journalist by the name of Ivor Powell with her father's confession to her of how Timol was murdered. "I immediately reported the allegations to the DSO ('The Scorpions')," wrote Macadam. "A chief investigating officer was sent to interview Mr Powell and establish whether Sergeant Rodrigues could be charged with murder. I was informed that after the investigation no basis for the allegations could be established. Mr Powell was emphatic that no such approach had been made to him."

Macadam then stated that in February 2004 he wrote to Cajee to inform him of the bad news, inviting the latter to supply him "with additional information so that the case could be reconsidered". Macadam did not "hear anything further" from Cajee, he added.

Shortly thereafter, he continued, he was taken off all TRC cases and assigned to a lengthy prosecution involving an "international nuclear weapons syndicate". When he was later instructed to return to the TRC cases, he went on, he looked into the Timol matter—in 2015, according to Macadam's affidavit, he formally requested the NPA to open an investigation.

"I downloaded the copy of the inquest record which was held by Wits and requested the police to establish the whereabouts of the implicated parties, witnesses and medical experts. I also contacted Mr Piers Pigou who had dealt with the matter at the TRC. I also requested a researcher to obtain the detention files of persons who were detained at the same time as the deceased."

Once again, however, Macadam's best intentions were foiled by a more important case – was assigned, his affidavit stated, to "a very urgent matter relating to international terrorism". Enter Frank Dutton, the international policing and investigations expert who was instrumental in exposing the apartheid regime's "Third Force". Following the inquest, Dutton was asked to respond to Macadam's claims. In his written statement, he started out with the presidential proclamation that established the PCLU in 2003. "The PLCU was mandated to 'manage and direct investigations and prosecutions' relating to matters emanating from *inter alia* the TRC process," he wrote. "One such matter is the death of Ahmed Timol who died whilst in Security Branch (SB) detention on 22 October 1971."

Dutton noted that the PCLU did not actually investigate the Timol case. "(Instead it) limited its inquiries to determining whether one of the security branch members had 'confessed' to a journalist. The journalist apparently denied the allegation. The PCLU subsequently claimed 'there was no other evidence to prove that the deceased had definitely been murdered' and decided to close the inquiry."

Dutton expressed his dismay at the approach: "It is clear that the PCLU task team did not bother itself with 'studying' the Timol matter (which amongst other facts, disclosed several potential witnesses who had not been interviewed), before making an irrational recommendation (based on the report of a journalist rather than the facts contained in the filed material) not to prosecute and to close the matter without interviewing the potential witnesses. "Chris Macadam followed a similarly unreasoned course of action (concerning himself only with the journalist, and not determining the facts of the matter or following up on the potential witnesses). He however also called on the Timol family to provide any additional relevant material in respect of the death so that the case could be reconsidered in

light thereof. This was obviously a ploy to move the onus for investigation from the authorities to the Timol family. It effectively meant that if the family failed to provide additional material, the PCLU would not move, and the case would remain 'closed'."

In other words, the NPA was doing what it had always done when it came to apartheid-era political murders: ignore, equivocate, suppress.

So why did the Timol inquest get re-opened, with a proper airing before the nation, when all the other cases—most notably the Simelane case—got choked in contradictory and impossible paperwork? The long answer is contained in paragraph 43 of the main heads of argument submitted on 8 September 2017 by the legal team for the family of Ahmed Timol—the paragraph dealing with the timeline of events. In this paragraph, the police file of Captain Van Niekerk discloses a litany of complaints of torture (one resulting in the death of a detainee, for which Van Niekerk is convicted of assault) made against him and Captain Gloy. Within hours of the arrest of Timol, a call is placed to Van Niekerk and Gloy summoning them to John Vorster Square to "break" the "big fish". The timeline also discloses the following: on 31 October 2006 "Van Niekerk dies"; on 25 February 2007 "Buys dies"; on 30 July 2012 "Gloy dies".

This, then, is the short answer: it was *safe* to re-open the Timol inquest. The most important suspects were dead.

Ultimately, Macadam had nearly nine years to carry out the most elementary and basic investigation. He had nine years to interview Salim Essop (who was arrested with Timol and brutalised into a coma), as well as other detainees who could testify to their own torture as well as what they had heard and seen on the 10th floor. He had nine years in which to identify the whereabouts of police officers who had interrogated or guarded Timol. He had nine years in which to peruse the police files for evidence linking the latter to brutality. He had nine years to trace Rodrigues and interrogate *his* version of what transpired in room 1026. He had nine years in which to do a walkabout through the building to discover potential witnesses to the fall (which is how the family's lawyers discovered witnesses 45 years later). He had nine years to consult forensic pathologists and trajectory experts to determine whether the police version was possible or not. But Macadam did none of the above in these nine years. Is it any wonder that the apartheid-era political cases assigned to him have all died slow deaths on his desk?

As *Daily Maverick's* series on the Simelane trial has been at pains to point out, the NPA prefers not to go after former Security Branch operatives mainly because, to put them on the stand would be to run the risk of the ANC's apartheid-era secrets coming to light. Unlike Germany, which has been known to charge and sentence former SS prison guards as old as 94, South Africa's policy is to smother its past.

And so here we are. **DM**

Photo: Activist Ahmed Timol was killed in detention on 22 October 1971.

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"IC4"

SECRET

REPORT
AMNESTY TASK TEAM

SECRET

553

Secret

REPORT: AMNESTY TASK TEAM

1. Background

1.1 A Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

"1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.

2 Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

3 Bearing the above-mentioned in mind, whether legislative enactments are required.".

1.2 The Task Team comprises the following members

Deon Rudman (Chairperson):		Department of Justice and Constitutional Development
Yvonne Mabule	:	National Intelligence Agency
Vincent Mogotloane	:	National Intelligence Agency
Gerhard Nel	:	National Prosecuting Authority
Lungisa Dyosi	:	National Prosecuting Authority
Ray Lalla	:	South African Police Service
Joy Rathebe	:	Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are--

- individuals who were misled by their leadership to treat the process with disdain;
- others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
- others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

(c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.".

(d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing ".

(e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.".

(f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who in any wish to seek justice in our courts.".

(g) "It is critically important that, as a government we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."

(h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.".

(i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.".

(j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.".

(k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.".

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

(a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement

(b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should be the following:

(a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.

(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

(i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;

(ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

(c) To–

- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
- gather intelligence information,
- investigate the matter;
- consult victims.

(d) To consider the following factors when carrying out its mandate:

(i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".

(ii) The following specific criteria

- Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past

- Whether a prosecution can be instituted on the strength of adequate evidence.
- Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- Whether the offence in question is serious.
- Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- Whether the prosecution will lead to the traumatisation of victims and conflicts in areas where reconciliation has already taken place
- The degree of co-operation on the part of the alleged offender.
- The credibility of the alleged offender.
- The alleged offenders sensitivity to the need for restitution.
- The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict
- The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation.
- The degree of indoctrination to which the alleged offender was subjected.
- The extent to which the alleged offender carried out instructions or perceived instructions.
- The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated

- The alleged offender's role during the TRC process - co-operation, full disclosure and assisting the process in general (if relevant).
- Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- Whether the alleged offender fully disclosed the alleged offences
- The views of the NPA.
- If the accused is in custody, the views of the presiding judge or magistrate.
- Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- Any further criteria, which the Task Team might deem necessary

(e) To consider—

(i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act,

(ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;

(iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child stealing; rape; or the crime of genocide, crimes

against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

(iv) the possibility of diversion in the case of juvenile offenders;

(v) possible arrangements settling the matter out of court;

(vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns.

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

(b) The possibility of the institution of private prosecutions.

(c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

"IC5" 1 S64

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -05- 20
T. MALELE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOE HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

Case Number: 35554/2015

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

WILLEM SCHOON Ninth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT on a date and at a time to be arranged with the Registrar, the applicants intend to apply to this Honourable Court for an order in the following terms:

1. The rules relating to forms and service are dispensed with and the application is heard in terms of shortened time periods.

2. Compelling the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping, torture, disappearance and murder of NOKUTHULA AURELIA SIMELANE ("the deceased") (Priority Investigation: JV Plein: 1469/02/1996) in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice.

3. Declaring that:

3.1 the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;

3.2 the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,

3.3 the ongoing failure or refusal of the first respondent to refer the abovenamed case to a formal judicial inquest.

is a gross violation of my rights to human dignity and equality; and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

4. Declaring that the conduct referred to in paragraphs 3.1 and 3.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy Directives issued in terms

of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.

5. Declaring that the conduct referred to in paragraph 3.3 above is inconsistent with the provisions of the Inquests Act 58 of 1959 ("the Act") and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated.

6. Alternatively to prayer 2 above, reviewing and setting aside the refusal to take the decisions referred to in paragraphs 3.2 and 3.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

7. *Alternatively* to prayers 2 and 6 above:

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7.1 Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

7.2 Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

8. Ordering the public release of the memorandum titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development.

9. Ordering the first to fourth respondents to pay the costs of this application and that such of the other respondents who may oppose the matter to pay the applicant's costs.

10. Granting the applicant further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the affidavits of the **Applicant, Sizakele Ernestina Simelane, Antonio Lungelo Simelane, Junior Mzwandile Nkosinathi Simelane, Frank Dutton, Vusi Pikoli, Anton Ackermann, Dumisa Ntsebeza, and Alexander Boraine** and the annexures thereto will be used in support of this application.

KINDLY TAKE NOTICE FURTHER that the *in camera* founding affidavit of the **Applicant** and the *in camera* supporting affidavit of **Vusi Pikoli** and the annexures thereto will be used in support of this application. The former affidavit is to be served only on the first respondent (the National Director of Public Prosecutions) and the latter affidavit is to be served only on the first and third respondents (the Minister of Justice and Correctional Services). The aforesaid affidavits are to be held by the Registrar of this honourable Court as part of an *in camera* record and only to be released to the other respondents or the public on the order of this honourable Court.

TAKE NOTICE FURTHER THAT the Applicant has appointed the **LEGAL**

RESOURCES CENTRE as its attorneys of record at whose address the Applicant will accept service of all process in these proceedings.

TAKE NOTICE FUTHER THAT that should you intend opposing this application you are required:

a) to notify the Applicant's attorneys in writing within 15 (fifteen) court days of service of this application on you;

b) within 30 (thirty) court days after having given such notice to oppose this application to deliver your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given, the application will be made to the above Honourable Court as soon as counsel for the Applicant may be heard.

DATED AT **JOHANNESBURG** ON THIS 19th DAY OF May **2015.**

LEGAL RESOURCES CENTRE

Applicants' Attorneys
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Ref: 1100514J/CVDL
C/O GILFILLAN DU PLESSIS
Democracy Centre,
357 Visagie Street
Pretoria.
Ref: J56

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA

AND TO:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
c/o The State Attorney
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Pretoria
GAUTENG

SERVICE PER SHERIFF

THE NATIONAL COMMISIONER OF POLICE

Second Respondent
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229 Pretorius Street
Pretoria
GAUTENG

SERVICE PER SHERIFF

THE MINISTER OF JUSTICE
Third Respondent
c/o The State Attorney
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SERVICE PER SHERIFF

THE NATIONAL MINISTER OF POLICE
Fourth Respondent
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SERVICE PER SHERIFF

WILLEM HELM COETZEE
Fifth Respondent
28 Augusta

SERVICE PER SHERIFF

IA

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ANTON PRETORIUS
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President Ridge
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MSEBENZI TIMOTHY RADEBE
Eight Respondent
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Carenvale — **SERVICE PER SHERIFF**
Honeyhills
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GAUTENG

alternatively

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Roodepoort
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WILLEM SCHOON
Ninth Respondent
689 Verecunda Street
Dorandia Ext 2
0182
GAUTENG

SERVICE PER SHERIFF

"IC6" 575

"TN7" 170

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

TPN

WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

by the then President, Mr. T. Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ("TRC") contributed to the decision of President Mbeki to suspend me. The President suspended me from office in terms of section 12(6) of the NPA Act and ordered an Enquiry into my fitness to hold office as the NDPP.

9. During 2008, a commission of enquiry into my fitness to hold office, led Dr. F. Ginwala, found that the Government had failed to substantiate the reasons for my suspension and that I was a fit and proper person to hold the position of National Director of Public Prosecutions. She further recommended that I be restored to the office of the NDPP. Notwithstanding this finding and recommendation, acting President Mr. K Monthlanthe dismissed me from my post. In 2009 I obtained an order from the High Court restraining President Zuma from appointing a successor to my position. Later that year I accepted a monetary out-of-court settlement from the government.

10. Between 2010 and 2012 I was a partner at SizweNtsalubaGobodo and the director of its Forensic Investigations department.

11. Between 2012 and 2014 I served as a commissioner of the Khayelitsha

PROFESSIONAL EXPERIENCE

4. Prior to 1990 I was a member of Umkhonto weSizwe and I worked for the ANC's legal and constitutional affairs department in exile.

5. Between 1991 and 1994 I worked as a legal adviser with the Munich Reinsurance Company of Africa Limited Group. From 1994 until 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar. My specific mandate was to help restructure the Department of Justice. At the time, there were eleven departments countrywide and I was tasked with amalgamating those departments into one central department.

6. From 1997 to 1999, I served as Deputy-Director General of the Department of Justice. In 1999, I was appointed Director General of the Department of Justice and Constitutional Development and worked in that role until 2005.

7. On 1 February 2005, I was appointed the National Director of Public Prosecutions ("NDPP") by the President in terms of Section 10 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") as read with Section 179 of the Constitution. My appointment was for a 10 year term as contemplated in Section 12(1) of the NPA Act.

8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty

Commission, which investigated allegations of police inefficiency in Khayelitsha as well as allegations of a breakdown in relations between the community of Khayelitsha and the Police. In December 2014 I was appointed as the Western Cape's first police ombudsman.

12. I am a former trustee of the Constitutional Court Trust, a former member of the Magistrate's Commission and a founding member of the International Association of Anti-Corruption Authorities. I am currently an independent director on the board of Cricket South Africa, where I chair the social and ethics committee. Amongst my awards, I was conferred the International Association of Prosecutors Award in 2008.

CONFIRMATION

13. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Anton Ackermann SC ("Ackermann"), insofar as they relate to me.

14. In particular, I confirm the contents of the applicant's affidavit under the heading "Political constraints". I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996

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("the TRC cases").

15. In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority (NPA).

THE INDEPENDENCE OF THE NPA

16. The Office of the NDPP was created on 1 August 1998 in terms of section 179 (1) of the Constitution. The NDPP is the head of the NPA, and manages the directors of public prosecutions, investigating directors, special directors, and other members of the prosecuting authority either appointed or assigned. During my tenure I was duty bound to carry out the responsibilities set out in the NPA Act as well as the Constitution of the Republic of South Africa.

17. As NDPP I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act) which both impose a duty on prosecutors to act "*without fear, favour or prejudice*". These provisions provide both a constitutional and statutory guarantee of independence to the NPA.

THE TRC CASES

18. In April 2003 President Mbeki received the final TRC report. The President announced in Parliament that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA as part of the "*normal legal processes*". He also said that those perpetrators who were prepared to unearth the truth would be welcome to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in existing legislation. Former President Mbeki's statement to the national houses of Parliament dated 15 April 2003 is annexed hereto marked **"VPP1"**. Regrettably what was to follow in relation to the TRC cases was anything but the "*normal legal processes.*"

19. In my former capacity as Director General ("DG") of the Department of Justice and Constitutional Development ("DoJ") I had previously been involved in the formulation of a policy to deal with the TRC cases, which were regarded as politically sensitive. On 23 February 2004, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives.

20. It is important to note that the recommendation of the Task Team of a two stage process which would have required a recommendation from an inter-departmental task team before the NDPP could institute any criminal proceedings in the political cases was rejected. This was because such a process would have been a violation of prosecutorial independence enshrined in Section 179 of the Constitution.

21. Some of these developments have been highlighted in the extracts from my affidavit filed before the Ginwala Commission in May 2008, which have been annexed to the founding affidavit. For the sake of completeness I highlight some of these facts in this affidavit.

22. In relation to the steps taken by the NPA with regard to the TRC cases prior to my appointment as NDPP on 1 February 2005 I refer to the affidavit of Anton Ackermann SC filed evenly herewith. On my appointment as NDPP, the Priority Crimes Litigation Unit (PCLU), a sub-unit within the NPA, had already been tasked with handling the TRC cases. The PCLU was headed by Special Director Advocate Anton Ackermann.

23. The decision to prosecute those implicated in the attempted murder, through poisoning, of former church leader and head of the South African Council of Churches, the Reverend Frank Chikane, on 23 April 1989 at the then Jan Smuts Airport, Kempton Park ("the Chikane matter), saw the

unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

24. The initial decision to prosecute three Security Branch members, former Colonel C L Smith, and former Captains G J L H Otto and H J Van Staden, was taken prior to my appointment as NDPP. This decision was taken in November 2004 by Dr. Silas Ramaite SC in his capacity as Acting National Director of Public Prosecutions. However, he instructed that this matter, and all other TRC cases, be held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.

Developments since 2005

25. Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by the NPA Act, the amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments to the Prosecution Policy were titled: "*PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994*" ("the Prosecution Policy Guidelines" or "the Guidelines"). A copy of the said amendments is annexed to the founding affidavit marked **"TN30"**.

26. In terms of paragraph B6 of the amended Prosecution Policy it was stipulated that that the PCLU should be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

26.1. The National Intelligence Agency ("NIA");

26.2. The Detective Division of the South African Police Service ("SAPS");

26.3. The Department of Justice and Constitutional Development; and

26.4. The Directorate of Special Operations ("DSO").

27. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects in the Chikane matter, which, in my opinion, was clearly sufficient to justify a prosecution. None had applied for amnesty for this offence. I therefore gave the initial instruction to proceed with the prosecution in February 2006.

28. In response to the said notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. These representations were reviewed by a team within the NPA under the

leadership of Advocate T. Pretorius who reported to me that the representations did not comply with the requirements set out in the Guidelines, insofar as the suspects declined to disclose the full truth. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

29. Meanwhile in early 2006 I had approached the then Commissioner of Police, the DG of Justice, and the heads of the NIA and the DSO (also known as 'the Scorpions') requesting them to nominate senior officials to assist the PCLU in accordance with the Prosecution Policy guidelines. Unfortunately the SAPS and the NIA never provided the PCLU with the necessary support to conduct its investigations adequately.

30. In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackermann's participation claiming that Ackermann intended to prosecute the leadership of the ANC. This is notwithstanding the formal denial by the NPA that no such plans were in place. I advised Mr. Selebi that Ackermann was appointed as the head of the PCLU under Presidential proclamation and it was not for the SAPS to determine who should discharge the mandate given to the PCLU.

31. I then approached the Presidency in order to secure the necessary

collaboration of the parties to apply the Prosecution Policy Guidelines. A meeting was arranged in mid-2006 by Reverend Frank Chikane, the then Director General in the Presidency. The meeting was attended by himself, the DGs of Justice and the NIA, Mr. Selebi, the Secretary of the Defence Secretariat, Mr. Jafta from the Presidency and I. Mr. Selebi again complained about Advocate Ackermann's involvement in the process.

32. Later in 2006 I was summoned to a meeting which was convened at the home of Minister Skweyiya, the then Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza and I was advised that it related to the prosecution in the Chikane matter.

33. At this meeting it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members. I quote hereunder from my affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> *"The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to*

prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.

...The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

34. Also in 2006 a further meeting took place at the office of the Presidency. My recollection of this meeting is that it was decided that the working committee or Task Team would not make recommendations on a decision

as to whether to prosecute or not, but would be responsible for ensuring that I received all the necessary inputs and information from the various departments so as to assist me to make a well-considered decision.

35. At this meeting I proposed that Dr Silas Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team. I suggested this in order to counter the complaints in regard to Advocate Ackermann and to get the Task Team working. The proposal was accepted.

36. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Mr. Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and accepted.

37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph B6 of the Guidelines.

38. The Task Team met for the first time on 12 October 2006. I attended the opening session of the first meeting together with Ms. Kalyani Pillay (my

adviser), the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Aside from this meeting, I did not participate further in the activities of the Task Team. I received reports from time to time on their activities. These reports led me to believe that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing.

39. Meanwhile I had received further representations from the suspects in the Chikane matter contending that they had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I sought an independent opinion from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006 and concluded that the claimed indemnities were no bar to prosecution and that the said law had been repealed in 1995.

40. Dr Silas Ramaite reported to me that at the Task Team meeting on 25 October 2006 had received an audit report from Advocate Ackermann on all cases in the possession of the PCLU. Dr. Ramaite reported to me further that the Chikane matter was discussed by Task Team for the first time at its meeting on 6 November 2006. Mr. J Lekalakala of the SAPS stated that the National Commissioner believed that Rev. Chikane was not interested in a prosecution. Advocate Ackermann however indicated that Rev. Chikane had left the matter in the hands of the NPA.

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41. In early December 2006 I was informed by Dr Ramaite of the renewed contention by Mr. Selebi that Reverend Chikane had not been consulted. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held discussions with him during the course of interactions during 2006 and 2007. I also met with him separately. Reverend Chikane's advised me that while he may have forgiven his perpetrators, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

42. Although I knew that Ackermann had discussed the matter with Rev. Chikane as far back as 2004, in December 2006 I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position.

43. However, towards the end of 2006 it became clear to me that powerful elements within government structures were determined to impose their will on my prosecutorial decisions. In this regard I quote from my affidavit filed before the Ginwala Commission:

> *"In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors*

General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

Developments from 2007

44. In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DoJ I informed Mr. Selebi and the Directors General that there was a serious misunderstanding. I resolved to approach the Minister of Justice and request her guidance. Pending such response the functioning of the Task Team was compromised by the uncertainty and it held no further meetings until 8 August 2007.

45. Towards the end of January 2007 Advocate Ackermann and Advocate Mthunizi Mhaga (also of the PCLU) reported to me that they had met with

Reverend Chikane on 22 January 2007 and that he had reaffirmed his attitude, namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this confirmation I wrote to the legal representatives of Messrs. Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

46. Around this time, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General Johann van der Merwe, had both made representations to me as contemplated in the Guidelines. They both admitted to authorising the murder of Reverend Chikane and requested me not to prosecute them in the light of this disclosure. However, they declined to make full disclosure in response to requests for information. I accordingly declined to accede to their request that they be given immunity from prosecution in terms of the Guidelines.

47. On 6 February 2007 I had a meeting with the Minister of Justice and Constitutional Development, Mrs. B S Mabandla. During this meeting it appears that she had gained the impression that I had agreed not to pursue the TRC cases. On 8 February 2007, she addressed a letter to me titled "TRC MATTERS", a copy of which is annexed hereto marked **"VPP2"** in which she stated the following:

"I must advise you at the outset that the media articles alleging that

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the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

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

49. I am at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters will not be prosecuted. I found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice.

50. It is most likely that I would have clarified my position with the Minister, either through a meeting or a telephone discussion. I would have confirmed to the Minister that it was not my intention to drop the TRC cases.

51. I decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the

problems experienced in implementing this policy. This memorandum is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

52. In this memorandum I concluded that there had been improper interference in relation to the TRC cases and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.

53. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to this affidavit. I have attached it to an *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release. In this regard I make the following submissions:

53.1. The issues and complaints raised in the memorandum have already been discussed in the body of my affidavit filed before the Ginwala Commission, which has been part of the public record

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since 7 May 2008. and which was also part of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).

53.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

53.3. Since the memorandum points to unlawful and unconstitutional conduct it would in the public interest for this memorandum to be released

53.4. The public interest in the disclosure of the memorandum far outweighs any possible contemplated harm, inconvenience or embarrassment.

54. I never received any response from the Minister to this memorandum. Given the serious issues I was raising in the memorandum, and given that the NPA Act criminalizes obstruction of the work of the prosecuting authority, I would have expected an immediate response from the Minister. The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.

55. During the course of the next few months the legal representative of Messrs. Otto, Smith and van Staden, Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea and sentencing agreement.

56. The negotiation of the plea and sentencing agreements with the five accused was an extended process and was only concluded in early July 2007. On 10 July 2007 I sent a memorandum to the Minister informing her of the fact that the prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to murder Reverend Chikane by means of poisoning. The memorandum informed her of the fact that plea and sentencing agreements had been entered into. To the best of my recollection the Minister did not respond to this memorandum.

57. On or about 10 July 2007 I went off on compassionate leave because of the illness and subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

58. In August 2007, those implicated in the Chikane case pleaded guilty to the charges in exchange for suspended sentences as per Section 105A of the Criminal Procedure Act, 1977. Vlok and Van der Merwe were sentenced to

ten years in prison suspended for five years, while the other three received five year prison sentences, suspended for five years.

59. I would have preferred a full prosecution in this case because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They largely confined their disclosure to facts that were already in the public domain. They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

60. A full prosecution in the Chikane case would have produced greater truth and accountability. However there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances.

61. Shortly after the plea and sentence agreement had been confirmed in court

a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The claim was made on the basis of a fabricated document. A copy of this newspaper article is annexed hereto marked **"VPP4"**. The NPA responded to this article by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport article were denied. A copy of this press statement is annexed hereto marked **"VPP5"**.

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

63. During the meeting, Mr. Selebi said to me that the '*gloves are now off*' and that he was '*declaring war*' on me. In response I told him: "*for once in your life can you tell the truth and shame the devil*".

64. Those at the meeting demanded answers from me about TRC prosecutions. They were also particularly concerned that I was instituting an investigation into certain members of the South African Police Service.

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This was in relation to my investigation into who was behind the fabrication of the letter purportedly written by Ackermann SC. Minister Mabandla told me to stop this investigation as we could not be seen to be taking each other to court. I advised the Minister that I would not stop the investigation.

65. I explained that:

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

65.2. the NPA was actively preparing for those prosecutions and that we should not be stopped from doing our job.

65.3. it was my role as the NDPP to decide who would be charged.

66. On 28 August 2007 I received a faxed letter from the Minister of Justice, Ms. B S Mabandla. A copy of this letter is annexed hereto marked "**VPP6**". She referred to the meeting held on 23 August 2007. She noted that the National Commissioner of Police and I had different views on the Rapport article regarding the alleged forgery of certain NPA documents. She noted that I had initiated an investigation into the alleged forgery but she complained that she had not been advised of this decision or the basis thereof. Paragraphs 4 and 5 of the Minister's letter are particularly

revealing:

> *4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that* ***indeed there is an investigation by the NPA on certain political office bearers.***
>
> *5. It was suggested at the meeting then that it would be useful if you could* ***respond to the allegation that there is an investigation*** *as mentioned above.* (Emphasis added).

67. The Minister's letter was further indication of the view held at ministerial level that I should not enjoy actual discretion to make prosecutorial decisions in relation to the so-called political cases arising from the conflicts of the past.

68. I responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked **"VPP7"**. My copy of this letter is not on an NPA letterhead, but I confirm that the contents thereof were transmitted to the Minister.

69. In this letter I referred to the 23 August 2007 meeting:

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

70. I confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*".

71. In relation to paragraph 4 of the Minister's letter I noted that it is:

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

72. I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had then briefed the then Minister of Justice, as well as the President. I also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the Director of Public Prosecutions (DPP) in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as then DG of Justice I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.

73. I concluded my letter by requesting an urgent meeting with the Minister and myself and my Deputies. I also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

74. The Minister did not respond to my requests and these meetings never

took place. On 23 September 2007 I was suspended from office by President Mbeki. Shortly after my suspension I learned that Advocate Ackermann had been relieved of his duties in relation to the TRC cases.

CONCLUSION

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

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

VUSUMZI PATRICK PIKOLI

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I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohohlo
Commissioner of Oaths
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2nd Floor, Leadership House 49 Shortmarket Str
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STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality. Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring.

It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated.

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls.

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures...The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors, who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law.

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy. In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Mpumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once-off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty. A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past,

but also in the creation of a new ethos within our society.

Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases; and this was not to be.

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to

make a contribution to this Fund. Most of the resources that have been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

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VPP 2

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

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

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
9/2/07
NATIONAL PROSECUTING AUTHORITY

V.P

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VPP 3

news24 archives
Breaking News First

Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan
Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoli, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

Johan Wagener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

Beeld

VPP 4.

Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuienis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweier is nie.
Rapport het die afgelope week uit onberispelike bronne verneem die polisiedossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiewe poste wat hulle beklee.
Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie.
Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingspan wat die vermeende Boeremaglede aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.
Die nasionale vervolgingsgesag (NV) het die ondersoeke jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.
Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat weinig aan die ondersoeke gedoen het.
Hierna is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.
Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuienis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontploffing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.
In Junie 2004 het mnr. Sipho Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrektiewe dienste, en min. Essop Pahad kan vervolg word nie omdat "daar eenvoudig nie genoeg getuienis is om 'n klagstaat op te stel nie".
Ngwema het destyds gesê die NV weet nie wié het wát gedoen of wie die opdragte gegee het nie.
"Indien die NV dit met die getuienis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.
Mnr. Dirk van Eck het reeds aangedui hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.
Die politieke omstredenheid oor vervolgings vir misdade uit die verlede sal uitbrei as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidstak. Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.
Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuienis in die ondersoeke na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweier om te sê of die opdrag nagekom is en wat die vordering daarmee is.
Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phuti Setati, woordvoerder van nasionale speurdiens, verwys.
"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

scarstenss@rapport.co.za
) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear '
Sonja CarstensPretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.
Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services.
The sources' names are withheld at the request because of the sensitive positions that they hold.
According to the sources, no further investigation into the information taken in the case files.
The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.
The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.
Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.
After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state. Ackermann was the prosecutor in the Vlok Van der Merwe trial.
Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.
In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linda Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".
Ngwema said then that the NPA do not know who has what or who did not give the orders.
"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility, "was Ngwema's words.
Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.
The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. institute. Basie Smit, a former head of the police detective and security branch. One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.
Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.
Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.
"The police want his comments on the case reserved," the RAF said.
scarstenss@rapport.co.za
) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

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VPP5 213

http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

* In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
* Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
* Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
Cell: 082 333 3880

28-AUG-2007 16:40 FROM DEPRT OF JUSTICE TO 0128049329 VPP6 P.01/2

MINISTRY
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Our ref: 2/3/6
Enq: Adv. M Sibelane

Adv V P Pikoli
National Director of Public Prosecutions
Office of the National Director of Public Prosecutions
Private Bag X 752
PRETORIA
0001

Dear Adv Pikoli

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to the discussions in the above meeting of 23 August 2007.
2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.
3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.
4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.
5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find the above in order.

Yours sincerely

MS B S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07

28/8/07

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VP

VPP7

Ref: NDPP/kp

Minister B. Mabandla
Minister of Justice and Constitutional Development
Momentum Building
cnr Prinsloo and Pretorius Streets
PRETORIA

29 August 2007

Dear Minister

MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to your fax of 28 August 2007.

2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.

3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).

4. I confirm and repeat the following:

4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.

4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police. I give the

Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.

6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing.

7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

VP.

TP

IA

"IN8"
"1C7" 217

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

TP

IA

WILLEM SCHOON Ninth Respondent

AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

INTRODUCTION

1. I am a senior counsel, a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (the first respondent in this matter, hereinafter referred to as the "first respondent" or the "NDPP"). I am currently retired.

2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 ("the Act") I was appointed by President T M Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit ("PCLU"). A copy of this proclamation is annexed to the founding affidavit marked **"TN28".** I served as head of the PCLU between 2003 and 31 March 2013. I retired from the National Prosecuting Authority on 31 March 2013.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. As I have not studied all the relevant official documentation I stand to be corrected on certain details, such as dates.

4. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

EXPERIENCE

5. I have worked as a prosecutor for more than 40 years. I have prosecuted several high profile cases in South Africa. I set out hereunder an outline of my professional career:

5.1. Joined the Department of Justice in 1970.

5.2. Graduated from the University of Potchefstroom with the degrees of B Juris and LLB in 1975.

5.3. Admitted as an advocate in 1976.

5.4. Served with the office of the Attorney-General in Pietermaritzburg between 1977 and 1989.

5.5. Appointed Deputy Attorney General: Transvaal in 1989 and served in this post until 2003.

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5.6. Senior Counsel status was conferred on me in 1993.

5.7. Appointed head of the Priority Crimes Litigation Unit (PCLU) in March 2003.

5.8. I retired in 2013.

CONFIRMATION

6. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Vusumzi Patrick Pikoli insofar as they relate to me.

7. Although I was not specifically aware of an official policy or decision to stop, obstruct or hold back the investigation and possible prosecution of the cases recommended for prosecution by the Truth and Reconciliation Commission ("TRC"), including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996, I can confirm that I was effectively stopped from pursuing the investigation and prosecution of the so-called political cases arising from South Africa's past ("the TRC cases").

8. In this affidavit I set out my experiences in trying to pursue the prosecution of the TRC cases and how I was effectively stopped from carrying out this work.

BACKGROUND

9. If my memory serves me correctly, in 1998 the investigation dockets held by the Unit headed up by Transvaal Attorney General Dr. Jan D'Oliveira Unit were transferred to the National Prosecuting Authority ("NPA"). In terms of a directive issued in 1999 by the then National Director of Public Prosecutions ("NDPP"), the TRC related cases were transferred from the then Directorate of Special Operations ("DSO"), and from the various offices of the Directors of Public Prosecutions ("DPP") and the South African Police Service ("SAPS") to the office of the NDPP.

10. In 1999, a working group called the Human Rights Investigative Unit ("HRIU") was established within the NPA by the then National Director of Public Prosecutions ("NDPP"), Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The head of the Unit was Vincent Saldanha. It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, however it instituted no prosecutions.

11. In 2000, the dockets held by the HRIU were transferred to the Directorate of

Special Operations ("DSO"), more widely known as the Scorpions. An entity was established within the DSO to handle the TRC cases known as the Special National Projects Unit ("SNPU"), which was headed by Advocate Chris Macadam. The SNPU operated until 2003, but it too instituted no prosecutions.

12. On 24 March 2003 I was appointed to head up the newly established PCLU. The mandate of the PCLU is to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national and international crimes, such as terrorism, sabotage, high treason, sedition, foreign military crimes and other priority crimes as determined by the NDPP.

13. On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.

14. In May 2003 the then NDPP, Advocate Bulelani Ngcuka, made a determination that all TRC-related cases, in which amnesty had been denied or not applied for, were '*priority crimes*' in terms of the proclamation. This resulted in more than 400 investigation dockets being transferred to my office. Advocate Chris Macadam, attached to my office, and I conducted the initial audit and identified 21 cases as worthy of further investigation.

15. During 2004 and 2005 the PCLU identified 16 cases for further investigation and

possible prosecution. The Simelane case was one of the cases earmarked for further investigation.

16. In relation to post-TRC prosecutions conducted by the PCLU, only the following cases have been instituted: S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others.

16.1. In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism during the 1990s, entered into a 'plea agreement' with the PCLU in terms of 105A of the Criminal Procedure Act. Terre' Blanche pleaded guilty to five counts of terrorism in contravention of the Internal Security Act and was sentenced to six years of imprisonment, which was wholly suspended. He had not applied for amnesty. This was the first TRC related case taken up by the PCLU.

16.2. During 2004 I came across the docket of Buyile Roni Blani, an ANC member, who was implicated in the mob killing of two people in 1985. Blani was charged with the killings in 1985 but managed to flee to Angola where he remained in exile until his return in 1992. He did not apply for amnesty. Since the evidence was clear and compelling and the case was already fully investigated I instructed that it should proceed. Blani was arrested and granted bail. On 25 April 2005, following a plea and sentence agreement, he was convicted on all charges and sentenced to five years imprisonment,

four of which were suspended for five years.

16.3. In 2004, Gideon Nieuwoudt (who died in 2005), Johannes Martin van Zyl, and Johannes Koole were each charged with abduction, assault and murder of the 3 anti-apartheid activists, known as the PEBCO 3.

16.3.1. This was the first case that the PCLU brought in respect of perpetrators who had been denied amnesty. Their applications for amnesty had been denied in 1999.

16.3.2. Shortly after their bail hearings in 2004, Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some 5 years because of the failure of the Department of Justice to file its answering papers. Eventually in 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of van Zyl.

16.3.3. The case against the three former security policemen was provisionally withdrawn in 2009. The NPA submitted to the High Court that the prosecution could not proceed while there was an amnesty proceeding pending. The Department of Justice filed an affidavit recommending the provisional withdrawal of the criminal charges against the surviving Johannes Koole, and Martin Van Zyl,

who was seriously ill. The Amnesty Committee was never reconvened and the case against Van Zyl and Koole was never reinstated.

17. On the morning of 11 November 2004 the police was on the verge of effecting the arrests of three former officers of the Security Police on charges which related to the attempted murder of the Rev. Frank Chikane, the former head of the South African Council of Churches in 1989 by poisoning. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

17.1. On the same morning I received a phone call from Jan Wagenaar, the attorney for the abovenamed suspects. He told me that I would receive a phone call from the Ministry of Justice and I would be advised that the case against his clients must be placed on hold.

17.2. Shortly thereafter I received a phone call from an official in the then Ministry of Justice. I was informed by the said official that a decision had been taken that the Chikane matter should be put on hold pending the development of guidelines to deal with the TRC cases. I told him that that only the NDPP could give me such an instruction.

17.3. A few minutes later the NDPP contacted me and instructed me not to

proceed with the arrests. I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases.

18. All TRC related investigations and prosecutions were accordingly placed on hold pending the formulation of guidelines in relation to the so-called political cases of the past. These were to be incorporated as amendments to the Prosecution Policy (hereinafter referred to as "the amendments" or "the guidelines"). I was instructed by the NDPP to stop working on all the TRC cases.

19. At least two legal opinions were prepared by my office regarding the constitutionality of the proposed amendments to the Prosecution Policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerard Nel, the legal adviser to the NDPP, who was playing a leading role in formulating the proposed amendments.

20. This suspension of prosecutions amounted to an effective moratorium on the pursuit of TRC related cases.

21. During 2005 I met with representatives of the Simelane family. They raised a number of requests, including that the PCLU should:

21.1. Investigate with a view to prosecuting Detective Inspector Msebenzi Timothy Radebe, who played a role in the abduction and the torture of Simelane both at Norwood and Northham and who did not apply for amnesty.

21.2. Investigate with a view to bringing defeating the ends of justice charges against Coetzee and Pretorius for intimidating the late Sergeant Lengene into making a false statement and for attempting to coach Norman Mkhonza into making a false statement.

21.3. Follow up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and follow up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.

21.4. Investigate the circumstances of the deaths of two key witnesses, Sergeant Mathibe and Sergeant Lengene.

22. I was not able to assist with these requests as at that stage my hands were tied with the effective moratorium in place pending the issuing of the new Prosecution Policy.

23. In December 2005 the amendments to the Prosecution Policy were issued. These

amendments permitted the granting of effective indemnities to perpetrators in TRC related cases who did not make use of the erstwhile amnesty process.

23.1. The NDPP was authorised to apply the same amnesty criteria used by the TRC but could also decline to prosecute on other open-ended criteria such as the perpetrator's demonstration of remorse, level of indoctrination sustained, attitude towards reconciliation and/ or his willingness to abide by the Constitution.

23.2. These criteria would entitle the NDPP to decline to prosecute, even where there was adequate evidence to justify a prosecution in a serious case such as kidnapping or murder.

23.3. The PCLU was expected to act under the advisement of a multi-departmental committee which included the National Intelligence Agency and the South African Police Service. The entire process would be carried out behind closed doors.

24. As mentioned above, I was opposed to the amendments to the Prosecution Policy as I felt they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. I again expressed my dissatisfaction with various officials, including the NDPP. In my view the amendments or guidelines were aimed solely at accommodating

perpetrators and providing them with another avenue to escape justice.

25. Once the guidelines were issued in December 2005 I wanted to proceed with the 5 cases I had identified with good prosecution prospects and the 11 cases which required further investigation. These were identified as "*major priorities*" for the PCLU for the 2006 – 07 period. Moreover a press statement issued by the NDPP during 2006 led to additional requests from victims for further investigations in their cases. However, with the exception of the Chikane matter, during the course of 2006 and 2007, the PCLU was unable to pursue any of the TRC cases for various reasons. These included a lack of investigative capacity as well as difficulties encountered in convening the multi-departmental committee that was meant to advise the PCLU on what cases to pursue.

26. In March 2006 I again met with the representatives of the Simelane family. I had to advise them that I was unable to take the investigation forward as there were no investigators attached to the PCLU. Requests I had made to the SAPS and the DSO for competent and experiences investigators, in this matter and the other TRC cases, had fallen on deaf ears. The said representatives also supplied me with a legal opinion which recommended that those involved in the torture of Ms. Simelane be charged with torture, as a crime against humanity or war crime, in terms of customary international law, since such crimes never prescribe.

27. As a result of this meeting the said representatives wrote to the then NDPP, Adv.

Pikoli, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. In subsequent interactions I advised the said representatives to pursue an inquest rather than a prosecution. I did so because I realized that there was no prospect of a serious investigation or prosecution taking place in the political context that prevailed at the time.

28. During 2006 the then NDPP, Adv Pikoli, appointed a team to review the representations made by the suspects in the Chikane matter who were seeking an indemnity under the amendments to the Prosecution Policy. The team was chaired by Dr. T. Pretorius. I refused to participate in this review as I regarded the said amendments as unconstitutional. After several months the review team concluded that no indemnities should be granted as the full truth had not been disclosed.

29. During 2007 the PCLU eventually returned to the Chikane attempted murder case and in June 2007 the three suspects, together with Adriaan Vlok, former Minister of Police, and Johan van der Merwe, former Commissioner of Police were charged with one count of attempted murder, alternatively conspiracy to murder Chikane. A plea and sentence agreement was agreed upon which the Court confirmed during August 2007. In terms of the plea and sentence agreement the accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced to ten years imprisonment, wholly suspended for five

years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the condition that that they are not convicted of a similar crime.

30. This case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the Security Branch in October 1988, as well as other senior officers of the both the SAPS and the former South African Defence Force (SADF). However no further cases were pursued which can be attributed to political interference in the work of the NPA.

31. In 2008 the High Court in Pretoria (*Nkadimeng & Others v The National Director of Public Prosecutions & Others*, TPD case no 32709/07) struck down the amendments to the Prosecution Policy as unconstitutional. The Court found that the amendments were a "*copy-cat*" of the TRC amnesty process; that many of the criteria were not relevant in deciding whether or not to prosecute; and that they were moreover "*a recipe for conflict and absurdity*".

POLITICAL INTERFERENCE

32. The first act of political interference which effectively stopped the work of the PCLU into the TRC cases was the suspension of such cases during 2004 pending the issuing of the new prosecution guidelines. This introduced the effective moratorium I referred to above.

33. Once the guidelines had been issued, and the multi-departmental working committee (subsequently referred to as the Task Team) was established in 2006, it became clear that the SAPS and NIA representatives believed they were part of the prosecutorial decision making process.

33.1. On 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General P C Jacobs, representing the view of the National Commissioner, which indicated that before any prosecutorial decision was made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP in respect of who to prosecute or not.

33.2. In respect of the interactions between the NDPP and other government departments and officials, I refer to the affidavit of Adv. Pikoli, which is filed evenly herewith.

34. The NDPP objected to this approach on the basis that it would constitute an unwarranted interference in the work of the NPA. The NDPP would be obliged to wait for the process to be completed and to receive a recommendation before he could make a decision, even where there were reasonable prospects of a successful prosecution.

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35. During 2007 an office note, purportedly written by me in 2006, was circulated in certain government circles in which it was reflected that I was investigating criminal charges against 37 ANC leaders, including the then President, Thabo Mbeki. This office note was a fabrication. I had written this office note in 2003 but the date of the note had been adjusted to give the false impression that it had been compiled in 2006. I believe it was aimed at discrediting me and ultimately stopping the investigations into the TRC cases. I am firmly of the view that the then National Commissioner, the late Mr. J Selebi, played a conspicuous role in claiming that I was pursuing the said leaders.

36. During this time I was informed by Adv. Pikoli that the then Director-General of the Department of Justice, Menze Simelane, had approached him and raised concerns about my handling of the prosecution of the TRC cases. He asked the NDPP to relieve me of my duties in this regard, which the NDPP declined to do. The NDPP advised me that senior people in the government wanted to fire me because I was still pursuing the TRC cases.

37. Adv. Vusi Pikoli was suspended from his duties as NDPP in September 2007. Shortly after his suspension I was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP. Adv. Mpshe advised me that I was relieved of my duties in relation to the TRC cases with immediate effect. I have no doubt that Adv. Mpshe received a political instruction to remove me from these cases. I

advised Adv. Mpshe that removing me from the TRC cases would not make the cases go away.

38. At the time, I believed that if I was being removed from the TRC cases, then nobody else would be permitted to pursue the cases boldly and fearlessly. It is no coincidence that there has not been a single further prosecution since I was relieved of my duties in this regard.

CONCLUSION

39. There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.

40. In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes.

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A R ACKERMANN

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at PRETORIA on this the 07TH day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of his affidavit, that he/she does not have an objection to taking the oath, and that he/she considers it to be binding on his/her conscience, and which was sworn to and signed before me and that the administering oath complied with the regulations contained in Government Gazette No R 1258 of 21 July 1972, as amended

SIGNATURE Commissioner of Oaths — FULL NAMES

Designation ex officio Republic of South Africa — Date 07/05/2015

Area WOODMEAD — Business Address WOODMEAD POST OFFICE

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MEDIA REPORTS RELATING TO AHMED ESSOP TIMOL 1997 - 2015

Date	Publication	Title
1997-02-07	The Star	Timol death still hunts his family and friends
1997-02-07	The Star	The invisible hand at his throat
1997-05	Southern Globe	Ahmed Timol's mother passes on…a year after appearing before the TRC
1997-09-23	The Star	Voster bust removed from police station at start of major revamp
1998-09	Lenasia Times	Memory of Ahmed Timol lives on!
1999-03-30	The Star	School renamed after ANC cadre Timol
1999-03-30	Beeld	Bejaarde ma se droom word waar: Skool genoem na vryheidsvegter
1999-03-30	Pretoria Star News	Timol will not die
1999-03-30	Sowetan	Ahmed Timol honoured
1999-04-01	Sowetan	School remained after Timol
1999-04	Lenasia Times	The memory of Ahmed Timol will live on forever as Mandela names Azaadville school
2000-10-12	Sunday Times	Never, never and never again
2001-01	The Lenasia Indicator	Book to memorialize Ahmed Timol's death
2001-02-25	Sunday Times Extra	Information sought for Timol book
2003-10-26	City Press	Ahmed Timol remembered
2003-10-27	The Star	New insights' emerge into how Timol died while in police detention
2003-11-06	The Lenasia Indicator	32 years since Timol's death in detention
2005-01-23	Sunday World	Remember
2005-02-06	Sunday Independent	Revisiting the case of Ahmed Timol, an unresolved death in detention
2005-02-22	Cape Argus	Family's quest for justice after activist's murdered

2005-03	Muslim Views	Slain activist's life honoured in Cape Town
2006-05-28	Sunday Times	Where death stalked the 10th floor
2006-10-22	Sunday Independent	Timol family appeals for justice
2006-10-27	The Star	Timol – 35 years later
2007-11-03	Pretoria News	As ons net kan weet
2009-12-12	Saturday Star	Ordinary people honoured for extraordinary deeds
2012-10-25	The Star	Teacher who died in detention to get award from Zuma
2012-11-05	The Star	Nephew's bid to solve puzzle of 1971 death
2014-10-11	Saturday Star	Teacher-turned-activist paid ultimate price for a free SA
2014-10-30	Cape Argus	Timol mystery haunt SA
2015-10-27	ENCA	Ahmed Timol's death comes under the spotlight

MEDIA REPORTS RELATING TO AHMED ESSOP TIMOL 2016 – 2018

DATE	PUBLICATION	TITLE
2016-10-28	Daily Maverick	Ahmed Timol and the return of The Light
2017-06-27	The Citizen	The significance of the Ahmed Timol inquest
2017-09-22	Daily Maverick	History, suppressed: What didn't get revealed at the Timol inquest
2017-10-12	Mail & Guardian	Timol inquest: The high stakes judgement that could change history
2017-10-12	IOL	Timol inquest verdict will set a precedent, says his family
2017-07-24	Daily Maverick	Unstitching the culture of criminal impunity
2017-10-24	The journalist / The Conversation	Ahmed Timol inquest: why uncovering apartheid crimes remains so important
2018-05-18	Daily Maverick	The Truth and Reconciliation Commission has still not resulted in restorative justice
2018-10-11	IOL	Justice in the Timol case is just the beginning
2018-10-22	Daily Maverick	Victim or killer? Apartheid-era cop asks State to dismiss murder charges against him

2018-10-23	Citizen	Rodrigues' murder trial not just about Timol, but scores of others – nephew
2018-10-27	Eyewitness New	Calls for Joao Rodrigues to be Prosecuted for Ahmed Timol's Murder

DOCUMENTARIES

DATE	TITLE
2015-02-01	*Indians Can't Fly*
2018-10-14	*Someone to Blame – The Ahmed Timol Inquest*

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The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 **Background relating to Amended Prosecution Policy**

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament and is binding on the prosecuting authority.

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;

(ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;

(iv) such agreements should be in accordance with the NPA's prosecution mandate; and

(v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*).[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU "shall be assisted in the execution of its duties" by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C" and "D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";

- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken,".

- "In my view a comprehensive report...should be discussed by the Directors-General".

- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "**normal legal processes**" and "**prosecuting mandate**" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

16-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

VP

TP

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"IC11"

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'Government interference let killers off hook'

POLITICS / 31 MAY 2015, 2:03PM / ZENZILE KHOISAN



Former National Director of Public Prosecutions Vusi Pikoli. Picture: Chris Collingridge

Cape Town - The shocking admission by former National Director of Public Prosecutions Vusi Pikoli that "powerful elements within government were determined to impose their will" on his prosecutorial decisions, effectively giving some of apartheid's most brazen killers a get-out-of-jail-free card, has led to calls for the government to explain what some have termed "a total betrayal of the people's trust."

Pikoli's affidavit was issued in support of a matter before the High Court in Gauteng involving the 1983 abduction and disappearance of 23-year-old Nokuthula Simelane, whose family is demanding the prosecution of the apartheid security policemen who did not receive amnesty for torturing her for five weeks on a North West farm and then refusing to disclose where they had disposed of her body.

The matter of Simelane is one of 300 cases which the Truth and Reconciliation Commission (TRC) asked the prosecuting authority to follow up, and the family, which has searched for her remains for more than three decades, is demanding action.

In supporting the family's action Pikoli stated: "I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane in the case: Priority Investigation: JV Plein 1469/02/1996."

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"In this affidavit I set out evidence that reflects such political interference, I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority."

While directing blame for failure to prosecute on senior government officials, the affidavit also opens a particularly contentious can of worms for the ruling ANC – that it feared the NPA would target senior ANC officials for crimes committed before 1994. It also states that the reason Pikoli was relieved of his duties is because he wanted to prosecute perpetrators responsible for gross violations of human rights during apartheid.

In Pikoli's explanation of why the NPA, on his watch, failed to institute prosecution of the cases recommended by the TRC, he details memos, meetings and communications with top government figures such as former Justice Minister Bridgette Mabandla, former Social Development Minister Zola Skweyiya, former Intelligence Minister Ronnie Kasrils and the late former police chief Jackie Selebi who, he claims, interfered with his mandate to act "without fear, favour or prejudice."

Pikoli cites efforts by the NPA to prosecute security police members implicated in the 1989 attempts to kill Frank Chikane as an example of the manner in which his office was undermined.

"The decision to prosecute those implicated in the attempted murder, through poisoning, of head of the South African Council of Churches Reverend Frank Chikane at the then Jan Smuts Airport,saw the unraveling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes."

According to Pikoli, this effectively derailed the prosecution of three security branch members.

This is supported by an affidavit by Anton Ackermann, the former head of the NPA Priority Crimes Litigation Unit, which had been assigned TRC cases for investigation and prosecution.

"On the morning of November 11, 2004 the police were on the verge of arresting three former officers of the security police on charges which related to the attempted murder of Rev Frank Chikane by poisoning. The three former officers were Major General Christoffel Smith and colonels Gert Otto and Johannes Manie van Staden. None had applied for amnesty.

"On the same morning I received a call from Jan Wagenaar, the attorney representing the suspects. He told me that I would receive a call from the ministry of justice and would be advised that the case against his clients must be placed on hold."

Ackerman states that he subsequently received calls from the Department of Justice and the National Directorate of Public Prosecutions instructing that he not proceed with the arrests. "I believe that it can safely be assumed that the NDPP was instructed at a political level to suspend these cases."

The former Priority Crimes Litigation Unit head added that he had little doubt that "the investigation and the prosecution of TRC cases have been effectively stopped by machinations at a level above that of the NPA. Such interference explains why the Simelane matter, as well as the bulk of TRC cases have not been seriously investigated or prosecuted.

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"In doing so 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," he concluded.

Reacting to Pikoli's claims of political interference in the NPA's attempts to hold apartheid killers accountable, former TRC chief investigator Dumisa Ntsebeza, who was part of many delegations which met with the NDPP, labelled Pikoli a "latter day convert to principle, who has finally summoned up enough courage to come out with the truth".

Ntsebeza said "Pikoli should have done the honourable thing at the time, resigned his post and exposed the attempts to undermine Section 179 of the constitution which defines the work of the National Director of Public Prosecutions."

Majorie Jobson, head of the Khulumani victims support group, said she had been very disappointed with Pikoli's inability to act in the interests of apartheid-era rights violations victims. Succumbing to political pressure by the prosecutions body "was a massive betrayal of the people's trust," Jobson said.

Weekend Argus

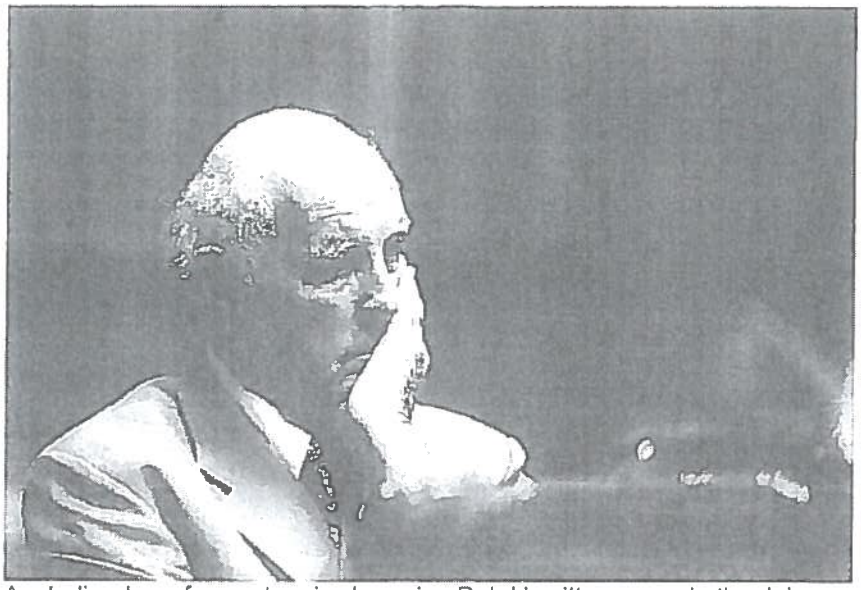
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"IC4"

"IC12"

Rapist Bob Hewitt enters prison in Port Elizabeth

Tuesday 20 September 2016 - 11:46am



Australian-born former tennis champion Bob Hewitt appears in the Johannesburg High Court in Palm Ridge on February 10 2015.
Donald Lobelo

PORT ELIZABETH - Disgraced former tennis pro Bob Hewitt handed himself over to authorities at St Albans prison in Port Elizabeth on Tuesday.

Hewitt is expected to start his six-year jail term for the rape and sexual assault of three teenage girls who were his tennis students in the 1980s and 1990s.

It is just over a week since the Constitutional Court rejected Hewitt&39;s bid to have his rape conviction overturned.

READ: Hewitt regrets replying to love letters

The Women and Men against Child Abuse (WAMACA) advocacy group said that Hewitt had approached the state for permission to hand himself in at the St Albans Correctional Facility, which is close to his home at Addo.

This was approved by the Johannesburg High Court due to Hewitt's ailing health and his inability to travel the distance to Johannesburg.

WAMACA director Miranda Friedmann said that she and her advocacy team would fly from Johannesburg on Tuesday to be at St Albans when Hewitt handed himself in.

She told eNCA: "It&39;s an incredible relief, it&39;s an incredible sense of achievement, it&39;s an incredible sense of victory today. It&39;s been a very long

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struggle, it has taken a team ... it has really been a team effort to bring down Bob Hewitt."

Friedmann said that the odds had been stacked against his victims. "Our organisation has been with them throughout. I've seen their courage first-hand, as well as the toll the process has taken. Seeing Hewitt behind bars will be a victory for them."

One of the women who was abused by Hewitt, Theresa 'Twiggy' Tolken, said she had been waiting for justice for a very long time.

"My mother and I have been waiting for tomorrow [Tuesday] for a very long time. I just wish my dad was around to witness this day. Bob Hewitt has tried to evade justice and tried anything at his disposal to stay out of jail for the past few years! He has continually lied about his despicable actions," said Tolken.

"The truth always catches up with you and hopefully this is a lesson for other paedophiles out there: don't ever think you are above the law, you will be caught.

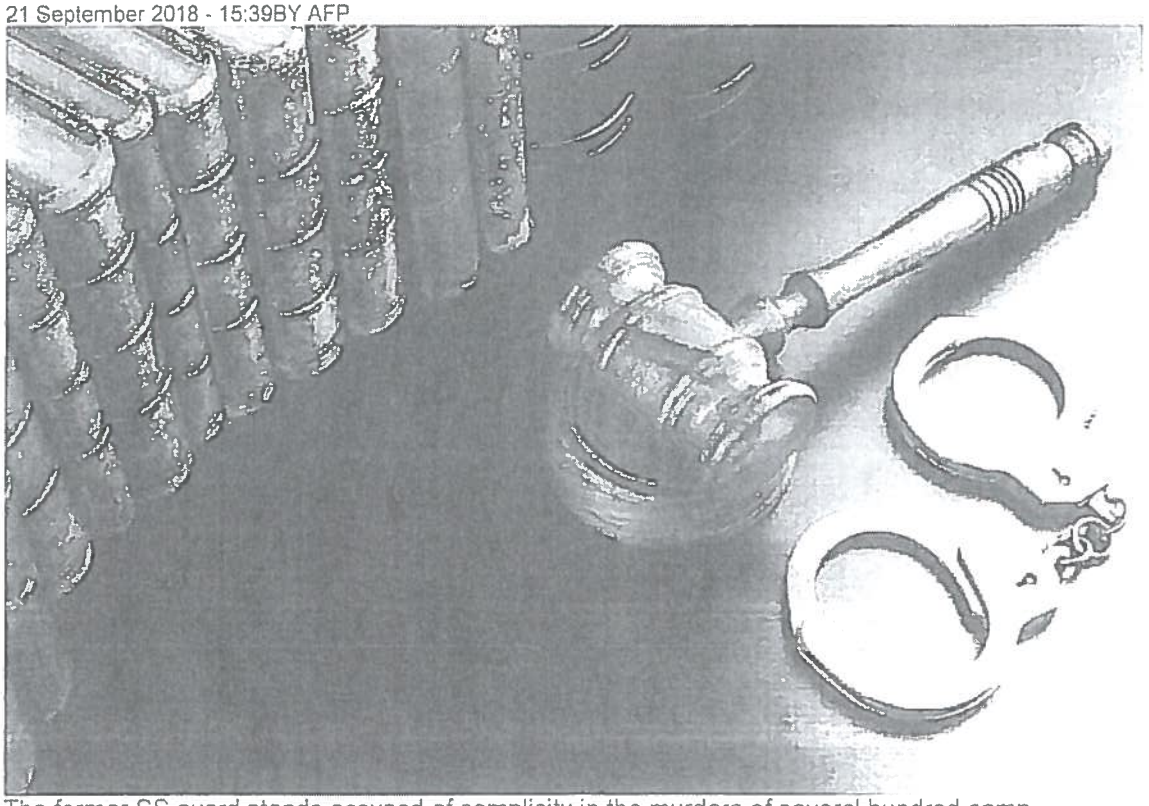
"To all the other victims, don't be afraid to speak up, there are people and organisations like Women and Men Against Child Abuse out there who will hold you up and support you through your ordeal."

https://www.enca.com/south-africa/bob-hewitt-to-hand-himself-over-to-authorities-in-port-elizabeth

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Former SS guard, now 94, faces trial in Germany

21 September 2018 - 15:39BY AFP



The former SS guard stands accused of complicity in the murders of several hundred camp prisoners between 1942 and 1945
Image: Gallo Images/ IStock

A 94-year-old former SS guard faces trial in November charged with complicity in the mass murders at the Nazi concentration camp Stutthof during World War II, a German court said Friday.

The man from the district of Borken, who was not named, was a watchman at the Nazi camp near what was then the free city of Danzig, now Gdansk in Poland.

He stands accused of complicity in the murders of several hundred camp prisoners between 1942 and 1945, said the regional court of Muenster more than seven decades after the end of World War II.

These included more than 100 Polish prisoners gassed to death on June 21 and 22. 1944, as well as "probably several hundred" Jewish prisoners murdered in the same way from August to December 1944 as part of the Nazis' so-called "Final Solution" operation.

Prosecutors believe that the man "knew about the killing methods" at the camp and that the guards were a crucial part of the camp system.

As the former SS guard was not yet 21 at the time of the crimes, he will be tried before a juvenile court from November 6.

Germany has been racing to put on trial surviving SS personnel, after the legal basis for prosecuting former Nazis changed in 2011 with the landmark conviction of former death camp guard John Demjanjuk.

He was sentenced not for atrocities he was known to have committed. but on the basis that he served at the Sobibor camp in occupied Poland - for having been a cog in the Nazis' killing machine.

German courts subsequently convicted Oskar Groening, an accountant at Auschwitz camp, and Reinhold Hanning - a former SS guard at the same camp, when they were aged 94 for the mass murders seven decades back.

But neither served jailtime as they both died before they could be imprisoned.

Prosecutors had filed charges against another former SS guard at Stutthof, a 93-year-old from the city of Wuppertal.

But a decision on whether the case will go ahead is pending as it is yet to be determined if he is fit for trial, the court in Muenster said.

https://www.timeslive.co.za/news/world/2018-09-21-former-ss-guard-now-94-faces-trial-in-germany/

"~~IC6~~" 662

"IC 14"

Former Auschwitz guard jailed for five years over murder of 170,000 Holocaust victims

Reinhold Hanning was convicted at the end of a trial lasting four months

- **Elke Ahlswede**Detmold
- Friday 17 June 2016 13:28

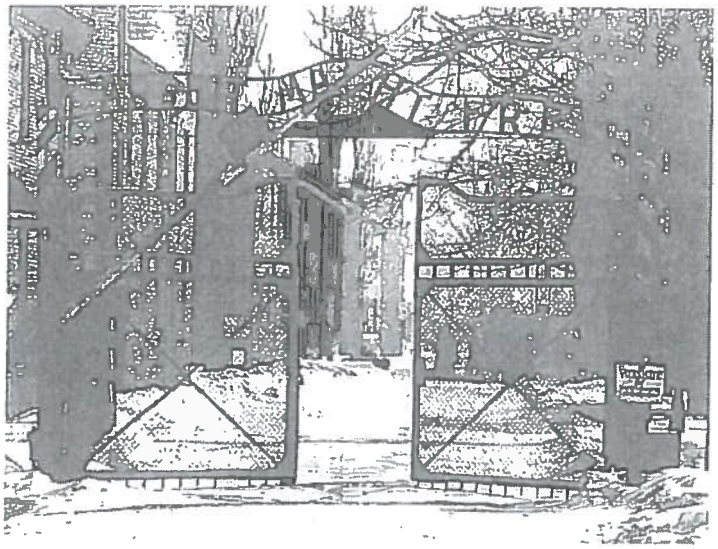


94-year-old former SS sergeant Reinhold Hanning sits in the courtroom in Detmold *(AP)*

A 94-year-old former Auschwitz guard has been convicted of being an accessory to the murder of at least 170,000 people, at the end of what is likely to be one of Germany's last Holocaust trials.

Reinhold Hanning was sentenced to five years' jail for facilitating the slaughter at the death camp in Nazi-occupied Poland, having served at Auschwitz during the Second World War between January 1942 and June 1944. He had faced a maximum sentence of 15 years.

During his four-month trial, Hanning admitted serving as an Auschwitz guard. He said he was ashamed that he was aware Jews were being killed but did nothing to try to stop it.



Read more Auschwitz guard speaks about murder of 170,000 people for first time

Hanning showed no reaction as the judge. Anke Grudda, read her justification for the verdict and sentence.

"You were in Auschwitz for two and a half years, performed an important function. ... You were part of a criminal organisation and took part in criminal activity in Auschwitz," she said.

Last Holocaust-Related Case? 94-Year-Old Former Auschwitz Guard Stands Trial

The nearly four-month long trial in Detmold included testimony from around a dozen Holocaust survivors, many of them extremely elderly, who detailed their horrific experiences, recalling piles of bodies and the smell of burnt flesh in the death camp

"It is a just verdict, but he should say more, tell the truth for the young people," said Leon Schwarzbaum, a 95-year-old Auschwitz survivor from Berlin who had spoken at the trial.

"He is an old man and probably won't have to go to jail, but he should say what happened at Auschwitz. Auschwitz was like something the world has never seen," Mr Schwarzbaum told the Associated Press

Mr Schwarzbaum added that he does not want Hanning to go to prison and is happy that he apologised, but had hoped that he would provide more details about his time in Auschwitz for the sake of educating younger generations.

Auschwitz survivor Hedy Bohm, who came from Toronto to testify at the trial and for the verdict, said she was "grateful and pleased by this justice finally after 70 years."

"It is my dream to be in Germany, in a German court, with German judges acknowledging the Holocaust," the 88-year-old said.

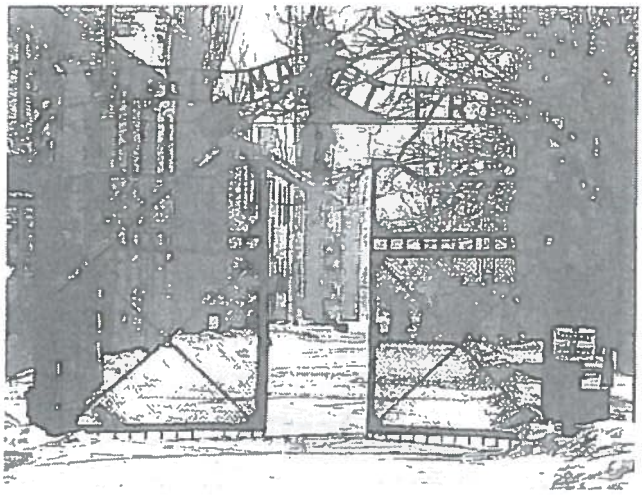
Remembering the Holocaust



The defence had said Hanning should be acquitted as the former SS officer had personally never killed, beaten or abused anyone.

Hanning is said to have joined the Hitler Youth with his class in 1935 at age 13, then volunteered at 18 for the Waffen SS in 1940 at the urging of his stepmother. He fought in several battles in World War II before being hit by grenade splinters in his head and leg during close combat in Kiev in 1941.

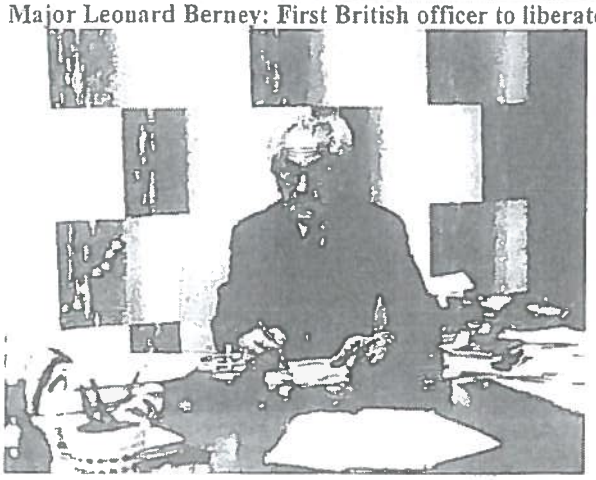
He told the court that as he was recovering from his wounds he asked to be sent back but his commander decided he was no longer fit for front-line duty, and so sent him to Auschwitz, without his knowing what it was.



Nazi Auschwitz guard Ernst Tremmel dies just before trial



Major Leonard Berney: First British officer to liberate Bergen-Belsen Nazi camp dies aged 95



Germany finally pays tribute to first Nazi hunter Fritz Bauer

Speaking at the trial at end of April, Hanning apologised to the victims, saying that he regretted being part of a "criminal organisation" that had killed so many and caused so much suffering.

"I'm ashamed that I knowingly let injustice happen and did nothing to oppose it," he read from a prepared speech.

Hanning was not charged with direct involvement in any killings. But prosecutors and dozens of joint plaintiffs from Germany, Hungary, Israel, Canada, Britain and the United States said he had helped Auschwitz function. The indictment against him is focused on a period between January 1943 and June 1944 for legal reasons, but the court has said it would consider the full time he served there.

A precedent was set in a similar case in 2011, when camp guard Ivan Demjanjuk was convicted. Last year, Oskar Groening, known as the "bookkeeper of Auschwitz", was sentenced to four years in prison after he was convicted of being an accessory to the murder of 300,000 people.

None of the convictions are definitive. Demjanjuk had appealed but died before the German Federal Court of Justice ruled on the case, and the court is still considering an appeal filed by Groening.

Both sides in Hanning's case have a week to appeal Friday's verdict, and Hanning will remain free while any appeals are heard. The defence had asked for a six-year sentence.

Germany is holding what are likely to be its last trials linked to the Holocaust, in which the Nazis killed more than six million people, mostly Jews.

Besides Hanning, one other man and one woman in their 90s are accused of being accessories to the mass murder at Auschwitz. A third man who was a member of the Nazi SS guard team at Auschwitz died at the age of 93 in April, days before his trial was due to start.

Dr Moshe Kantor, President of the European Jewish Congress, welcomed the news. "We must once again use this opportunity to educate about the horrors of the Holocaust and show that hatred, fascism and anti-semitism must be rooted out. It should never be too late for the guilty to be held to account," he said.

Reuters

https://www.independent.co.uk/news/world/europe/auschwitz-guard-guilty-accessory-murder-charges-jailed-five-years-reinhold-hanning-nazi-germany-a7087341.html

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"1C15"

Victor Jara murder: ex-military officers sentenced in Chile for 1973 death

Eight retired officers sentenced to 15 years in prison for the murder of popular folk singer during coup

Reuters in Santiago

Tue 3 Jul 2018



Victor Jara posing for a portrait in Santiago, Chile. Photograph: Patricio Guzman/AP

Eight retired Chilean military officers have been sentenced to 15 years in prison for the murder of popular folk singer Victor Jara during the 1973 coup that installed late dictator Augusto Pinochet in power.

A judge handed down the sentences after leading a long-running inquiry into Jara's death on 16 September, 45 years ago, a statement from Chile's courts authority said.

Miguel Vázquez sentenced the eight men to 15 years and one day in prison for the murder of Jara and that of former prisons director Littre Quiroga Carvajal.

A ninth suspect was jailed for five years for his role in covering up the killings.

Jara, 40, was a celebrated singer, theater director and university professor who sympathized with the socialist government of Salvador Allende, who was ousted in the 1973 coup.

Jara's work, and the nature of his death, inspired tributes from artists including Bruce Springsteen, the Clash and U2.

He was detained along with his students, fellow academics and scores of other leftists in a Chilean soccer stadium that has since been named after him.

According to detainees in the stadium who survived, Jara's hands were smashed with the butt of a gun and he was badly beaten during his incarceration. When his body was found three days after his disappearance near a cemetery, it was found riddled with 44 bullet holes.

Agony of Chile's dark days continues as murdered poet's wife fights for justice

Read more

His family, including British-born ballerina wife Joan and his daughter Amanda, has fought a long-running campaign for justice in his case and had his body exhumed in 2009 for a full autopsy.

In 2016, a civil court jury in Florida found another former military official, retired army lieutenant Pedro Barrientos, liable for torturing and killing Jara.

Barrientos, who lives in Florida but whose extradition to Chile is currently under US consideration, was also ordered to pay $28m in damages to Jara's family.

The case against Barrientos was filed by the US-based Center for Justice and Accountability, a human rights advocacy group, on behalf of Jara's widow, his daughter and step-daughter.

During Pinochet's rule, which lasted until 1990, an estimated 3,200 people were killed and 28,000 tortured by the state.

668
"IC 8" 669
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Operation Condor conspiracy faces day of judgment in Argentina court

Eighteen former military officers accused of participating in a plan in the 70s and 80s to operate international death squads to eliminate leftwing exiles face verdict

Uki Goñi *in Buenos Aires*

Thu 26 May 2016 10.10 BSTLast modified on Fri 27 May 2016 17.43 BST



Mariana Zaffaroni, front left, stands next to her grandmother at a demonstration in Montevideo. Her parents were killed as part of Operation Condor in Buenos Aires in 1976. Photograph: Matilde Campodonico/AP

It was an organised programme of state-sponsored murder in which US-backed regimes conspired to hunt down, kidnap and kill political opponents across South America and beyond.

Operation Condor – named after the world's largest carrion bird – was devised to eliminate thousands of exiled leftwing activists who had dared confront the military dictators who ruled the continent in the 1970s and 80s.

The exact number of its victims may never be known, but this week judges in Buenos Aires will deliver their verdict on the first court case to specifically focus on the conspiracy.



Former dictator Reynaldo Bignone is the most senior surviving ex-military figure on trial. Photograph: Victor R Caivano/AP

Eighteen former military officers – including Argentina's last dictator Reynaldo Bignone, 88 – will on Friday be sentenced on charges including kidnapping, torture and forced disappearance. Seven other defendants, including Jorge Videla – the general who headed Argentina's junta during its bloodiest first three years – have died since the trial began in 2013.

The court has heard evidence on the deaths of more than 100 leftwing activists allegedly killed in Argentina, including 45 Uruguayans, 22 Chileans, 15 Paraguayans and 13 Bolivians.

If the judges accept the thesis presented by the plaintiffs, many of them represented by the human rights group Cels (Centre for Legal and Social Studies) in Argentina, it will be first time the existence of the murderous, multi-nation plan is proven in court.

The verdict is also likely to cast a fresh light on allegations that the operation was backed by the CIA – and at least tacitly approved by the then secretary of state Henry Kissinger.

The plaintiffs allege that Operation Condor received support from the US, especially in the form of its communications system, which they say operated through Condortel, a US telex system based in Panama.

Gastón Chillier, the executive director of Cels, said: "What we found among the large amount of documents we presented as evidence is that the US definitely had knowledge of the existence of the operation and even provided a communications station in Panama for the intelligence services of the six nations involved to communicate with each other via telex."



FacebookTwitterPinterest
The dictators, from left: Jorge Videla of Argentina, Augusto Pinochet of Chile, João Figueiredo of Brazil and Alfredo Stroessner of Paraguay. Composite: AP, Reuters & Rex Features

According to secret documents unearthed after democracy returned to the region, Operation Condor was originally drawn up at a secret 1975 meeting of intelligence chiefs from Argentina, Bolivia, Chile, Paraguay and Uruguay, and later expanded to include Brazil. The minutes of the meeting were signed for Chile by Colonel Manuel Contreras, the dreaded head of that country's Dina secret police.

Its purpose was to allow cooperating countries to send death squads into each other's territory – and sometimes further afield – to monitor, kidnap or kill political exiles.

While some individual crimes committed during Operation Condor have been the subject of previous trials, Friday's verdict will focus on participation in the plan itself, said Chillier.

"What distinguishes this trial from other cases involving isolated crimes committed by Operation Condor is that the defendants now face being condemned for being members of an illegal association," he said.

Among those who will be paying close attention to Friday's verdict is Edy Binstock, whose then wife Monica Pinus de Binstock, a young Argentinian member of the Montoneros urban guerrilla group, was captured by Brazilian security forces when her plane landed in Rio de Janeiro in March 1980.

"She was from flying from Panama, and had called me by phone the day before, to arrange where we would meet in Rio. We had both escaped from Argentina because our lives were in danger there," Binstock told the Guardian. "I waited and waited and she never showed up."

It was when a batch of US documents from the period were declassified in 2002 that Binstock was able to discover his wife's fate.

"One of the documents mentioned her by name, relating a conversation between an Argentinian military officer and a US diplomat at that time, with the officer saying how an Argentinian military plane had flown specially to Galeão airport in Rio to pick her up and bring her to Buenos Aires, from where she was taken to the Campo de Mayo army facility, which at that time operated as a death camp."

Binstock has still not been able to find out what happened to his wife after she was taken to Campo de Mayo.

Another case involved a young Uruguayan couple, María Gatti and Jorge Zaffaroni, who in 1975 fled to neighbouring Argentina, at the time still under democratic rule.

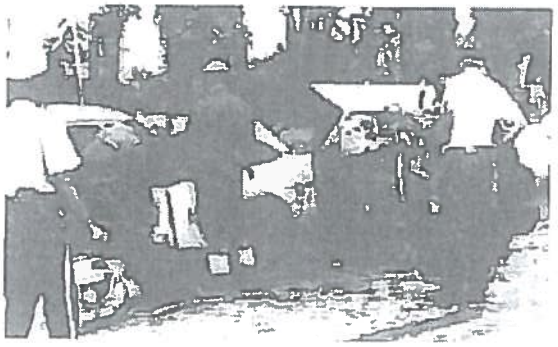
After Argentina's 1976 coup the couple – and their infant daughter Mariana – were kidnapped by Uruguayan agents and taken to Automotores Orletti, a converted mechanic's garage that served as the "Operation Condor" headquarters in Buenos Aires.

The couple were murdered and their child, then just one-year-old, was given to intelligence officer Miguel Ángel Furci to raise as his own.

Mariana Zaffaroni was eventually reunited with her biological family in 1992 and Furci was sentenced for her kidnapping the following year. Furci is now also among the defendants to be sentenced on Friday, on 67 counts of "disappearances" and torture at Orletti.

The impact of Operation Condor was not limited to Latin America: one of the most dramatic episodes took place in Washington DC.

In 1976, Orlando Letelier, Chile's former defence and foreign minister under President Salvador Allende, was killed by a car bomb that detonated in front of the Irish embassy on Sheridan Circle. US intelligence documents declassified last year show that the order to kill Letelier had come directly from the dictator, General Augusto Pinochet.



Firemen remove victims from Orlando Letelier's shattered car in Washington on 21 September 1976. Photograph: AP

Declassified State Department records show that the month before Letelier's murder, Kissinger had ordered US ambassadors posted to the six Condor countries to express Washington's "deep concern" at the possible assassination of "politicians and prominent figures" in South America and beyond.

The ambassadors, fearful to raise the topic with their hosts, demurred, suggesting that it would be safer to approach the South American ambassadors posted in Washington instead.

But Kissinger rescinded the order on 16 September, just five days before Letelier's murder, instructing that "no further action should be taken on this matter".

https://www.theguardian.com/world/2016/may/26/operation-condor-trial-argentina-court-death-squads

673
"IC9"
"IC17"

Argentina missing: Omar Graffigna, ex-Air Force chief, goes on trial

3 May 2016



The former head of the Argentine Air Force, Brigadier Omar Graffigna, has gone on trial in Buenos Aires province accused of forced disappearances during military rule from 1976 to 1983.

Mr Graffigna, 90, is a suspect in the 1978 abduction of left-wing activists Patricia Roisinblit and her husband, Jose Manuel Perez Rojo.

He has denied any wrongdoing.
Human rights groups say about 30,000 people were forcibly disappeared under Argentina's military rule.

Stolen baby

Patricia Roisinblit was eight months pregnant when she was taken along with her partner and 15-month-old daughter Mariana to the Regional Intelligence Centre of Buenos Aires (Riba), which was under the control of the Argentine Air Force.

From there, she was transferred to the infamous Navy Mechanics School.

The school, known as Esma, was the largest clandestine detention and torture centre in Buenos Aires.

Argentina's military rule

1976: General Jorge Videla seizes power. Thousands of political opponents are rounded up and killed
1982: Videla's successor, General Leopoldo Galtieri, orders the invasion of British-held Falkland Islands
1983: Civilian rule returns to Argentina, investigations into rights abuses begin
2010: Videla sentenced to life imprisonment for murders during his term in office
2012: Videla sentenced to 50 years for overseeing systematic theft of the babies of political prisoners

Mariana was released shortly afterwards but her parents are believed to have been killed in detention.



Ms Roisinblit was kept alive long enough to give birth to her son.

The son, who was given the name of Guillermo, was given to an employee of the Regional Intelligence Centre to bring up, a common practice during Argentina's "dirty war" on left-wing activists.

Guillermo was tracked down in 2000 by his sister Mariana, who suspected he may be her long-lost brother.

'Death threat'

According to Guillermo, the man who raised him, Francisco Gomez, threatened "to put a bullet in the heads" of him, his sister Mariana and their grandmothers.

Gomez is on trial along with Mr Graffigna and the former head of Riba, Luis Trillo, over the disappearance of Guillermo's parents.

Mr Gomez is already in jail for stealing Guillermo from his parents.



Guillermo's grandmother, Rosa Roisinblit, is the vice-president of the Grandmothers of the Plaza de Mayo, a pressure group which seeks to trace the babies stolen by the military regime.

Ms Roisinblit, who is 96, attended the opening of the trial on Monday along with Guillermo.

She is expected to give evidence on Wednesday along with her granddaughter Mariana.

The Grandmothers of the Plaza de Mayo have re-united 119 stolen children with their birth families.

They believe about 500 babies were stolen during military rule.

https://www.bbc.com/news/world-latin-america-36192107

676
"IC 10"
"IC 18"

Guatemala: ex-military officers convicted of crimes against humanity

Four former high-ranking officers convicted of 1981 rape and torture of young woman and disappearance of her teenage brother

Nina Lakhani *in Mexico City*

Wed 23 May 2018 17.57 BSTLast modified on Fri 1 Jun 2018



Emma Theissen Álvarez de Molina pointed out ex-major Hugo at Zaldaña Rojas as one of the men who took away her son, saying: 'That is him. His face is forever recorded in my memory.' Photograph: Esteban Biba/EPA

Four former high-ranking Guatemalan military officers once considered untouchable have been convicted of crimes against humanity. They were also found guilty of aggravated sexual abuse against a young activist, Emma Guadalupe Molina Theissen, one of a small number of civilians who escaped army custody during the country's 36-year civil war.

Three of the officers – the former head of the armed forces, Benedicto Lucas García, former intelligence chief Manuel Antonio Callejas y Callejas and local commander Hugo Ramiro Zaldaña Rojas – were also found guilty of the forced disappearance of Emma's 14-year-old brother Marco Antonio and sentenced to 58 years' jail by the court for high-risk crimes in Guatemala City.

The Molina Theissen family have been searching for Marco Antonio since 6 October 1981, when he was bundled into a sack by military officers and driven away. The Guatemalan state admitted responsibility for grave crimes against the Molina Theissen family in 2000, but it has taken 37 years for the perpetrators to be brought to account.

Wednesday's verdict was hailed by anti-impunity campaigners as it is the first time senior military officers have been prosecuted for serious human rights violations since the 2013 genocide verdict against the former dictator Efraín Ríos Montt was sent back to trial.

Jo-Marie Burt, associate professor at the Schar school at Virginia's George Mason University, who has been monitoring the trial, said: "The significance of this sentence

cannot be overstated. It shows that Guatemalan justice system has not bowed under pressure from powerful military and economic elites to end human rights prosecutions. The perpetrators must tell the Molina Theissen family the truth about what happened to their beloved son."

The crimes took place as part of the military junta's "national security doctrine". Key to this were counterinsurgency operations used to detain, torture for information, and then kill or "disappear" people regarded as the internal enemy – suspected communists, critics of the military dictatorship and activists. At the time, senior military officers received training at the School of Americas and in Argentina.

Molina Theissen was captured in September 1981. The then 21-year-old social and political activist was then taken for interrogation to a clandestine base in Quetzaltenango, western Guatemala, known as MZ17 (military zone 17). She was deprived of food, beaten, given electric shocks and raped. When she refused to help identify other suspected subversives, the torture intensified.

But Molina Theissen managed to escape, causing embarrassment to military intelligence. Her family had been under surveillance since 1955, the year after the CIA-backed coup, and were designated "internal enemies".

The following day, a raid was organised to recapture the escapee at home. When they could not find her, her brother was taken instead. Marco Antonio is one of an estimated 5,000 children forcibly disappeared by the military during the internal conflict, according to the Truth Commission.

"Enforced disappearance was used as a weapon of war, just like a rifle or a bullet," according to historian Marc Drouin, an expert prosecution witness.

In court, the victims' mother, Emma Theissen Álvarez de Molina, pointed at Zaldaña Rojas as one of the men who took away her son. "That is him. His face is forever recorded in my memory."

The defence sought to cast doubt on Molina Theissen's escape from military detention. In a moving testimony, she said: "The fact that I escaped is not just unusual, it is very unusual, because otherwise, there would not be 45,000 victims of enforced disappeared in this country.

"They did not kill me, but what they did profoundly destroyed my life ... The fact that by escaping I had managed save my own life filled me with pride, but this became my worst mistake ... because it resulted in the kidnapping and the disappearance of my little brother."

Former MZ17 commander Francisco Luis Gordillo Martínez was sentenced to 33 years for crimes against humanity. His number two, the retired colonel Edilberto Letona Linares, was absolved of all charges.

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"IC 19"

WIKIPEDIA

Adolfo Scilingo

Adolfo Scilingo (born 28 July 1946 in Bahía Blanca) is a former Argentine naval officer who is serving 30 years (the legally applied limit, although he was sentenced to 640 years) in a Spanish prison after being convicted on April 19, 2005 for crimes against humanity, including extra-judicial execution.

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Charges

Scilingo was charged under Spain's universal jurisdiction laws by investigating magistrate Baltazar Garzón with genocide, 30 counts of murder, 93 of causing injury, 255 of terrorism and 286 of torture. He denied the charges but initially refused to plead, claiming to be unwell. In 2005 doctors ruled Scilingo was fit to stand trial.[1]

The murder charges related to 30 drugged political prisoners thrown out of government jets during Leopoldo Galtieri's military junta's Dirty War against leftist insurgents between 1976 and 1983. Scilingo had earlier attracted great notoriety for publicly confessing to journalist Horacio Verbitsky in c. 1996, to participating in the so-called death flights, the first of a series of public confessions collectively called in Argentina the 'Scilingo effect' (Feitlowitz 1999). Scilingo was serving a jail term for fraud in Argentina at the time.

Judgement

The court found Scilingo guilty of crimes against humanity and torture and sentenced him to 640 years in jail.[2] 21 years for each for the murder of 30 victims, who were thrown from planes to their deaths, and a further five years for torture and five years illegal detention.[3] Scilingo is unlikely to serve more than 30 years in jail as that is the maximum time a person can serve for non-terrorist offences.[3]

The Spanish case was the first use of a new Spanish law whereby people can be prosecuted for crimes committed outside Spain.[3] Scilingo's confession prompted Argentines residing in Spain to press charges against him. It also led to Chileans living in Spain to file charges against their former dictator, Augusto Pinochet, who was later arrested in Britain at the request of Judge Baltasar Garzon.

Alicia Gil Gil wrote in 2005 that use of a genocide charge to initiate proceedings, was a breach of the legal principle *Nullum crimen, nulla poena sine praevia lege poenali* which forms part of Spain's constitution, because at the time the offence was committed the Spanish provision on crimes against humanity was not yet in force.[4]

On 4 July 2007, the Supreme Court of Spain increased Scilingo's prison sentence to 1084 years (but effective for only 25 years) and altered the conviction to the specific penalties provided in the current criminal code for the crimes of murder and unlawful detention, but held that these crimes "constitute crimes against humanity according to international law".[5]

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See also

- Alberto Ángel Zanchetta, a military chaplain who reported to Scilingo

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AD



Argentina 'Angel of Death' Alfredo Astiz convicted

27 October 2011

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Crowds cheered as the judge jailed Alfredo Astiz for life

Former Argentine naval officer Alfredo Astiz has been jailed for life for crimes against humanity during military rule in 1976-83.

Astiz - known as the "Blond Angel of Death" - was found guilty of torture, murder and forced disappearance.

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Among his victims were two French nuns and the founders of the Mothers of the Plaza de Mayo human rights group.

Eleven other former military and police officers were also given life sentences for crimes against humanity.

Four others were jailed for between 18 and 25 years.

All worked at the Naval Mechanical School in Buenos Aires - known as Esma - which was the biggest secret torture and killing centre set up by the military during what became known as the "Dirty War".

Of the 5,000 or so prisoners taken to Esma, 90% did not come out alive.

Some were killed by firing squad while others were thrown from planes - drugged but still alive - into the Atlantic Ocean.

More than 70 of those who did make it out were among the witnesses in the 22-month trial.

Symbol of oppression

Astiz looked straight ahead and showed no emotion as the sentence was read out.



Among the others given life terms are Jorge Acosta, Antonio Pernias and Ricardo Cavallo.

Human rights groups had campaigned for years to bring the perpetrators to justice, and there were celebrations as the sentences were read out.

"We resisted. We never committed a crime. This is why this is just. They committed crimes. They are imprisoned," said Esma survivor Ricardo Coquet.

Astiz, 59, is one of the most notorious symbols of oppression during military rule in Argentina.

As a young naval intelligence officer he infiltrated the Mothers of the Plaza de Mayo human rights group, which was set up to find relatives abducted by the security forces.

He then arranged the kidnap and murder of its three founders - Azucena Villaflor, Esther Ballestrino and Maria Ponce.

He had already been convicted in absentia in France for the murder of the French nuns Alice Domon and Leonie Duquet, who disappeared in Argentina in 1977.

In his defence, Astiz said he had acted to save Argentina from left-wing "terrorism", and he dismissed his trial as an act of political vengeance.

Human rights groups say 30,000 people were killed or made to disappear by the armed forces in their campaign against opposition activists and left-wing guerrillas.

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16 September 2011

Argentina Dirty War army officers sentenced to life
14 July 2011

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14 April 2011

Argentina marks coup anniversary amid Dirty War trial
24 March 2011

Argentina 'stolen baby' cases legacy of Dirty War
5 March 2011

Latin America & Caribbean



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"1C21"

Moray Hathorn

Subject: FW: Inquests: Aggett/Timol

From: Moray Hathorn
Sent: 21 June 2016 09:25
To: 'Torie Pretorius (JP)'
Subject: RE: Inquests: Aggett/Timol

Dear Torie,

Re: opening of Inquests: Aggett and Timol cases

Firstly, thank you for meeting the team representing the families at the NPA on 14 June 2016.

As you requested, we address an email to you to set out why we believe the decision to reopen the Aggett (1988) and Timol (1971) inquests should be taken as a matter of urgency.

The main reason is that both cases are old and witnesses are ageing and some may die in the near future. If the decisions are delayed any further and witnesses pass away before the inquests can be reopened, aside from the devastating impact this will have on the interests of justice, it is likely that an extremely negative public perception will be generated.

In particular, the following witness are at an advanced age (in their 70s or 80s) and/ or some are in very poor health:

- George Bizos,
- Roelf Venter,
- Salim Essop,
- Charles Smith.

We note your original thinking that these matters be kept on hold pending the Simelane prosecution but we are of the view that there is no connection between these matters and the Simelane case to justify this approach.

We pointed out that once decisions to reopen are taken there will inevitably be a lead in time of several months before the actual inquests can take place. This means that there will still be ample time to carry out any outstanding investigations.

We are of the considered view that there is no reason why the decision to reopen these 2 inquests cannot be taken in the next few days, or at the very latest within the next 2 weeks.

We look forward to hearing from you at your earliest convenience.

Yours sincerely
Moray Hathorn
Partner

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Advocate Shaun Abrahams
National Director of Public Prosecutions

Per email: skabrahams@npa.gov.za

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Your reference	Our reference	Date
	Mr M Hathorn 3005789	8 July 2016

Dear Advocate Abrahams

INQUESTS RE: THE LATE NEIL AGGETT AND THE LATE AHMED TIMOL

Our earlier meetings and correspondence between 2015 and this year in respect of the above matters refer. We refer more specifically to our meeting on 14 June 2016 with Adv. Torie Pretorius and our email to him dated 21 June 2016, a copy of which is attached for your easy reference.

At our meeting with Adv Pretorius on 14 June 2016, he agreed that both the Aggett and Timol inquests should be reopened without delay. He further advised us that he would be recommending such advice to you. He also mentioned that he would recommend that the inquests take place in the High Court.

In our aforesaid letter to Adv Pretorius we set out why these decisions should be taken as soon as possible. Essentially, we pointed out that key witnesses are old and sickly and their passing before the reopening of the inquests would have a devastating impact on the interests of justice, as well as generating a very poor public impression of the NPA.

Although we do not believe there is much more to be done in terms of further investigations we note that there will be some lead time before the inquests can be heard in the High Court and that any outstanding investigations can take place during this period.

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley KZ Dlothi G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman MM Gibson H Goolam CI Gouws JP Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PN Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston MD Kota J Lamb L Marais S McCafferty MC McIntosh M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VM Movshovich M Mtshali SP Narcker RA Nelson BP Ngcobo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh MP Spalding L Stein PS Stein LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen N van der Walt N van Dyk A van Niekerk JE Veeran D Ventar B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson N Yudaken **Chief Operating Officer:** SA Boyd

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We felt that the decision should have been taken within 2 weeks of our meeting with Adv. Pretorius. More than 2 weeks have elapsed since that meeting. Should a decision not be taken imminently our instructions are to take the necessary legal steps to secure such a decision.

Should you require further information or would like to meet with us again, we remain ready to assist you and to meet at any time convenient for you. We look forward to hearing from you per return.

Yours sincerely

Moray Hathorn

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Your reference	Our reference	Date
	Mr M Hathorn 3005789	11 August 2016

Dear Adv. Pretorius,

INQUESTS RE: THE LATE NEIL AGGETT AND THE LATE AHMED TIMOL

With reference to your telephone call to me on 18 July 2016 and your email dated 25 July 2016, were you able to meet with Roelf Venter on 2 August and with the Director of Public Prosecutions (Johannesburg), Adv Chauke, in the week of 25 July?

Has the recommendation to the Minister in terms of section 17A of the Inquests Act been transmitted? If so, we would be grateful if you furnished us with a copy for our records. If not, please advise when the recommendation will be made. We would also be grateful for an explanation for the delay.

We have previously set out why we regard the reopening of these 2 inquests as urgent. Kindly confirm by close of business on Wednesday, 17 August 2016, that the recommendation to the Minister has been made. Should we not receive such advice by that time our instructions are to take appropriate action.

Yours faithfully

Mathorn.

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Your reference	Our reference	Date
	Mr M Hathorn 3005789	23 August 2016

Dear Adv. Pretorius SC

Inquests re: The Late Neil Aggett and the Late Ahmed Timol

1. I refer to my discussion with you on 16 August 2016.

2. You informed me that you have spoken to Paul Erasmus and Roelof Venter and Piers Pigou. You mentioned that you are trying to contact Japie and Kobus Koch and Waal du Toit. You indicated that they might be able to confirm the notion that communists committed suicide rather than cooperate was deliberate propaganda advanced by the Security Branch to support the concocted version of suicide.

3. You said further that you are following up on 17 witnesses in the case of Neil Aggett and that you are doing your best, under heavy work pressure, to properly prepare submissions to the DPP, Johannesburg.

4. We first wish to point out that once requests are made for a hearing in the High Court there is likely to be a considerable time lapse, probably of several months, before the inquests actually happen. We point out that you do not have to finalize every last aspect of the investigations before these steps are taken.

5. We further point out that an inquest is not a criminal trial and is itself in the nature of an investigation. We have already placed on record our deep concern that witnesses are elderly and could pass away at any time.

6. We are of the firm view that there is already more than sufficient evidence to warrant the reopening of inquests in both matters. Indeed at our last meeting with you at your office

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Senior Partners: JC Els Managing Partner: SJ Hutton Partners: RS Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Bocysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KN Colman KE Coster K Couzyn CR Davidow JH Davies PN Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman KL Gawith NM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis KNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok MD Kota J Lamb L Marais S McCafferty V McFarlane MC McIntosh SJ McKenzie N McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu J Moolman VH Movshovich M Mtshali SP Naicker RA Nelson BP Ngcobo A Ngubo ZN Nkshona MB Nxumalo L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan GI Rapson RJA Robb DC Rudman M Sader JW Schultz KE Shepherd DNJ Simaan AJ Simpson J Simpson N Singh P Singh NP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen H van der Walt N van Dyk A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Willson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

on 14 June 2016 you agreed that both matters should proceed to inquests, without delay. We are accordingly surprised and concerned that you now advise that both matters require further investigation.

7. We respectfully place on record that such delay is prejudicial to the interests of justice in both cases.

8. We set out below our reasons why there is currently sufficient basis to seek the reopening of both inquests. We also set out suggested steps that we believe need to be carried out, which we assert can be done over the next few months, pending the hearings in the High Court.

9. **The Timol matter**

9.1 Ahmed Timol and Salim Essop were arrested after the vehicle they were travelling in was stopped and searched by police. Communist leaflets were apparently found in the boot.

9.2 The men were first taken to Newlands police station. After the arrival of Security Branch (SB) investigators they were separated and taken to the SB offices at John Vorster Square, where they were detained.

9.3 Both men were fit and injury free at the time of their arrest.

9.4 A few days later Timol was alleged to have jumped out of the 10th floor window and fallen to his death.

9.5 Numerous pre-death injuries were present on his body.

9.6 At about the same time as Timol's death, the District Surgeon was summoned to the 10th floor of John Vorster Square where he found an unconscious Salim. Salim was taken to hospital in the morning of 26 October 1971. Timol died in the afternoon of Wednesday, 27 October 1971.

9.7 Salim was secretly admitted to hospital and later to a prison hospital where he remained until his first court appearance about a year later. He appeared, together with three others, in a magistrate's court in Johannesburg on 8 March 1972, and was remanded in custody by the magistrate. He appeared, again together with the three, in the Pretoria Supreme Court on 13 June 1972, and was formally charged. His political trial ended on 31 October 1972, when the three others and him, were each sentenced to five years of imprisonment.

9.8 Salim was prosecuted and convicted on terrorism related charges and imprisoned for five years.

10. **The first Inquest**

10.1 Timol's family was represented by Advocates Issy Maisels and George Bizos at the Inquest.

10.2 They disputed the SB version that Timol had been well treated, not assaulted and had spontaneously committed suicide. They contended that he had been tortured and that this had caused his death – either directly or indirectly.

10.3 The SB presented a wall of silence and denied any wrongdoing. They specifically denied that they assaulted or tortured detainees and claimed that they treated detainees well and won their confidence.

10.4 The Magistrate rejected the evidence of pre-death injuries, assaults or torture and found the SB version credible.

11. The Cover-Up

11.1 The police and the State were obliged under law to present all relevant evidence to the inquest court. Salim was a material and important witness but he was deliberately hidden and not produced as a witness. Had he been produced as a witness he would have directly contradicted the SB version and their assertions of kindly treatment. Salim's account of vicious and sustained assault would have been corroborated by conclusive medical evidence.

11.2 Instead he was held incommunicado in secret under security laws. The fact that he was severely injured and had been removed from SB offices in an unconscious state at about the same time as Timol's death was never disclosed. Neither were Salim's medical reports disclosed.

11.3 The torture and assault on Salim contradict the SB version that they treated Timol with care and consideration.

12. Evidence of defeating the Ends of Justice

12.1 We have provided the NDPP with the account by Salim (written by him) of what happened to him and to a lesser degree Timol. Salim will testify that from the moment that he and Timol were separated at Newlands he suffered continual and severe assaults from the SB until he lost consciousness and was admitted to hospital. There is absolutely no reason to conclude that Timol was treated differently.

12.2 At our meeting at the NPA in January, George Bizos related to the Deputy NDPP and to yourself the details of the Timol case – giving a first-hand account of how SB policemen presented a wall of silence, the medical evidence indicating assault on Timol and the failure to present/disclose the Salim evidence. He also highlighted weaknesses and contradictions in the SB version.

12.3 Accordingly, the NDPP has compelling evidence that the SB defeated the ends of justice in the Timol Inquest.

13. Suggested steps

13.1 The following steps are set out below:

13.1.1 make contact with Salim Essop and arrange for his affidavit to be obtained;

13.1.2 obtain the Inquest documents;

13.1.3 cause an affidavit to be obtained from George Bizos (who offered to be a witness at our original meeting with the NDPP staff);

13.1.4 review the important post mortem forensic evidence;

13.1.5 follow up on medical records in respect of Essop;

13.1.6 obtain the record and judgment of the interdict before Judge Margo to restrain further assaults and torture on Essop;

13.1.7 determine who of the original witnesses are still available and their contact details;

13.1.8 determine if there are additional witnesses who were not called during the first inquest and if there are such witnesses cause their affidavits to be recorded;

13.1.9 carry out an in-depth consultation with our client Imtiaz Cajee concerning the information he has.

13.2 At this stage there is no need to re-investigate the entire inquest in order to present a watertight case. It only needs to be demonstrated that the version of the SB was false and the Inquest was corrupted. As we have indicated this can be done through the evidence of Salim and George Bizos.

14. **The Aggett Matter**

14.1 Neil Aggett was one of seventeen persons detained in connection with a list of activist's names found in possession of Barbara Hogan.

14.2 He was detained for several weeks. The initial SB investigating officer could not find anything incriminating concerning Aggett's activities. A young SB Lieutenant, Steven Whitehead (the son of a very senior officer in SB), said he disagreed with this conclusion and asked to be put in charge of Neil Aggett's interrogation. This was acceded to.

14.3 A period of torture and harsh prolonged sleep deprivation interrogations occurred.

14.4 Aggett made complaints of assault and ill treatment to visiting magistrates and fellow detainees during this period. Detective Sergeant Blom recorded his formal affidavit of assault.

14.5 One of the detainees (Maurice Peter Smithers) witnessed an assault on Aggett in the office next door to where he was kept through oblique glass.

14.6 Aggett remarked to one of the detainees that he had been "*broken*" and appeared dejected and miserable.

14.7 That night Aggett apparently hanged himself in his cell using a scarf.

14.8 Medical and other material evidence supported the contention that Aggett had committed suicide.

14.9 As is customary in an unnatural death which involves the authorities (in this case a detainee in the custody of the police) a formal inquest was held to inquire into the cause of death.

14.10 Aggett's family was represented by George Bizos SC and Denis Kuny. They took the position that they believed that Aggett had hanged himself, but that his death was unlawfully induced by the severity of the torture he endured at the hands of the SB – particularly Whitehead.

14.11 Evidence that supported their contention included:

14.11.1 the police records showing the lengthy periods during which Aggett was booked out of the cells for "*investigation*";

14.11.2 the fact that most of the detainees on the Barbara Hogan list said that they had suffered torture at the hands of the SB;

14.11.3 Aggett's formal complaints of abuse and assault;

14.11.4 **a detainee (Maurice Smithers) who said that he had witnessed an assault on Aggett.** Maurice Smithers witnessed an assault on Aggett while another detainee Ismail Mononait said he saw a bruise or mark on Aggett's forehead;

14.11.5 **marks on Neil Aggett's body, reported in the post mortem, which were consistent with assaults.** These marks and injuries were consistent with the injuries that Aggett reported he had sustained to the magistrate and to detective sergeant Blom.

14.12 The SB maintained a wall of silence, denying the assaults and the prolonged periods of interrogations.

14.13 The Inquest Court accepted the SB versions and rejected all the contentions and evidence put forward by the family.

14.14 The full and complete record of the police investigation and inquest is kept by Wits University and is available on-line.

14.15 We have provided you with the following documents in connection with William Smith and Roelof Venter:

14.15.1 **William Smith was a Warrant Officer in the SB and was involved in the interrogations of some of the Barbara Hogan detainees (but not Aggett).**

14.15.1.1 The affidavit he made in 1982 to police investigators denying assaults or torture of the detainees he interrogated. A copy was also provided to you.

14.15.1.2 The transcript of his evidence at the Aggett inquest on 12 October 1982 denying assaults as alleged by Pramanathan Naidoo and others.

14.15.1.3 The affidavit he made in 1997 in support of an amnesty application (which did not go ahead) in which he admitted assaulting Prima Naidoo and others during the Barbra Hogan investigation.

14.15.2 **Roelof Venter was a Lieutenant in the SB and was involved in the interrogations of some of the Barbara Hogan detainees.**

14.15.2.1 The affidavit he made in 1982 to the police investigators denying assaults as alleged by the detainees.

14.15.2.2 The transcript of his evidence at the Aggett inquest in October1982 denying assaults as alleged by Pramanathan Naidoo, Ismail Mononait and others. His evidence is reflected on page 2488 of the record and was given on 12 October 1982.

14.15.2.3 The affidavit he made in 1999 in support of an amnesty application in which he admitted assaulting Prima Naidoo and other during the Barbara Hogan investigation.

14.16 Paul Erasmus was a SB member at John Vorster Square but was not involved in the interrogations or investigation of the Barbra Hogan cases.

14.16.1 He applied for amnesty for a number of matters including the breaking and entry into Aggett's parental home in an effort to find evidence that could support the police version i.e. records that Aggett suffered from depression. In his evidence to the Amnesty Committee he testified that:

14.16.1.1 The SB had bugged George Bizos in order to discover the direction of his cross examination and the evidence he would present on behalf of the family.

14.16.1.2 Whitehead was implicated in the breaking and entry into Aggett's parental home.

14.16.1.3 Top police commanders collaborated in the cover-up of the abuses perpetrated against Aggett as well as the break-in at the home of Aggett's parents.

14.17 The NPA accordingly has *prima facie* evidence (in the form of affidavits and transcripts of evidence under oath) that the SB conspired to and did defeat the ends of justice in the Neil Aggett Inquest.

14.18 George Bizos personally related to the Deputy NDPP and to yourself at our meeting during January 2016 the details of this case He gave a first-hand account of how SB policemen perjured themselves during the Inquest hearing and the effect this perjury had on the outcome of the inquest.

14.19 This evidence set out above demonstrates how the entire inquest process in the Aggett matter was thoroughly corrupted.

15. **Suggested steps**

15.1 We suggest the following steps be taken:

15.1.1 check the veracity of the documents that we have provided to you;

15.1.2 cause an affidavit to be obtained from George Bizos;

15.1.3 check the availability of all the Inquest records and documents and obtain copies;

15.1.4 determine who of the original witnesses are still available and their contact details; and

15.1.5 determine if there are additional, new, witnesses who were not called during the inquest and if there are such witnesses, cause their affidavits to be recorded.

16. In the circumstances we hereby demand that the necessary recommendations to the Minister of Justice in terms of section 17A of the Inquest Act 58 of 1959 to reopen the aforesaid inquests be made by no later than 30 September 2016. Our client's rights are reserved.

Yours faithfully

WEBBER WENTZEL
Moray Hathorn
Partner
Direct tel: +27115305539
Direct fax: +27 11 530 6539
Email: moray.hathorn@webberwentzel.com

CC: The NDPP
skabrahams@npa.gov.za

The DPP (Johannesburg), Adv. Chauke
achauke@npa.gov.za

JA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

SUPPORTING AFFIDAVIT OF PIERS ASHLEY PIGOU

I, the undersigned

PIERS ASHLEY PIGOU

do hereby make oath and state:

SUID-AFRIKAANSE POLISIEDIENS
CSC
2019 -01- 07
BRIXTON
SOUTH AFRICAN POLICE SERVICE

1. I am an adult male residing in Johannesburg. I am the International Crisis Group's Senior Consultant for Southern Africa. Formerly, from 2011 I was Crisis Group's Southern Africa Project Director, overseeing the organisation's research and advocacy activities in South Africa, Zimbabwe, Madagascar and Angola.

2. I hold an M.A. in Southern African Studies from York University and a B.A. (Hons) in Politics from Portsmouth Polytechnic.

3. Before joining the International Crisis Group, I was:

   3.1. the Program Manager at the Foundation for Human Rights,

   3.2. a Senior Associate for Southern Africa at the International Center for Transitional Justice,

   3.3. Director of the South African History Archive,

   3.4. Research and Advocacy Coordinator at the Institute for Democratic Alternatives in South Africa/

   3.5. Researcher at the Center for the Study of Violence and Reconciliation;

   3.6. Researcher at the Community Agency for Social Enquiry;

   3.7. Investigator for the Truth and Reconciliation Commission in South Africa,

   3.8. International Advisor to the Truth-Seeking Division of the East Timorese Truth, Reconciliation and Reception Commission.

SUID-AFRIKAANSE POLISIEDIENS
CSC
2019 -01- 07
BRIXTON
SOUTH AFRICAN POLICE SERVICE

4. I was attached to the investigation unit of the Gauteng office of the Truth and Reconciliation Commission.

5. During 1997 I was asked to investigate the detention and death in custody of Ahmed Timol. I was able to identify and collate records from a range of state and private archives relating to Timol and others arrested during the sweep on activists during 1971. This was a few months before I left the full time employ at the TRC at the end of May 1997.

6. During this period, I spoke with the daughter of Joao Rodrigues, the police officer who, according to official records had been in the room with Timol when he allegedly jumped from the 10th Floor. I had been informed that Rodrigues' daughter has been encouraging her father to engage with the TRC.

7. As a result of this interaction, I was able to locate and speak on the phone with Mr Rodrigues who at the time was working for SanParks. We arranged to meet in Pretoria at the SanPark offices. He indicated when we spoke telephonically that he was willing to discuss the case. Several days later I drove to Pretoria as arranged and met Mr Rodrigues at his place of work.

8. However, at this meeting he was no longer amicable nor was he willing to cooperate. He came across as reticent and insisted that our entire interaction be



recorded with a voice recorder. He was not willing to talk to me about what has happened with Timol and our interaction was concluded rather quickly.

9. I indicated that the TRC needed to hear his version of events directly, and I informed him that I would be advising the TRC to subpoena him in terms of Section 29 of the TRC Act. I subsequently made such a recommendation to the Commission, but most regrettably this was not done.

10. It appeared to me that between the time of my initial telephonic contact with Mr Rodrigues and the time we met, he had either by himself, or as a result of the intervention of another, decided not to cooperate with the TRC.

11. I specifically deny the claim made by Rodrigues that if he had been supplied with the evidentiary materials from the 1972 inquest he would have cooperated with the TRC. When I met with him at his office at SanParks he was completely firm in his view that he wanted nothing to do with the TRC inquiry. This is precisely why I recommended to the TRC that he should be compelled to appear under a subpoena.

12. As far as I am aware Mr Rodrigues never approached the TRC to disclose what he knew about the death of Ahmed Timol.

SUID-AFRIKAANSE POLISIEDIENS
CSC
2019 -01- 07
BRIXTON
SOUTH AFRICAN POLICE SERVICE

SUID-AFRIKAANSE POLISIEDIENS
CSC
2019 -01- 07
BRIXTON
SOUTH AFRICAN POLICE SERVICE



PIERS PIGOU

I certify that the deponent has acknowledged that he knows and understands the content of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and affirmed to before me at Brixton SAPS on this 07 of January 2019 the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

SUID-AFRIKAANSE POLISIEDIENS
CSC
2019 -01- 07
BRIXTON
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS

FULL NAMES: Neo Portia Heroin

DESIGNATION: Constable

ADDRESS: High Str. Brixton JHB

699a

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO 76755/18

PH NO 342

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT that the confirmatory affidavits of Vusumzi Patrick Pikoli, Anton Rossouw Ackermann, Frank Kennan Dutton and Moray Hathorn to the Fourth Respondent's answering affidavit in the main application are hereby delivered.

Dated at **Johannesburg** on this 16th day of January **2019**.

LEGAL RESOURCES CENTRE
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WEBBER WENTZEL
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Fax: +27 11 530 6539
Email:moray.hathorn@webberwentzel.com
Ref: Moray Hathorn
3005789

To:
The Registrar of the above Honourable Court

AND TO:
BEN MINNAAR ATTORNEYS **Service via email**
Attorneys for the Applicant
190 Melt Marais Street
Wonderboom AH x1
Wonderboom
Pretoria
Tel: 082 446 2644
Email: benjaminnaar@gmail.com
Ref: B M 01/10/18

AND TO:
THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS **Service via email**
First Respondent
c/o State Attorney
316 Thabo Sehume Street
Salu Building
Pretoria
Ref: Peter Seleka
Email: pseleka@justice.gov.za
msramaite@npa.gov.za / hzwart@npa.gov.za

AND TO:
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE
Second Respondent
c/o State Attorney
316 Thabo Sehume Street
Salu Building
Pretoria
Ref: Peter Seleka
Email: pseleka@justice.gov.za/

Service via email

THE MINISTER OF POLICE
Third Respondent
c/o State Attorney
316 Thabo Sehume Street
Salu Building
Pretoria
Ref: Peter Seleka
Email: pseleka@justice.gov.za/

Service via email

699d

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa. I am currently a special adviser to the Minister for the State Security Agency. I was the National Director of Public Prosecutions ("**NDPP**") between 1 February 2005 and 23

V.P.
M.R

September 2007.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I have read the answering affidavit of **IMITIAZ AHMED CAJEE** and bear personal knowledge of the factual averments contained therein as far as they relate to me and developments at the National Prosecuting Authority ("**NPA**") while I was the NDPP.

4. I confirm the veracity and essence of the aforesaid affidavit, together with the annexes attached thereto, inso far as they relate to me and the NPA while I was the NDPP.

VUSUMZI PATRICK PIKOLI

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Bezuidenhout Valley on this the 15th day of **January 2019** in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

M.P. Zwane (B.Proc, LLB)
Advocate of the High Court
083 468 1964
Commissioner of Oaths

COMMISSIONER OF OATHS

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

THE MINISTER OF POLICE Third Respondent

IMITIAZ AHMED CAJEE Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

1. I am a senior counsel and a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (the "**NDPP**"). I was the head of the Priority Crimes Litigation Unit ("**PCLU**") from 24 March 2003 until my retirement from the National Prosecuting Authority ("**NPA**") on 31 March 2013.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I have read the answering affidavit of **IMITIAZ AHMED CAJEE** and bear personal knowledge of the factual averments contained therein as far as they relate to me and developments at the NPA while I was the head of the PCLU.

4. I confirm the veracity and essence of the aforesaid affidavit, together with the

annexes attached thereto, insofar far as they relate to me and the NPA while I was the head of the PCLU.

699g

ANTON ROSSOUW ACKERMANN

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Hermanus on this the 14 day of **January 2019** in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS
SYBRAND SMIT
Certified Public Accountant
10 Main Road, Onrus River, Hermanus

699h

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

FRANK KENNAN DUTTON

do hereby make oath and state:

1. I am an International policing and investigation expert and provide expertise on a consultancy basis locally and internationally. I carried out the investigation into the death of Ahmed Timol on behalf of the Timol family.

2. I have played leading roles in complex investigations in South Africa and many other countries. I have 38 years of policing experience in South Africa and I was the first head of the former Directorate of Special Operations (also known as the Scorpions). In 2012, I was awarded the Order of Baobab in Gold by the President of South Africa for my policing work both locally and abroad.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

4. I have read the answering affidavit of **IMITIAZ AHMED CAJEE** and bear personal knowledge of the factual averments contained therein as far as they relate to me.

5. I confirm the veracity and essence of the aforesaid affidavit, together with the annexes attached thereto, insofar as they relate to me.

FRANK KENNAN DUTTON

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Parktown on this the 13th day of **January 2019** in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

ANTI-CORRUPTION INVESTIGATIONS
PRIVATE BAG X1800
SILVERTON 0127
2019 -01- 13
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE

.....COL
H. HEAP
Commissioner of Oaths
Herbert Heap
DPCI ACI Head Office
421 Prebprius Street Pta

699j

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

MORAY HATHORN

do hereby make oath and state:

1. I am a partner at Webber Wentzel attorneys and I head the Pro Bono Practice at the firm. I am the instructing attorney for the Timol family.

699k.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I have read the answering affidavit of **IMITIAZ AHMED CAJEE** and bear personal knowledge of the factual averments contained therein as far as they relate to me.

4. I confirm the veracity and essence of the aforesaid affidavit, together with the annexes attached thereto, insofar as they relate to me.

MORAY HATHORN

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Rosebank on this the 10th day of **January 2019** in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

Thela Makoneta Malotc
15 Sturdee Avenue
Rosebank

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
10 JAN 2019
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/2018

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

REPLYING AFFIDAVIT IRO FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JOAO RODRIGUES

do hereby declare under oath as follows:

1.

1.1. I am an adult pensioner presently residing at 835 Eleventh Avenue, Wonderboom South, Pretoria, Gauteng. I have been residing at the address for the past 54 years.

1.2. The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary, and are both true and correct.

2.

I have read the answering affidavit deposed to on behalf of the Fourth Respondent and wish to indicate, already at this stage, to the Honourable Court that I dispute the correctness of such allegations insofar as these allegations are inconsistent to what I have stated in the founding affidavit. I again confirm the correctness of the allegations contained in the founding affidavit.

AD ANSWERING AFFIDAVIT: FOURTH RESPONDENT:

3.

AD PARAGRAPHS 1 TO 8 THEREOF:

3.1. Apart from denying that all the factual allegations contained in the affidavit are correct in all respects I take note of the further allegations contained in these paragraphs.

3.2. I deny that the reason for not joining Fourth Respondent as a party to the proceedings initially was to exclude the family from participating in the matter. I was advised at the time that the First Respondent, in terms of its obligations in terms of our Constitution, is the party that should represent all alleged victims and/or their family members in proceedings of this nature.

4.

AD PARAGRAPH 9 THEREOF:

4.1. I take note of the motivation for the Fourth Respondent to intervene, but I am advised that it is not necessary to deal with these issues in view of the fact that Fourth Respondent had already been joined as

a party by this Honourable Court. I wish to emphasise that I again deny that I was involved in any interrogation, torture and/or murder of the late Mr Timol ("Timol") and/or any other detainee and/or victim of the apartheid era.

5.

AD PARAGRAPHS 10 TO 20 THEREOF:

5.1. I deny that I was at any stage involved in the acts of torture, murder and/or other heinous acts, either as alleged or at all.

5.2. I agree with the allegation on behalf of the Fourth Respondent that the very State Institutions that the Constitution mandated to give effect to Constitutional compact dismally failed to comply with their obligations in terms of the Constitution. That is indeed the basis of this application.

5.3. I submit that it is not Constitutionally acceptable to allow the First Respondent, the very Institution that failed to comply with their obligations in terms of the Constitution, to proceed with a

prosecution against me that is unfair for the reasons already set out in the founding affidavit.

5.4. In the above regard I am advised and respectfully submit that the seriousness of the offences that the security police committed during that era does not limit the fundamental rights provided for in the Constitution – i.e. the right to a fair trial. There is clearly no limitation in section 35 of the Constitution providing for the fundamental rights only to a certain category of offenders.

5.5. I also deny that my non-participation in the TRC proceedings should have any effect and/or limitation on my rights provided for in the Constitution.

5.6. I deny all further allegations contained in these paragraphs insofar as it is inconsistent with what I have already stated in the founding affidavit.

6.

AD PARAGRAPH 21 THEREOF:

6.1. First Respondent clearly had ample opportunity since the dawn of democracy in 1994 comply with their constitutional obligations towards *inter alia* the Timol family.

6.2. Failure to comply with their obligations and to prosecute the main perpetrators of atrocities, when they were still alive and able to answer to the acquisitions, cannot be rectified by sacrificing my fundamental right of a fair trial.

6.3. It is common cause that the security branch officers such as Gloy, Van Niekerk and Buys were still alive at that stage.

7.

AD PARAGRAPHS 22 TO 24 THEREOF:

7.1. I take note of the allegations contained in these paragraphs but wish to emphasise that I was never involved in the murder and/or torture and/or interrogation of Timol.

7.2. I agree that the Authorities dismally failed to comply with their obligations and that it was indeed an inexcusable lapse as alleged.

7.3. The question, however, remains whether I should now be subjected to an unfair trial because of the inexcusable failure by the relevant authorities.

8.

AD PARAGRAPHS 25 TO 34 THEREOF:

I take note of the allegations contained in these paragraphs. I must, however, emphasised that I have no personal knowledge of these facts and that I have never been involved in the operational activities of the security police. I was only a financial clerk dealing with financial issues of members.

9.

AD PARAGRAPHS 35 TO 39 THEREOF;

I do not wish to deal with the merits of the case at this stage. I wish, however, to emphasise again that it was found based on evidence led

during the second inquest that I was not present at the time when Timol fell to his death at the John Vorster Police Station.

10.

AD PARAGRAPHS 40 TO 46 THEREOF:

10.1. I have already explained to the Honourable Court in the founding affidavit what transpired between me and Pigou of the TRC. I again confirm the correctness of my explanation.

10.2. I take note of the further allegations in these paragraphs but deny that it is relevant for purposes of this application.

11.

AD PARAGRAPHS 47 TO 55 THEREOF:

11.1. This application is based on the fundamental right to a fair trial provided for in the Constitution.

11.2. I am advised and respectfully submit that the TRC process and the question whether a person participated in the process is not relevant

in determining whether the right to a fair trial will be infringed by a Prosecution.

11.3. I further submit that there is no provision in the Constitution that provides for the limitation and/or restriction of fundamental rights due to non-participation in the TRC process.

12.

AD PARAGRAPHS 56 TO 63 THEREOF:

12.1. Although I have no knowledge of the allegations contained in these paragraphs, I take note of the steps taken by the deponent in this regard.

12.2. It appears from the facts set out in these paragraphs that the First Respondent clearly dismally failed to comply with their obligations in terms of the Constitution.

13.

AD PARAGRAPHS 64 TO 65 THEREOF:

13.1. I take note of the allegations relating to the political interference in Prosecutions.

13.2. I am advised and respectfully submit that this illustrates the fact that the failure to proceed with the prosecution against me was apparently based on a deliberate decision by the relevant Authorities. I submit that this is a very material fact that should be considered when evaluating the question whether the First Respondent should now be allowed to prosecute me after almost 50 years. Legal argument will be addressed to the Honourable Court at the hearing of this matter to the effect that this is clearly an example where First Respondent should not be allowed to infringe my fundamental right to a fair trial under circumstances where the cause of the extreme delay was a deliberate decision by the First Respondent and the relevant Authorities.

14.

AD PARAGRAPHS 66 TO 69 THEREOF:

I take note of the steps taken by the deponent as set out in these paragraphs. I have no personal knowledge of these facts.

15.

AD PARAGRAPHS 70 TO 73 THEREOF:

15.1. I take note of the summary of the findings by the Honourable Judge in the 2017 inquest. The judgment is before this Honourable Court and speaks for itself.

15.2. It is significant that the deponent himself refers to the fact that the Court found that my involvement related to the contradictory statements that I have made and that I *prima facie* became an accessory after the fact. It is of course common cause that this offence had prescribed in terms of the Criminal Procedure Act.

15.3. It is for these very reasons that I submitted in the founding affidavit that the First Respondent's decision to prosecute me on a charge of murder is without any factual basis.

16.

AD PARAGRAPHS 74 TO 76 THEREOF:

16.1. I do not understand what the deponent means by alleging that he brings this application not only in his own interests but also in the interest of his family. The objective facts are that the Fourth Respondent actually opposes my application.

16.2. I deny that it is in the National interest that I be prosecuted on a charge of murder under the circumstances already set out in the founding affidavit.

17.

AD PARAGRAPHS 77 TO 80 THEREOF:

I take note of the summary of the application as set out in these paragraphs. I refer the Honourable Court to the application papers in order to evaluate what the basis of the application indeed is.

18.

AD PARAGRAPH 81 THEREOF:

I take note of the evaluation by the deponent of the legal position in considering applications of this nature.

19.

AD PARAGRAPH 82 THEREOF:

I take note of the allegations contained in this paragraph. I am, however, aware of various cases where members of the Police, including the Security Branch, were indeed prosecuted for criminal conduct during the period before 1994.

20.

AD PARAGRAPH 83 THEREOF:

I deny that the TRC process can provide an explanation for the deliberate failure by the First Respondent to comply with its obligations in terms of its mandate. I take note of the allegation that the failure by the First Respondent to explain the delay in this period is conspicuous if not downright suspicious. I agree that it is inexcusable that the First and/or Second Respondents did not even attempt to explain the delay since 1994,

more so under circumstances where members of the Timol family had various requests addressed to the First Respondent in this regard.

21.

AD PARAGRAPHS 84 TO 94 THEREOF:

21.1. I take note of the allegations relating to the political interference in prosecutions after 1994.

21.2. There is no suggestion that I was involved in this deliberate decision by the relevant authorities not to institute prosecutions.

21.3. I, however, submit that this conduct by the Authorities cannot and should not have the effect of limiting my fundamental right to a fair trial.

21.4. I note with interest that it is correctly stated that the real decisionmakers behind unlawful conduct have not been prosecuted but that only foot soldiers who acted at the behest of Generals and the politicians are being prosecuted. This is clearly what the First Respondent attempts to do with me at this stage.

22.

AD PARAGRAPHS 95 TO 98 THEREOF:

22.1. I again take note of the allegations of the complete failure by the authorities, including the First Respondent to comply with their obligations in terms of the Constitution.

22.2. I again emphasise that this issue is important in determining the question whether the First Respondent should be allowed to prosecute me almost 50 years after the alleged incident.

22.3. I deny again that my non-participation in the TRC process should be considered as a factor to limit my fundamental right to a fair trial as provided for in our Constitution.

23.

AD PARAGRAPHS 99 TO 100 THEREOF:

I take note of the examples of prosecutions notwithstanding the fact that a considerable time lapsed after the alleged crimes. I, however, submit that

these examples are clearly distinguishable from the present case. I refer *inter alia* to the following:

23.1. The first example relates to a sexual crime against children. The principles set for offences of this nature are clearly different from the present case.

23.2. In the other examples the accused persons were clearly the cause of the delay. It appears to be common cause in this case that I was not the cause of the delay, either directly or indirectly.

24.

AD PARAGRAPHS 101 TO 103 THEREOF:

24.1. Although I do not dispute that society demands that accused persons stand trial on serious charges such as murder, I submit that such demand can never have the effect of destroying fundamental rights provided for in the Constitution.

24.2. It should also be emphasised that this Court already in the second inquest found that I was not involved in the murder of Timol.

24.3. I therefore deny that it can ever be suggested that it would be fair to prosecute me on a charge of murder under the relevant circumstances.

25.

AD PARAGRAPHS 104 TO 105 THEREOF:

I deny that the issues raised in these paragraphs are relevant for purposes of determining the fairness of the proceedings against me. I refer the Honourable Court to what I have already stated in this regard hereinbefore.

26.

AD PARAGRAPHS 106 TO 109 THEREOF:

26.1. The bases for the allegations in these paragraphs are clearly wrong. There is no suggestion that I at any stage attempted to evade justice for decades.

26.2. It is important to note that this deponent himself stated in no uncertain terms that the relevant authorities are clearly to be blamed for the inexcusable delay in proceeding with the judicial process in

this matter. I have not been blamed, clearly correctly so, for this delay.

26.3. I again confirm that these proceedings already had an will have in future a very detrimental effect on my health.

27.

AD PARAGRAPHS 111 AND 112 THEREOF:

27.1. I deny that the approached followed in these paragraphs is correct. I refer to what I have stated with reference to *inter alia* the TRC process and my non-participation in the process hereinbefore.

27.2. I further deny that the circumstances relied on should only have a bearing of on the sentence should I be found guilty. The main question is whether I will have a fair trial under the relevant circumstances.

28.

AD PARAGRAPH 113 THEREOF:

I agree that a charge of murder is very serious. I, however, deny that there is any evidence that I committed murder. The contrary is true and I refer the Honourable Court to what I have already stated in this regard above. I further again emphasise that the seriousness of the crime is no basis for the limitation of the fundamental right involved.

29.

AD PARAGRAPH 114 THEREOF:

I deny the allegations contained in this paragraph and refer the Honourable Court to what I have already stated hereinbefore.

30.

AD PARAGRAPH 115 THEREOF:

I agree that the interest of justice is a material factor to be taken in consideration in this application. I, however, submit that it can never be in the interest of justice to continue with an unfair trial because of the seriousness of the allegations. I refer the Honourable Court to what I have already stated in this regard hereinbefore.

31.

AD PARAGRAPHS 117 AND 118 THEREOF:

31.1. I refer to what I have already stated in this regard hereinbefore.

31.2. I am advised that it was the proper procedure to institute this application in the Pretoria High Court. The reason obviously being that the First, Second and Third Respondents are domiciled within the area of jurisdiction of the Pretoria High Court.

32.

AD PARAGRAPH 119 THEREOF:

I submit that a proper case has been made in the founding papers for the relief sought. I deny the allegations in these paragraphs insofar as it is inconsistent with what I have stated in the founding affidavit and hereinbefore.

33.

AD PARAGRAPH 121 THEREOF:

33.1. It is significant to mention that the negative credibility findings against me was made on the basis that it was found that I was not involved nor present at the time of the death of Timol. It was further found that I was only involved to provide a cover version for the perpetrators in the death of Timol.

33.2. This can clearly not justify a prosecution on a charge of murder against me.

34.

AD PARAGRAPH 122 THEREOF:

34.1. I deny the correctness of the interpretation of section 257 of the CPA. However, I am advised that it is not necessary to burden these papers in this regard. The fact is that it is common cause that any prosecution in terms of section 257 of the CPA has prescribed at this stage.

34.2. While it may be correct that I can be held liable for pursuing a coverup during the 2017 inquest if it is to be found that I was indeed pursuing the coverup. This, however, can clearly not justify a prosecution on a charge of murder. I refer the Honourable Court to what I have already stated hereinbefore as well as in the founding papers in this regard.

35.

AD PARAGRAPHS 123 TO 128 THEREOF:

35.1. I deny the allegations contained in these paragraphs and refer the Honourable Court to the relevant judgment that speaks for itself.

35.2. I wish not to deal with the merits of the case at this stage but further wish to submit that the allegations in these paragraphs clearly do not provide a basis for a charge of murder against me.

35.3. I deny that I was ever involved in any wrongdoing against Timol and/or any other detainee.

35.4. I again confirm the correctness of the allegations contained in the founding affidavit and deny any factual allegation that is not consistent with what I have stated in the founding affidavit.

36.

AD PARAGRAPH 129 THEREOF:

I maintain that I indicated to my legal representatives at all relevant times that I was willing to appear before the learned Mothle J.

37.

AD PARAGRAPH 130 THEREOF:

37.1. I take note of these allegations and deny that I at any stage attempted to mislead this Honourable Court.

37.2. I submit that these allegations are not relevant for purposes of determining the merit of this application. It does not deal with the question whether I will have a fair trial under the relevant circumstances. It further does not provide an explanation for the extreme long and deliberate delay in the proceedings caused by the authorities including the First Respondent.

38.

AD PARAGRAPH 131 THEREOF:

I maintain with the allegations set out in the founding affidavit in this regard. I wish to emphasise that I do not blame the Honourable Mothle J for any improper conduct from his side. My criticism was levelled and is still levelled against the First Respondent in this regard.

39.

AD PARAGRAPHS 132 AND 133 THEREOF:

I maintain the correctness of the allegations contained in the founding affidavit.

40.

AD PARAGRAPH 134 THEREOF:

I submit that the issues raised in these paragraphs do not detract from my case to the effect that the present proceedings will infringe my right to a fair trial. I therefore maintain with what I have already stated in the founding affidavit in this regard.

41.

AD PARAGRAPH 135 THEREOF:

I deny the correctness of the allegations in these paragraphs and further submit that these allegations do not and cannot have the effect to limit my right to a fair trial.

42.

AD PARAGRAPHS 136 TO 137 THEREOF:

I maintain that the allegations contained in the founding affidavit are correct and deny any allegation in these paragraphs insofar as it is not consistent with what I have stated in the founding affidavit.

43.

AD PARAGRAPH 138 THEREOF:

I am advised that the approach by the deponent as set out in these paragraphs is wrong. It is clearly not a proper approach to suggest that I can ask for a discharge at the close of the State's case. That would clearly render the provision for a fair trial as set out in section 35 of the Constitution without any value and/or consequence. Clearly the First

Respondent should not be allowed to proceed with a trial against me if such trial would result in an unfair trial against me.

44.

AD PARAGRAPH 139 THEREOF:

I maintain that a proper case has been made out in the founding papers and beg the Honourable Court for an order in terms of the notice of motion.

45.

AD PARAGRAPHS 141 TO 143 THEREOF:

45.1. I agree that it is absolutely conspicuous that no explanation is provided by the First Respondent for the total inaction of the First Respondent, not only since 1994 but for the full period since the death of Timol.

45.2. I do not agree that section 35(3)(d) of the Constitution refers only to the period between the issuing of an indictment and the commencement of a trial. Legal argument will be addressed to the Honourable Court at the hearing of this application in this regard.

45.3. I fully agree with the further allegations by the deponent relating to the complete failure of the First Respondent to explain its inaction for the period mentioned.

45.4. I further submit that it is totally unfair to charge me now on a count of murder against all available evidence for the reason that I am the only member of the Security Branch that is still alive.

46.

AD PARAGRAPH 144 THEREOF:

I take note of the allegations contained in these paragraphs and it is clear that First Respondent attempted to mislead the Honourable Court in this regard.

47.

AD PARAGRAPHS 147 AND 148 THEREOF:

I take note of the allegations contained in these paragraphs.

48.

AD PARAGRAPHS 149 TO 151 THEREOF:

I deny that Fourth Respondent is entitled to reply to my replying affidavit relating to First Respondent's answering affidavit.

49.

AD PARAGRAPHS 152 TO 153 THEREOF:

I deny that the Fourth Respondent is entitled to the costs of this application even if the application is unsuccessful. There was clearly no reason for the Fourth Respondent to join the proceedings. Legal argument will be addressed to the Honourable Court at the hearing of this application on this issue.

50.

AD PARAGRAPHS 154 TO 155 THEREOF:

I deny that Fourth Respondent demonstrated that it would not be in the interest of justice to grant my application. I therefore maintain that I am entitle to an order in terms of the notice of motion.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 15 day of JANUARY 2019 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

COMMISSIONER OF OATHS

FULL NAMES: Rosetta Samuel Thamela
BUSINESS ADDRESS: 586 17TH Avenue Rietfontein
AREA: PRETORIA MOOT
DESIGNATION: CONSTABLE

SUID-AFRIKAANSE POLISIEDIENS
HUMAN RESOURCE MANAGEMENT
2019 -01- 15
PRETORIA MOOT
SOUTH AFRICAN POLICE SERVICE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMTIAZ AHMED CAJEE	Fourth Respondent

SUPPLEMENTARY AFFIDAVIT

I, the undersigned

IMTIAZ AHMED CAJEE

do hereby make oath and state that:

1 I am the nephew of the late Ahmed Timol. I am the fourth respondent in this matter. The facts contained herein are, save where otherwise stated or appears from the context, within my own personal knowledge and belief, and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I accept as correct.

2 On 8 January 2019, I deposed to an affidavit opposing the application brought by the accused seeking a permanent stay and the withdrawal of the criminal proceedings in respect of the charge of murdering Timol.

3 Events have arisen subsequent to the filing of my answering affidavit that I could not foresee, which I submit are necessary for the proper adjudication of the present matter. I depose to this affidavit to draw these facts to the attention of this Court. I submit that the interests of justice favour permitting this further affidavit in terms of Uniform Rule 6(5)(e).

4 My answering affidavit placed evidence before this Court of institutional capture and political interference at the highest level in the first respondent ("**NPA**") with the singular aim of enabling the perpetrators of so-called apartheid era crimes to evade justice, including:

4.1 A secret government report that explored ways of avoiding the State's responsibilities to prosecute offenders denied amnesty by the TRC or who had not applied for amnesty.

4.2 An affidavit deposed to by former NDPP, Advocate Vusumzi Patrick Pikoli describing how the former NDPP was subjected to political pressure from the highest levels to abandon TRC cases. When Adv Pikoli decided to proceed with prosecuting one such case he was suspended by President Mbeki on 23 September 2007.

4.3 An affidavit deposed to by former Special Director of Public Prosecutions in the office of the NDPP and former head of the PCLU, Advocate Anton

Rossouw Ackermann SC detailing how he was stopped from pursuing the investigation and prosecution of TRC cases. Following Adv Pikoli's suspension, Adv Ackermann SC was relieved of his duties in relation to TRC cases with immediate effect.

4.4 A secret memorandum authored by Adv Pikoli concluding that there had been improper interference in relation to TRC cases that obstructed their progress and impinged on his conscience and oath of office.

5 Against the backdrop of these unrefuted allegations of gross political interference, it became clear when reading the NPA's affidavit that it had inexplicably failed to explain the delay period between the committal of the crime and the trial date, especially the period post the TRC and its amnesty process.

6 On 15 January 2019, I was interviewed on Radio 702 by Ms Joanne Joseph.

6.1 In this interview I called upon President Cyril Ramaphosa to open a commission of inquiry into the NPA's failure to prosecute TRC cases.

6.2 I pointed out that the Priority Crimes Litigation Unit of the NPA had only taken steps in a handful of the more than 300 TRC cases that were handed over to the NPA by the TRC for investigation with a view to prosecute. The reason for this frightening lack of progress was that "*there was political interference that prevented them from investigating the TRC cases*" with the effect that "*these cases have been blocked for a number of years*".

7 A copy of the transcript of my aforesaid radio interview can be provided on request.

8 The following day, on 16 January 2019, the NPA's spokesperson, Luvuyo Mfaku and a spokesperson for the third respondent ("**Minister of Police**"), Hangwani Mulaudzi, were interviewed on Radio 702 by Ms Joseph to exercise their "*right of reply*" to my interview of 15 January 2019. I attach a copy of the transcript marked "**IAC1**".

8.1 During the interview, the NPA's spokesperson was asked by Ms Joseph to explain why the NPA had done so little in respect of the 300 cases that the TRC had recommended for prosecution.

8.2 In response, Mr Mfaku indicated to Ms Josephs that

> *"[O]ne of the lead prosecutors Chris Macadam who has been seized with the matters from inception has actually filed and deposed an affidavit outlining all the delays that the essence of the delay is the investigative capacity has never been there."* (My emphasis).

8.3 Ms Josephs then put it to Mr Mfaku that the affidavits submitted by Adv Pikoli and Adv Ackerman SC before this Court alleged that former Justice Minister Brigitte Mabandla and late former police commissioner Jackie Selebi, amongst others, "*actively interfered in investigations which hampered them*".

8.4 In response, Mr Mfaku stated as follows:

> *"I will never contest that. Remember Adv Pikoli was the head of NPA and Ackerman was the head of priority crime unit which was since with the investigation of the, the guiding of the investigations in respect of the TRC matters. If they are saying that there was that*

interference then they have exclusive knowledge of what was happening. I would never contest that." (My emphasis).

8.5 Mr Mfaku also indicated that Adv MacAdam had confirmed that some 300 cases had indeed been referred by the TRC to the NPA for prosecution and that Adv MacAdam had been "*guiding investigations in respect of TRC matters from the beginning*".

9 To date no such affidavit has been filed. The NPA was ordered by this Honourable Court to file its answering affidavits on 14 November 2018, which was then extended to 27 November 2018. All further answering affidavits had to be filed on 8 January 2019 and replying affidavits by 15 January 2019.

10 The comments of the NPA spokesperson raise serious questions as to why the NPA has held back the affidavit of Adv MacAdam, particularly in the light of the following factors:

10.1 Adv MacAdam is a senior prosecutor who has been guiding investigations in TRC matters from the beginning and clearly possesses the necessary knowledge to explain the delay period.

10.2 The NPA's spokesperson has publicly stated that Adv MacAdam has deposed to an affidavit explaining the delay period that is clearly relevant to the present proceedings.

10.3 The reference in the affidavit of Adv T P Pretorius SC, that he "*consulted with Adv Macadam*" and confirms an affidavit deposed to by Adv MacAdam that he attaches as Annex JPP5".

10.4 However, "Annex JPP5" is not an affidavit deposed to by Adv MacAdam. Nor does it concern delay. It is an internal memorandum analysing the legal framework applicable to inquests.

10.5 The testimony of Adv MacAdam at the Mokgoro Commission of Inquiry on 22 January 2019, as reported in the media, that cases involving political killings were dropped by the NPA because of political pressure. A news article titled '*NPA official tells #MokgoroInquiry cases were dropped due to political pressure*' dated 22 January 2019 by Botho Molosankwe is annexed hereto, marked "**IAC2**".

11 Accordingly, I call on the first respondent to:

11.1 take this Court into its confidence and file the affidavit of Adv MacAdam which explains the pre-prosecution delay period; alternatively

11.2 deny under oath the existence of an affidavit deposed to Adv MacAdam which explains the pre-prosecution delay period.

12 If the first respondent fails to do so, I respectfully submit that such conduct, could reasonably be construed as obstructing the administration of justice.

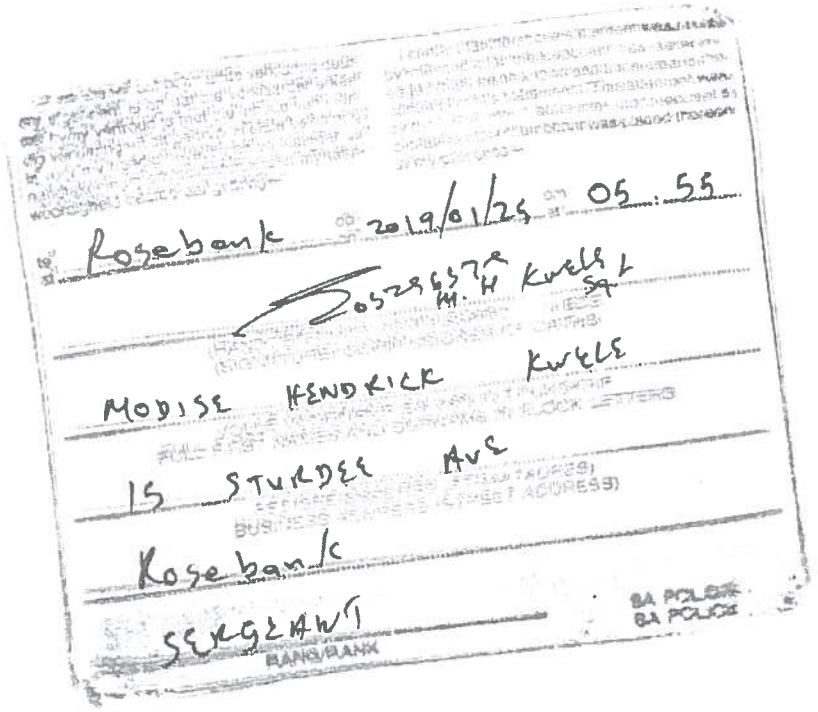
IKajee

IMITIAZ AHMED CAJEE

I certify that the deponent has acknowledged that he knows and understands the content of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and affirmed to before me at Rosebank on this 25 of January 2019, the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

0529637-9
M. H Kwele
Sgt

COMMISSIONER OF OATHS



"IAC1"

CASE NUMBER: 76755/2018
JOAO RODRIGUES VS NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA & 3 OTHERS

RADIO 702 PODCASTS

INTERVIEW: NPA BLAMED FOR LACK OF PROGRESS IN PROSECUTING APARTHEID CRIMES

DATE: 16 JANUARY 2019

JOANNE JOSEPH: Let's bring you this story now, you may have heard our interview yesterday with anti-apartheid fighter Ahmed Timol's nephew Imtiaz Cajee. He wants the president to institute an inquiry into why most of the 300 cases the Truth and Reconciliation Commission recommend be investigated haven't been touched. He says the NPA's reluctance to look into these cases should be probed especially because of political interference may have been the cause. We're giving the NPA right of reply this evening to Cajee's request spokesperson Luvuyo Mfaku joining us on the line now. Luvuyo good evening to you and lovely to have you on the program. So how many of the 300 cases the NPA should perhaps have been prosecuting have actually been taken to court.

LUVUYO MFAKU: Good evening Joanne. At this stage we've got about 4 matters emanating from that TRC list that are before court and the

Hawks have provided investigative capacity to ensure that other matters are actually investigated and advised by the head of the Priority Crimes Litigation Unit who've helped the prosecutors who are giving the necessary guidance to the Hawks investigators that at this stage they are looking at 24 matters that are at an advanced stage that are being investigated by the Hawks and they are giving the necessary guidance.

JOANNE JOSEPH: 4 matters out of 300 that were recommended for prosecution, how's that happened Luvuyo?

LUVUYO MFAKU: Let me outline the fact that the NPA cannot institute criminal proceedings on the basis of an investigation by the TRC. What the TRC did investigated and said these people, some of them never need full disclosure other they denied amnesty and therefore the NPA must establish whether there is a, they warrant a criminal investigation then they look at those dockets and those files and then they are forwarded to the police for investigation. One of the lead prosecutors, Chris MacAdam, who has been seized with the matters from inception has actually filed and deposed an affidavit outlining all the delays that the essence of the delay is the investigative capacity has never been there.

JOANNE JOSEPH: Alright so in other words, the intention was to pursue these cases but you just didn't have enough hands on deck to be able to do so?

LUVUYO MFAKU: That is correct. As a prosecutor you cannot investigate and prosecute they have separation of responsibility, hence the DSO commonly known as the Scorpions has disbanded is because the NPA cannot have an investigative and prosececutorial capacity in line with the constitution. So the investigative element of it is it requires the police, therefore prosecutors are saying we always had a team of prosecutors to give the necessary guidance but within that in terms of over the years in terms of they dedicated investigative capacity to look at these matters.

JOANNE JOSEPH: Alright so Luvuyo you make some important points here about police investigations let's bring into the conversation Hangwani Mulaudzi who is spokesperson for the Hawks. Hangwani good evening to you and thank you indeed for your time as well to discuss the story with us. 4 matters out of 300, I mean that suggests to me that very little effort has been put into actually investigating these matters.

HANGWANI M: Joanne, good evening and thank you for giving us an opportunity as well. Look Joanne, like my colleague said there, Luvuyo, these cases, we had to look, we had to get guidance from the NPA and as such there are some cases that are being looked at, but so far we are dealing with about 36 dockets that comes out of the referral from the NPA and off course there are others that are already in court so that does not necessarily mean that there's nothing being done. Out of those cases some

of them that have difficulties that we are also experiencing in terms of families that are not co-operating they do not want even suggest to open some of those cases, some had to be, we had to talk to them in terms of giving them guidance and trying to convince them to co-operate. There are documents that are also missing we are also going through the archives of the TRC to be able to get those documents, so it's a tedious job that we are facing does not necessarily mean that everything that we are looking for is there. So we have a team of about 15 investigators that have been assisting in this investigation, so they are working full-steam in terms of making sure that these cases are getting priority. We also have some witnesses that's overseas, we have already taken some statements from them. So it's a tedious job it's not like, you know some people has also relocated so there is a lot of work that needs to be done.

JOANNE JOSEPH: You know it's, I'm listening to what you're saying and I think you make some very good points about the limitations that make your job extremely difficult in these cases. But are you saying, just to pick up on one of your earlier points, that families who are looking for, or who should be looking for closure, who should be looking for justice perhaps in these unresolved cases, are actually resistant to having them investigated?

HANGWANI M: Of course, that is one of the challenges that we are facing because...

JOANNE JOSEPH: Why, what reasons do they give you Hangwani?

HANGWANI M: Well they say they have moved on you know they have moved on and I think went to the TRC processes, but like my learned friend said, we are given a docket, it is not our responsibility to take decisions on those ones, our job is to investigate and if we are getting resistance in that regard we go back to the NPA and they give us advice as to how we can be able to deal with it. So it's not easy, you know, it's not like people would want, if you are dealing with a docket, they would say now let's go ahead, but some that are the families actually not taking it lightly, I mean they don't want to actually [indistinct] investigation been done.

JOANNE JOSEPH: Alright. I want to ask you as well about capacity and I know that with 15 people you're probably very very stretched at looking, if you have to look at as many as 300 cases, however, I have witnessed the work of people like Madeleine Fullard and her team, the missing person's task team at the NPA. They're four or five people. They do all of the research, the investigation, every aspect of it, the exhumation of the bodies, the location of the bodies, the reburial of the bodies, that tiny team, because they are so committed and so sufficient managed to get so much done. Now over a 1000 people are estimated to have disappeared, Madeleine and her team have found a 100 of those bodies as far as I know, just over a 100. You have a team of 15, a stretched team no doubt, but a team of 15 people and you are looking at 300 cases, could you not be a little bit more efficient and competent in the task that's been set for you?

HANGWANI M: Well we are being competent, you know that's why I'm saying that people would think that nothing's been done, there is a lot of work that needs to be done. Take for instance, we are talking about cases that have happened 20, 30 years ago. Where will you get the documents in that regard? There are some documents that are even, they are missing, you know the archives that we have to go through we have to do our own, what you call it, affidavits so it's not as easy as that. It's not like that there is nothing that is been done. There is a lot of work that is been done and we got a special team, it's not a task team, you rightfully say, we've got the crimes against [indistinct] that has been given that responsibility to deal with these cases. [indistinct] Mahlangu and his team, they are, as I said, they are working full steam. It is unfortunate that some of these cases will go on to get all these hiccups because of the issues of people who have already passed away or people who are reluctant to co-operate with the investigations. The commendation that I have been talking about that is missing that we now have to search for it in other archives who also need to go back and speak to former members of the TRC if they can be able to assist with whatever information. So it's not like people are sitting in offices. These things they have them all over the nine provinces.

JOANNE JOSEPH: Yes I understand that and that is why I used the NPA task team as an example, because they are facing the same challenges

sometimes more challenges than you are. And that's why I thought it is a fair comparison of effort and success rate.

HANGWANI M: I think it is a bit unfair to compare us because we are dealing with investigations you know that is where now the core of these things will be finalised until such time we are have to take it back to the NPA and I said we've got people that are sitting overseas. We have to search for those people, because some of them we don't even know where they are and hence the result those are the delays. It does not necessarily mean that there's nothing that is been done.

JOANNE JOSEPH: Alright can I just ask you one last question which I'm also going to put to Luvuyo Mfaku. Has there, in any, throughout the years of investigation that you've been involved in, has there ever been any effort by political entities to scupper your investigations into these apartheid cases?

HANGWANI M: I don't remember because I don't, I don't even think that will ever happen. We are a political, we don't confine ourselves to any political beliefs, our job is to investigate and I don't think it's even, I heard that there are people who are making those allegations and if they've got any any proof to that effect, they are more than welcome to bring it to the public space, but .....

JOANNE JOSEPH: Alright it is in the public space in the form of affidavits from Vusi Pikoli and Anton Ackerman.

HANGWANI M: Well I don't know where it is coming from and I don't want to speculate on things that are not.....

JOANNE JOSEPH: No no no, it is not speculation. You should go and read it actually, those affidavits are really interesting. They are publicly available.

HANGWANI M: Ja I'm talking on behalf of what I'm saying now, I haven't seen those documents hence I am saying, that's why I'm saying speculation. So that is something, there is no that thing that I know of that revolves us in any political interference.

JOANNE JOSEPH: Alright. Thank you very much for your time Hangwani. Let's go back to Luvuyo from the NPA for a moment here. I just want to pick up on that one point Luvuyo. These allegations contained in affidavits submitted in Imtiaz Cajee's court papers saying Vusi Pikoli and Anton Ackerman are alleging that former justice minister Brigitte Mabandla and late former police commissioner Jackie Selebi actively interfered in investigations which hampered them. Is that true?

LUVUYO MFAKU: I will never contest that. Remember Adv Pikoli was the head of NPA and Ackerman was the head of priority crime unit which was since with the investigation of the, the guiding of the investigations in respect of the TRC matters. If they are saying that there was that interference then they have exclusive knowledge of what was happening. I would never contest that. But what I can assure you after their tenor when Shaun Abrahams took over he actually engaged with the head of the Hawks to ensure that they dedicated capacity of investigators that are solely dedicated to dealing with TRC matters. You have

alluded to how the TRC I mean the commission task team operates which is under [indistinct] as well, but the difference is that, they've got investigators researches who are dedicated, they do not have other responsibilities, you get an investigating officer who work on the TRC cases, who work on other matters so they, their plates are full.

JOANNE JOSEPH: Well that's clearly a problem with the way it was configured. But Luvuyo I just want to go back to this original question of 300 cases. Do you know of a list that was handed over from the TRC containing a list of 300 cases that could either be investigated or prosecuted, that number 300, is it accurate?

LUVUYO MFAKU: I, when this thing came up I engaged with Chris MacAdam, he actually, he confirmed the figure of 300 or more that was forward to the NPA which in turn referred to the police for investigation.

JOANNE JOSEPH: Sorry I didn't quite hear the name, who gave you that information?

LUVUYO MFAKU: Chris MacAdam who have been, with guiding investigations in respect of TRC matters from the beginning.

JOANNE JOSEPH: Right Luvuyo thank you for making the time to speak to us, Hangwani Mulaudzi, spokesperson of the Hawks thank you similarly. Great speaking to the both of you.

"IAC2"



IOL

NPA official tells #MokgoroInquiry cases were dropped due to political pressure

BOTHO MOLOSANKWE 2 days ago



© Provided by Independent Media Retired Constitutional Court Justice Yvonne Mokgoro (middle) and her panelists advocate Kgomotso Moroka (left) and advocate Thenjiwe Vilakazi (right). Photo: Brenda Masilela / ANA

Pretoria - A senior National Prosecuting Authority (NPA) official has revealed that there were instances where they were forced to drop some of the cases they were working on because of political pressure.

Senior deputy Director of Public Prosecutions (DPP) Advocate Chris MacAdam revealed this on Tuesday on the second day of the commission of inquiry into the fitness to hold office of NPA top officials Advocate Nomgcobo Jiba as well as Advocate Lawrence Mrwebi.

Jiba, deputy National Director for Public Prosecutions (NDPP), and Mrwebi, special director of public prosecutions, are currently on suspension.

MacAdam's revelations came after the commission chair, retired Constitutional Court Justice Yvonne Mokgoro, asked him if there had been times when prosecutors had to decide whether to investigate or not due to either economic or political pressure.

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MacAdam said he "certainly" experienced that when he was in KwaZulu-Natal at the time the NPA was probing political killings.

He said as soon as they would start an investigation targeting a particular politician, the former NDPP, Shaun Abrahams, would call and say they had to drop the case because the leader of the party had ordered that the investigation be halted.

In some instances, he said, prosecutors would also be accused of being politically biased and only pursuing a prosecution just to target certain politicians.

The commission continues.

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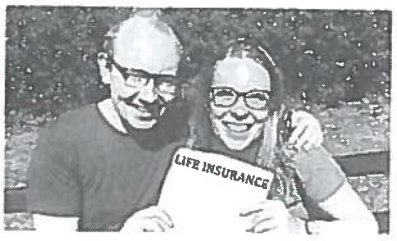
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IN THE HIGH COURT OF PRETORIA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	**APPLICANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	**1ST RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**2ND RESPONDENT**
THE MINISTER OF POLICE	**3RD RESPONDENT**
IMITIAZ AHMED CAJEE	**4TH RESPONDENT**

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IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

MINISTER OF JUSTICE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

IMITIAZ AHMED CAJEE **FOURTH RESPONDENT**

FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below.

1 INTRODUCTION

1.1 I am an adult and I am employed by the National Prosecuting Authority, herein represented by the first respondent. I have already deposed to the first respondent's answering affidavit and remain duly authorized to place the evidence contained herein before the Court on behalf of the first respondent.

1.2 Unless the context indicates otherwise, the contents of this supplementary answering affidavit fall within my knowledge and they are true and correct. In some respects, my knowledge of the contents hereof is derived from the documents to which I also refer herein. I believe that the contents of such documents are true and correct when regard is had to the source of such documents.

1.3 The purpose of this supplementary answering affidavit is to deal with the contents of the fourth respondent's answering affidavit and supplementary affidavit.

1.4 I have considered the fourth respondent's answering affidavit and I reply thereto below to the extent that it is necessary to show that the first respondent is not responsible for the delays in prosecuting the applicant and that the delays complained of do not justify the relief which the applicant seeks.

1.5 I have also considered the contents of the fourth respondent's supplementary affidavit in which is attached an uncertified transcript of what purports to be an interview conducted with a radio station. This supplementary affidavit is irrelevant and serves no purpose in these proceedings and was filed with an intention to paint the National Prosecuting Authority and the South African Police in a negative light. I do not admit the authenticity of the transcript attached to this supplementary affidavit and I am not going to respond thereto.

2 THE DELAYS

2.1 The fourth respondent filed an answering affidavit to oppose the relief which the applicant seeks in this application. This affidavit, however, reads like a supporting affidavit intended to boost the applicant's case and I have no doubt that the applicant will rely on it to support his case.

2.2 In such answering affidavit, the fourth respondent also seeks to tell the Court what caused the delays in instituting the criminal proceedings which are sought to be stayed permanently by the applicant. The only issue which the first respondent takes with the fourth respondent's approach is that he seeks to blame the National Prosecuting Authority and the first respondent for such delays.

2.3 I strongly deny that the first respondent is responsible for the delays upon which the fourth respondent seeks to rely. Even on the evidence upon

which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others.

2.4 Even if it may be found that the first respondent is responsible for the delays, which I deny, the delays and the first respondent's conduct is not of such a nature that it justifies the permanent stay of the criminal proceedings when regard is had to the following:

2.4.1 the nature of the criminal offence with which the applicant is charged;

2.4.2 the circumstances under which Mr. Timol died;

2.4.3 the fact that the fourth respondent himself says that the National Prosecuting Authority was subjected to severe political pressure not to take urgent steps to prosecute people such as the applicant;

2.4.4 the fact that the interests of justice require the Court to refuse the permanent stay sought by the applicant; and

2.4.5 the fact that the National Prosecuting Authority and its Priority Crimes Litigation Unit which was responsible for the prosecution of TRC matters since 2003 always wanted to have these cases investigated and prosecuted.

2.5 It is not entirely clear from the fourth respondent's answering affidavit as to what he seeks to achieve by blaming the first respondent when on the

other hand, he says that the first respondent was prevented from prosecuting by political office bearers.

2.6 Mr. Timol died in October 1971. An inquest which was conducted thereafter did not result in any criminal prosecution.

2.7 In paragraph 82 of his answering affidavit, the fourth respondent seems to accept that the circumstances around Mr. Timol's murder were covered up by the then government of the Republic of South Africa between 1971 and 1994 and that this cover up "*naturally explains*" the inaction during that period.

2.8 It is surprising that the fourth respondent does not take issue with the people responsible for the cover-up and does not seek any punishment against them. He, however, seeks to lobby for an inquiry to be conducted in relation to certain officials of the first respondent, which officials he accepts were subjected to severe political constraints and interference. It would appear from his answering affidavit that this is indeed his sole motive of seeking to blame the first respondent for the delays in prosecuting the applicant even though at the end he says that the delays in prosecuting the applicant do not justify the granting of the permanent stay relief which the applicant seeks in this application.

2.9 It is common cause that Mr. Timol's murder was politically motivated and it is for this reason a political crime. The fourth respondent also describes it

as such in paragraph 84 of his answering affidavit. It is also common cause that Mr. Timol's murder is not the only political crime for which the perpetrators have not been prosecuted.

2.10 When regard is had to the nature of the crime, it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government. It is irrelevant as to what one calls such steps. The fourth respondent calls them political interference with the National Prosecuting Authority. He describes the position as follows in paragraph 84 of his answering affidavit:

"*84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "TRC cases"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.*" (Own emphasis).

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

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

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

2.14 It is necessary for me to comment on each of the instances upon which the fourth respondent relies to demonstrate that the first respondent is not the author thereof.

The secret government report

2.15 This is a report of the Amnesty Task Team. This task team was appointed by the Director-General's forum on 23 February 2004. The Director-General's forum was not created by the first respondent. It was chaired by the Director-General of the Department of Justice and Constitutional Development. This Director-General must have chaired this forum on the instructions of his superiors. The National Prosecuting Authority was represented thereat by Gerhard Nel and Lungisa Dyosi who were not members of the National Prosecuting Authority's Priority Crimes Litigation Unit responsible for the prosecution of cases such as the present.

2.15.1 The task team was required to consider and report on, amongst others, the following:

> "2. *Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.*"

2.15.2 The report clearly indicates that the democratic government, at its highest level, intended to give people such as the applicant, who did

not participate in the TRC process, another opportunity to apply for amnesty. For this reason, the task team considered that it had to "*perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the tabling of the report of the Truth and Reconciliation Commission on 15 April 2003.*"

2.15.3 The report further states that the President provided, amongst others, the following guidelines:

> "*(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.*
>
> *(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process.*" (Own emphasis).

2.15.4 Paragraph 3.3 of the report shows that consideration was given to establishing "*a further amnesty process similar to that of the TRC process.*" This, however, was rejected by the task team with the following provision:

"*3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.*"

2.16 It is clear from the report upon which the fourth respondent relies that:

2.16.1 The functions of the aforesaid task team were not determined by the first respondent.

2.16.2 The government, through the President at the time expressed its willingness to establish a second amnesty process similar to that of the TRC clearly in order to give people such as the applicant an opportunity to fully disclose their participation "*during the conflicts of the past.*"

2.16.3 To the extent that the work of the Amnesty Task Team contributed to a delay in the applicant's prosecution, the blame for that does not find a place to sit in front of the first respondent's door steps. In the premises, the report of the Amnesty Task Team upon which the fourth respondent seeks to rely does not in any way establish any wrongdoing on the part of the first respondent.

2.16.4 At best, the government of the Republic of South Africa could be criticized for having entertained the thought of establishing another amnesty process similar to that of the TRC process – but that is as far as that criticism can go. There is absolutely no evidence placed before the Court to suggest that the entertainment of such a thought was malicious and not at all in the interests of justice and the interests of the community as a whole. The time taken entertaining that thought and giving effect to it clearly contributed to the delay in prosecuting the applicant – but that was not the first respondent's doing.

The affidavit of Adv. Vusi Pikoli

2.17 The fourth respondent says that the contents of the affidavit of Adv. Pikoli constitutes evidence of some of the "*various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases.*"

2.18 Pikoli was appointed as the National Director of Public Prosecutions on 1 February 2005. This is the highest position within the National Prosecuting Authority. Prior to that, he was the Director-General of the Department of Justice and Constitutional Development. His affidavit, however, does not say much about the role he played on the Amnesty Task Team. It also does not say anything about the origin of the task team and why it was necessary to set it up.

2.19 In paragraph 85.2 of his answering affidavit, the fourth respondent says that Pikoli's affidavit "*sets out how the independence of his office was seriously compromised*" and "*how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. BS Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases.*"

2.20 I must say upfront that I do not dispute the contents of Pikoli's affidavit upon which the fourth respondent relies. The contents of such affidavit, however, do not constitute a basis to grant the permanent stay which the applicant seeks in this application and further show that the first respondent did not abandon the intention to prosecute people such as the applicant.

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

2.21.1 In paragraph 8 of his affidavit, Pikoli says that:

> "8. *As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty by the then President, Mr. T Mbeki on 23*

September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me..." (Own emphasis).

2.21.2 It is clear from the above quoted paragraph 8 of Pikoli's affidavit that he did take a "*decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty*" by the Truth and Reconciliation Commission. Pikoli suspects that this decision also influenced President Mbeki to suspend him. Accordingly, not only was there political interference in the work of the highest office of the National Prosecuting Authority, but there was also action taken against the highest office of the National Prosecuting Authority for taking prosecutorial decisions.

2.21.3 In paragraph 14 of his affidavit, Pikoli says the following:

"*14. ... I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...*" (Own emphasis).

2.21.4 Pikoli also deals with what is referred to therein as the TRC cases. He says that decisions to prosecute certain members of the Security

Branch of the South African Police Service were taken by then Acting National Director of Public Prosecutions. After such decisions were taken, it was decided that the matters would be "*held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.*"

2.21.5 The contents of paragraph 33 of Pikoli's affidavit reveals what could have been the motivation against prosecuting people such as the applicant at the time. Therein, Pikoli suggests that the prosecution of "*cases like the Chikane matter could open the door to prosecutions of ANC members*" and that such prosecution could then "*give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.*"

2.21.6 In paragraph 52 of his affidavit, Pikoli refers to a memorandum which he wrote to the then Minister of Justice complaining about political interference in the work of the first respondent. Therein, Pikoli says that:

"*52. In this memorandum I concluded that there had been improper interference in relation to the TRC caces and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in*

terms of the normal legal processes and sought guidance on the way forward." (Own emphasis).

2.21.7 The contents of the above quoted paragraph, which the fourth respondent accepts as true and correct and reflective of the correct legal position, clearly indicates that the highest office of the National Prosecuting Authority had reached a point where it "*was unable to deal with these cases in terms of the normal legal processes*" and deemed it necessary to seek "*guidance on the way forward.*" According to Pikoli, such guidance was never received. In paragraph 54 of his affidavit, Pikoli concludes that:

"*The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.*"

2.21.8 In paragraph 60 of his affidavit, Pikoli again gives light to the reluctance from the political level to prosecute cases such as the present. Therein, he says that there was a "*fear of opening the door to prosecutions of ANC members, including government officials.*"

2.22 All that is contained in Pikoli's affidavit, upon which the fourth respondent relies to create an impression that the first respondent is responsible for the delays, clearly indicates that the highest office of the National Prosecuting

Authority was subjected to political interference and political pressure not to prosecute cases such as the applicant's case.

2.23 There is nothing in Pikoli's affidavit that could be interpreted to suggest that the first respondent was remiss or negligent in handling what is referred to in Pikoli's affidavit as the TRC cases, which include the applicant's case.

2.24 In the premises, on the fourth respondent's version, the delays in prosecuting the applicant were occasioned by political interference and political pressure and not by the first respondent itself. In the premises, there is no room to blame the first respondent for the delays or to use the delays to justify the permanent stay of prosecution.

The affidavit of Adv. Anton Ackermann

2.25 The affidavit of Adv. Anton Ackermann does not take the matter any further.

2.26 In his affidavit, Ackermann confirms that cases such as the prosecution of the applicant were not prosecuted due to political pressure and political interference as stated in Pikoli's affidavit.

2.27 I do not deny what Ackermann says in his affidavit but I do state that the contents of Ackermann's affidavit do not justify the granting of the permanent stay of prosecution which the applicant seeks in this application.

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

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

2.30 I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application.

2.31 It is important that I again highlight that the fourth respondent does not say that the "*manipulation of the criminal justice system to protect individuals from prosecution*" was perpetrated by the first respondent and its officials.

Insofar as it is not the fourth respondent's version that the manipulation of the criminal justice system was perpetrated by the first respondent and its officials, there can be no basis to use that against the first respondent to justify the granting of the relief which the applicant seeks in this application.

2.32 The relief which the applicant seeks in this application is so drastic that it cannot be granted simply on the basis of the manipulation of the criminal justice system or by what the fourth respondent says amounts to political interference or severe political constraints.

2.33 In the light of the contents of Pikoli and Ackermann's affidavits and the correspondence attached thereto, there can be no merit in the fourth respondent's suggestion in paragraph 97 of his answering affidavit that "*the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid-era cases.*" It is important to draw the Court's attention to the fact that the fourth respondent does not even tell the Court as to when this alleged collusion with political forces occurred. The fourth respondent is called upon to produce evidence of this alleged collusion or to formally withdraw such allegation.

2.34 In any event, the suggestion that the SAPS colluded with the National Prosecuting Authority is completely inconsistent with the contents of Pikoli and Ackermann's affidavits. The two affidavits clearly tell the Court as to why cases such as the applicant's case were not immediately prosecuted

and they do not include the alleged collusion between the SAPS and the National Prosecuting Authority.

2.35 It is not correct that the National Prosecuting Authority has decided to shield "*itself from embarrassment as well as violations of its obligations and duties under the Constitution*" as alleged in paragraph 142.3 of the fourth respondent's answering affidavit. The correct position is simply that the applicant did not in his founding affidavit call upon the first respondent to deal with the issues which the fourth respondent somehow suggests the first respondent ought to have dealt with in answering the applicant's founding affidavit. It is the fourth respondent which has now raised the issues which I have now answered in this supplementary answering affidavit.

2.36 In paragraph 142.1 of his answering affidavit, the fourth respondent contends that "*the period leading up to the decision to institute criminal proceedings cannot be ignored.*" There is no legal basis for this. The fourth respondent contends, in paragraph 142.3, that "*what transpired during this time-period must be explained by the NPA.*" I deny this. The applicant, however, does not rely on this point.

2.36.1 In support of the above contention, the fourth respondent seeks to rely on paragraph 3(C) of the Prosecution Policy.

2.36.2 Paragraph 3 of the Prosecution Policy deals with the role of a prosecutor. Paragraph 3(C) deals with prosecution in the public interest and seeks to provide guidance to prosecutorial decision-making process in relation to prosecution of cases in the public interest.

2.36.3 In relevant parts, paragraph 3(C) of the Prosecution Policy upon which the fourth respondent relies for his contention that the first respondent must provide an explanation for the time period leading up to the institution of criminal charges against the applicant provides that when a prosecutor considers whether or not it will be in the public interest to prosecute, the prosecutor must consider all relevant factors including, amongst others, whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.

2.36.4 It is important that I draw to the Court's attention the fact that the very same paragraph states that:

"The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case."

2.36.5 At all material times relevant to this case, the first respondent has always been aware of the long period of time which has passed between the date when the crime was committed and the date on which criminal proceedings were instituted against the applicant. For this reason, it cannot be suggested that the first respondent did not take into account the delay between the date on which the crime was committed and the date on which criminal proceedings were instituted against the applicant.

2.36.6 When regard is had to the nature and seriousness of the offence; the manner in which Mr. Timol was killed; the pain which Mr. Timol must have suffered; and the fact that the applicant has not admitted guilt and has not shown repentance the delay between the date on which the crime was committed and the date on which the prosecution was instituted justify the dismissal of this application. All of these factors, together with the fact that the delay in prosecuting the applicant was not deliberately caused by the first respondent, it is not in the interests of justice to grant the permanent stay relief which the applicant seeks in this application.

2.37 I deny the fourth respondent's insinuation in paragraph 142.6 that Chris Macadam did not act properly when the investigation of this matter was entrusted to him. In this regard, I attach hereto as **SA1,** Chris Macadam's affidavit in which he sets out in detail, and supported by documentary

evidence, his role during the relevant periods in the investigation of this matter.

2.38 When regard is had to the contents of Chris Macadam's affidavit, it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases such as the present. For this reason, the insinuation against Chris Macadam is wholly misplaced. [Chris Macadam's affidavit attached hereto as SA1 is the very same affidavit referred to in my main answering affidavit but was not attached thereto].

2.39 In the light of the interest which the fourth respondent has shown in Macadam, it is necessary that I draw the court's attention, and indeed the fourth respondent's attention to some of the contents of Macadam's affidavit and the annexures thereto.

2.40 Macadam is a senior advocate of this court and has, since 2003 served as the Senior Deputy Director of Public Prosecutions in the National Prosecuting Authorities Priority Crimes Litigation Unit. This unit has always been located within the office of the National Director of Public Prosecutions.

2.41 In paragraph 12 of his affidavit, Macadam says that the then National Director of Public Prosecutions took a decision, shortly after the

establishment of the Priority Crimes Litigation Unit, that such unit "*should take over the TRC cases which had not been finalized either by the DPP or by the defunct TRC unit.*" This is a clear indication that right from the beginning, the National Prosecuting Authority intended to investigate and prosecute cases such as the present.

2.42 In paragraphs 15 and 17, Macadam indicates that Mr Timol's case was identified as one which required further investigation and this is confirmed in annexure RCM2 to his affidavit.

2.43 In an internal memorandum dated 15 July 2003 Advocate Ledwaba of the then Directorate of Special Operations (then known as The Scorpions) which was mandated to investigate cases such as the present advised Macadam and others, amongst others, as follows:

"*(i) TRC Cases*

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used."

2.44 Pursuant to Ledwaba's aforesaid decision, Macadam and Ackermann did the right thing by commencing engagement with the SAPS after which

Commissioner J F De Beer of the SAPS addressed a letter dated 26 September 2003 to Ackerman in, amongst others, the following terms:

"As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking ...

In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seemed to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing. Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues." (Own emphasis).

2.45 The above-quoted letter clearly signaled the beginning of difficulties in investigating and prosecuting cases such as the present. In order to avoid delays and being entangled in bureaucracy, Macadam and Ackermann attempted to persuade Ledwaba to reconsider his decision not to investigate cases such as the present. Their frustrations are well documented in annexure RCM5 attached Macadam's affidavit – being an internal memorandum dated 11 November 2003. Therein, they set out their frustrations and concluded as follows:

"2. *As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions (eg. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability*

of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the bona fides of the National Prosecuting Authority into serious [disrepute] and do irreparable damage.

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

2.46 Despite Ackermann and Macadam's pleas, the then Directorate for Special Operations did not appoint investigators as requested and cases such as the present were not further investigated. To make matters worse, in 2004, Macadam was assigned a case which required his full-time attention until late 2007 and was then not involved in the investigation and possible prosecution of TRC cases.

2.47 No serious investigation of cases such as the present took place and the reasons for this are clearly apparent from Macadam's affidavit. In paragraph 40 of his affidavit, Macadam says that he requested the Directorate for Priority Crimes Investigations to re-open the investigation of Mr Timol's case.

2.48 After having done all of the above, Macadam was informed by Advocate Johnson, the then head of the Priority Crimes Litigation Unit *"that we should not continue to work with TRC cases as they were going to be removed from the PCLU."* (Own emphasis).

2.49 Attached to Macadam's affidavit as RCM16 is a letter dated 8 February 2007 from then Minister of Justice Ms Mabandla to then National Director of Public Prosecutions, Pikoli. In this letter, the then Minister expressed her concern that she read media articles suggesting that the National Prosecuting Authority was going ahead with prosecutions of cases such as the present. The then Minister said, amongst others, the following:

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

2.50 The contents of the then Minister's letter clearly indicates that government at the highest level was of the view that the first respondent knew that cases such as the present were not going to be investigated and prosecuted. In addition, the letter also suggests that Pikoli had advised the Minister that *"the NPA will not be going ahead with the prosecutions."*

2.51 In a memorandum dated 15 February 2007 from Pikoli to then Minister of Justice, Pikoli, amongst others, expressed his frustrations arising from political interference with the National Prosecuting Authority's prosecutorial decision-making processes. The upshot of Pikoli's frustrations is set out in paragraph 5.2 of this memorandum, wherein he said:

"5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end. (Own emphasis).

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Own emphasis).

2.52 Insofar as this particular matter is concerned, the political position about the prosecution of cases such as the present did not change until the re-opening of the inquest into the death of Mr Timol. As we now know, the matter was investigated after the 2017 inquest judgment was released and the first respondent then took a decision to prosecute the applicant herein.

2.53 When regard is had to the contents of Macadam's affidavit, there can be no rational basis to suggest that he acted in a cavalier and uncaring manner. The facts set out in his affidavit, confirmed by way of a confirmatory affidavit by Pikoli, clearly indicate that the political interference with the first respondent's prosecutorial decision-making processes did not only start in 2007 when Pikoli was suspended from his position as National Director of Public Prosecutions for what he says, amongst others, deciding to prosecute cases such as the present.

2.54 It is important to draw the court's special attention to paragraph 5.4 of Pikoli's memorandum to the Minister quoted above. Therein, and based on the prevailing political environment at the time, Pikoli took the view that *"these TRC matters"* could not be proceeded with *"in accordance with the 'normal legal processes' and 'prosecuting mandate'"* of the National Prosecuting Authority. Having taken this view, Pikoli then called for the Government to provide direction as far as the investigations and prosecutions of the TRC matters was concerned. Pikoli correctly called for this direction from the State *"in view of the fact that the NPA prosecutes on behalf of the State."* When regard is had to Pikoli's, Ackermann's, and

Macadam's affidavits, it is clear why Pikoli called for this direction from the State – simply because the State had clearly expressed its reluctance to prosecute cases such as the present and its desire to establish a second amnesty process for people such as the applicant.

2.55 The above being the case, this court cannot perpetuate the injustice to which Mr Timol was subjected by granting an order in terms of which the applicant's prosecution is stayed permanently. Mr Timol was subjected to injustice by the apartheid government and its security agents and cannot again be subjected to injustice by this government, for which he died.

I now turn to respond to some of the paragraphs of the fourth respondent's answering affidavit in which negative and incorrect statements are made about the first respondent.

3 AD PARAGRAPHS 64 AND 65

Ad paragraph 64

3.1 I deny that the National Prosecuting Authority acted in a cavalier and uncaring manner.

3.2 The fourth respondent's suggestion that the approach of the National Prosecuting Authority was cavalier and uncaring is not supported by any admissible evidence placed before the Court. Such a suggestion can easily

be disposed of by reference to the contents of Macadam's affidavit to which I have referred above.

Ad paragraph 65

3.3 The contents of paragraph 65.1 do not justify the criticism levelled against the first respondent. This is so due to the fact that the Amnesty Task Team referred to therein was not created by the first respondent. As I have demonstrated above, the Amnesty Task Team was created by the government, in particular, by the highest level of government. Rightly or wrongly, the Amnesty Task Team was clearly created to find ways to give people such as the applicant herein an opportunity to apply for amnesty in respect of their participation in what is referred to in the Amnesty Task Team's report as "*conflicts of the past.*"

3.4 The contents of paragraph 65.2 are not entirely correct. It is not correct that the amendment to the prosecution policy was intended "*to facilitate impunity for apartheid-era criminals.*" A simple reading of the report of the Amnesty Task Team clearly shows that it was not the intention of government to grant people such as the applicant blanket amnesty. There were stringent requirements with which they had to comply.

3.5 Pikoli's affidavit shows that it is not correct that government intended "*to facilitate impunity for apartheid-era criminals*" where he refers to instances where he refused to accept representations not to prosecute people such as

the applicant. The people referred to in Pikoli's affidavit, whose representations not to be prosecuted he refused, would have been granted amnesty easily if government's intention was indeed "*to facilitate impunity for apartheid-era criminals*" as suggested in paragraph 65.2.

3.6 The contents of paragraph 65.3 are not in dispute and do not justify the relief which the applicant seeks in this application and clearly show that it was former President Mbeki who "*introduced a political pardons program to further accommodate perpetrators*" and not the first respondent.

3.7 The contents of paragraph 65.4 are not in dispute.

3.8 The contents of paragraph 65.5 must necessarily bring an end to any criticism levelled against the first respondent by the fourth respondent. In paragraph 65.5, the fourth respondent says that the "*NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases*" which cases included the case of Mr. Timol. On this version, there could not have been collusion between the police and the National Prosecuting Authority.

4 AD PARAGRAPHS 82 TO 94

Ad paragraph 82

4.1 The cover-up of political crimes referred to in paragraph 82 which the fourth respondent says it "*naturally explains the inaction between 1971 and*

1994" is not different from the political interference which resulted in cases such as the present not being prosecuted immediately. For this reason, there is no basis to blame the first respondent and the National Prosecuting Authority for the delays in prosecuting this case.

Ad paragraph 83

4.2 There is no basis to suspect that the first respondent did not explain the delay as a result of an ulterior or improper motive. The position is simply that the applicant did not in his founding affidavit make out a case which required an explanation for the delay in the manner in which the fourth respondent has done in his answering affidavit.

4.3 It is clear from the applicant's founding affidavit that the applicant did not have much information on the basis of which he could criticize and blame the first respondent for the delays in the manner done by the fourth respondent in his answering affidavit. In fact, the fourth respondent's answering affidavit reads like a supporting affidavit on behalf of the applicant.

Ad paragraph 84

4.4 I have already dealt with the contents of paragraph 84 elsewhere above in this supplementary answering affidavit.

Ad paragraph 85

4.5 I have already dealt with the contents of paragraph 85 elsewhere above in this supplementary answering affidavit.

Ad paragraph 86

4.6 The statements and conclusions attributed to Pikoli and Ackermann in paragraph 86 are not in dispute.

Ad paragraph 87

4.7 I fail to understand the purpose of the contents of paragraph 87 because the fourth respondent is fully aware that the first respondent herein did not oppose the application referred to therein. Insofar as the first respondent did not oppose the application referred to in paragraph 87, it was not necessary for it to file an answering affidavit. The applicant's legal representatives are clearly aware of this.

4.8 The contents of paragraph 87 are clearly intended to create unnecessary sensation and negative atmosphere against the first respondent and the SAPS because a false impression is created that they were supposed to file answering affidavits but neglected to do so (even though they did not oppose the application).

4.9 The alleged "*considerable publicity that the case attracted*" did not on its own justify the filing of answering affidavits in circumstances where the first respondent and the SAPS decided not to oppose the application in issue.

Ad paragraph 88

4.10 I have already dealt with the contents of paragraph 88 elsewhere above in this supplementary answering affidavit.

Ad paragraph 89

4.11 I draw the Court's attention to the fourth respondent's conclusion that "*the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic-era*" is the "*manipulation of the criminal justice system to protect individuals from prosecution*" referred to in paragraph 88 and the political interference with the independence of the National Prosecuting Authority – none of which was done by the first respondent. On the fourth respondent's own version, it is the first respondent who was politically interfered with.

Ad paragraph 90

4.12 I admit that the unlawful interference with the first respondent's duties and the manipulation of the criminal justice system referred to in the fourth respondent's answering affidavit is not sufficient to justify the granting of a

permanent stay of the prosecution instituted against the applicant. There is no reason why the fourth respondent relies on the unlawful interference with the first respondent only to say it does not justify the relief sought.

Ad paragraph 91

4.13 The contents of paragraph 91 are admitted.

Ad paragraphs 92 and 93

4.14 The contents of paragraphs 92 and 93 are not in dispute.

4.15 It is not in the interests of justice to grant the relief which the applicant seeks on the basis of what the fourth respondent says was an unlawful manipulation of the criminal justice system and unlawful political interference with the first respondent's prosecutorial decision-making processes.

Ad paragraph 94

4.16 In paragraph 94 of his answering affidavit, the fourth respondent seeks to suggest that the National Prosecuting Authority and the South African Police Service are not doing anything about the possible prosecution of cases such as the present. I deny this.

4.17 The cases to which the fourth respondent refers are 9 deaths cases and 11 cases relating to the murder, kidnapping and torture of political activists. These cases include the so-called Cradock 4 and Pebco 3 murders and were placed before the Directorate for Priority Crimes Investigations and the National Prosecuting Authority in January 2018. I deny that "*absolutely no progress has been made in any of these 20 cases.*"

4.17.1 One of the above cases relates to the death of Hoosen Haffejee. In this case, the second respondent has approved the re-opening of the inquest into this death and the fourth respondent is fully aware that this matter is under investigation as it is apparent from the letter attached hereto as **SA2**.

4.17.2 Since the aforesaid cases where allocated to the Directorate for Priority Crimes Investigations and the National Prosecuting Authority, all the required support and resources have been provided to investigate and to then prosecute these matters.

4.17.3 A task team of 15 police officers has been constituted and each case has been allocated at least two investigators. This task team consists of members of the Crimes Against the State unit of the South African Police Service.

4.17.4 Progress meetings have been held on these cases and the fourth respondent and the fourth respondent's investigator, Frank Dutton have attended some of these meetings.

4.17.5 I am also aware that the fourth respondent's investigator, Frank Dutton, has interacted with Captain Chantelle Simpson of the South African Police Service on these matters and the fourth respondent must be fully aware of such interactions but creates a wrong impression that nothing has been done. This wrong impression is deliberately created in order to portray the National Prosecuting Authority and the South African Police Service in a negative light – which does not serve any purpose in proceedings such as the present.

4.17.6 I deny that two former members of the old South African Police's Security Branch were appointed "*to lead these investigations.*" It serves no purpose for the fourth respondent to accuse the South African Police Service and the National Prosecuting Authority and their officials without producing any evidence to support such accusation.

4.18 For the reasons stated above, the contents of paragraph 94 do not advance the fourth respondent's case, they are in any event irrelevant and ought to be rejected.

5 AD PARAGRAPHS 97 TO 99

Ad paragraph 97

5.1 I deny that the SAPS and the National Prosecuting Authority colluded with political forces to ensure the deliberate suppression of apartheid-era cases.

5.2 The fourth respondent's suggestion that the SAPS and the National Prosecuting Authority colluded with political forces is not supported by any admissible evidence placed before the Court. Of importance, this suggestion is inconsistent with some of the evidence upon which the fourth respondent relies which the fourth respondent himself has placed before the Court.

5.3 Elsewhere in his answering affidavit, the fourth respondent makes it clear that there was political interference and political pressure brought to bear upon the National Prosecuting Authority. This being the case, one fails to understand as to on what factual basis the fourth respondent can begin to speculate, let alone suggest, that the National Prosecuting Authority "*colluded with political forces.*" Such a suggestion, if accepted, would mean that Pikoli and Ackerman on whose affidavits the applicant heavily relies, are guilty of the collusion referred to in paragraph 97.

Ad paragraph 98

5.4 I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions.

Ad paragraphs 99 and 100

5.5 The contents of paragraph 99 are not in dispute.

5.6 The contents of paragraph 100 are not in dispute.

6 AD PARAGRAPHS 140 TO 148

Ad paragraph 141

6.1 The contents of paragraph 141 do not take the matter any further.

6.2 In paragraph 141 of his answering affidavit, the fourth respondent is responding to paragraphs 1.1 to 2.2.4 of the first respondent's answering affidavit to the applicant's founding affidavit. There is no basis to criticize the first respondent because the applicant's founding affidavit did not call the first respondent to provide an explanation for what the fourth respondent refers to as "*the near total inaction of the NPA*."

Ad paragraph 142

6.3 I have already dealt with the contents of paragraph 142 elsewhere above in this supplementary answering affidavit.

Ad paragraph 143

6.4 The contents of paragraph 143 clearly reveal the fourth respondent's motive in painting the first respondent in a negative light. The motive is to obtain answers to the criticism levelled against the first respondent which the fourth respondent would then use to call "*for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.*" This is clearly wrong.

6.5 The contents of the affidavits filed in this application for purposes of opposing the relief which the applicant seeks in this application were clearly not intended to defend the first respondent and "*those prosecutors and police*" who allegedly failed in their duties to uphold the rule of law. For this reason, it would be wrong to create an impression that such affidavits also constitute a defence against an allegation that "*those prosecutors and police*" failed in their duties to uphold the rule of law.

6.6 For the avoidance of any doubt, I expressly state that the purpose of this affidavit and the other affidavits filed on behalf of the first respondent in this application are not intended to be an answer and shall not be used as an

answer to the unfounded allegation that "*those prosecutors and police*" have failed in their duties to uphold the rule of law.

Ad paragraph 144

6.7 The contents of paragraph 144 do not require a further response from the first respondent.

Ad paragraph 145

6.8 The contents of paragraph 145 do not justify the relief which the applicant seeks in this application and it is not clear to me as to why the fourth respondent chose to include them in his answering affidavit, the purpose of which is, so I thought, to oppose the relief which the applicant seeks.

Ad paragraph 146

6.9 The affidavit of the investigating officer, Captain FN Mathipa is attached herewith as **SA3 (i)** and the unopposed bail application as **SA 3 (ii)**.

Ad paragraph 147

6.10 The contents of paragraph 147 do not require a further response from the first respondent other than to state that the fourth respondent himself has already told the Court of the reasons why this case was not investigated and prosecuted earlier than now. It accordingly does not serve a purpose to repeat the same contentions differently.

Ad paragraph 148

6.11 The affidavit of Macadam referred to in my main answering affidavit is the one now attached hereto as SA1.

6.12 I stand by what is stated in my main answering affidavit.

6.13 In conclusion, I state that the contents of the fourth respondent's answering affidavit do not justify any of the criticism levelled against the third respondent and the National Prosecuting Authority and also do not justify the granting of the permanent stay of prosecution relief which is sought by the applicant in this application.

6.14 In the premises, I persist that the application for a permanent stay of the criminal prosecution instituted against the applicant ought to be dismissed with costs including the costs consequent upon the employment of two counsel.

WHEREFORE, I pray that it may please the Court to dismiss the application with costs including the costs consequent upon the employment of two counsel.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 4th day of February 2019, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

Ally J. Murray Captain

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

OFFICE:

796

SA1

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF FIRST RESPONDENT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM,

do hereby make oath and state that:

1.

I am an adult male employed by the National Prosecuting Authority (NPA). I am an admitted advocate and since 2003 to date serve as a Senior Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit (PCLU) located in the Office of the National Director of Public Prosecutions (NDPP) (First Respondent).

2.

I depose to this affidavit solely to comment on the averment made by the Applicant that the NDPP acted improperly in not dealing with the matter which forms the scope of this application in either 1996 or 2003 (the **Timol**-case). I was not involved in making the decision

to institute the current criminal proceedings against the Applicant and the processes which flowed therefrom.

3.

It is necessary to provide certain background information to give context to my account.

4.

The Truth and Reconciliation Commission (TRC) was established to ascertain the fullest extent of politically motivated human rights' abuses committed between 1 March 1960 and early May 1994. I shall refer to these crimes as TRC cases. The TRC was mandated to grant amnesty to perpetrators who made a full disclosure of their involvement in human rights' violations.

5.

TRC cases were originally dealt with by the Attorneys-General in the Provinces and Self-Governing Territories.

6.

A further development was however the appointment of a Commission of Enquiry headed by Judge Richard Goldstone to investigate some of the most serious cases.

7.

When the Commission dissolved Dr Jan D'Oliveira SC, the then Attorney-General Transvaal, was appointed to head up a team to continue with the work of the Commission and to facilitate the institution of prosecutions.

8.

When the **NPA Act 32 of 1998** came into effect in October 1998 an NDPP (Mr BT Ngcuka) was appointed and the Attorneys-General became Directors of Public Prosecution (DPPs). The DPPs were seized with certain matters, many of which were put on hold pending applications for amnesty lodged by the accused with the TRC. When the TRC released a report calling for the prosecution of persons who had either been refused or not applied for amnesty provided that there was sufficient evidence, Ngcuka set up a TRC unit in his Office to deal with TRC cases not being already dealt with by the DPPs.

9.

This unit however dissolved because the amnesty process had not been concluded and therefore it was unclear which cases should be considered for prosecution. Furthermore it also lacked an investigative capacity.

10.

The unit headed by Dr D'Oliveira had ceased to function once the **NPA Act** came into effect.

11.

In March 2003 the PCLU was established by **Presidential Proclamation** as a Special Directorate in the Office of the NDPP. The **Proclamation** authorised the NDPP to refer priority crimes to the PCLU. Adv AR Ackerman SC (Ackerman) was appointed as Special Director and I was transferred from a component of the Directorate of Special Operations (DSO) to serve as one of his Deputies.

12.

Shortly after the establishment of the unit Ngcuka summoned Ackerman and I to his Office and informed us that he had decided that the PCLU should take over the TRC cases which had not been finalised either by the DPPs or by the defunct TRC unit. He further advised that the DSO would conduct any investigations which may be necessary. The DSO was a special NPA investigative unit established by virtue of an amendment to the **NPA Act**.

13.

In order to establish what cases required attention Ackerman and I took the following steps:

13.1 All the DPPs were visited and invited to handover any TRC cases which they were not in a position to finalise themselves.

13.2 We met with the Divisional Head of the Detective Services of the South African Police Services (SAPS) who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

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

13.4 Interviews were conducted with former members of the TRC and D'Oliveira units.

14.

This exercise did not result in the **Timol**-case being identified as one which warranted further attention.

15.

Ackerman and I however also entertained requests for investigations from victims and other members of civil society. This resulted in the **Timol**-matter being brought to my attention by a member of his family.

16.

This led to me on 5 May 2003 requesting a Chief Investigating Officer (Leask) of the DSO to conduct investigations into the matter. I attach herewith as **Annexure RCM1** a copy of my letter to Leask setting out the information which had been brought to my attention and outlining what investigative steps should be taken.

17.

On 15 May 2003 I submitted a report setting out the cases which had been identified as a result of the outreach programme described above. The **Timol**-case was identified as a matter which required investigation. This report was addressed to the NDPP, the Head of the DSO and his Head of Operations as well as Ackerman. It is attached as **Annexure RCM2**.

18.

In terms of the DSO's legislative mandate it was for the Special Director of the DSO and not the Head of the DSO to issue declarations to investigate certain matters. At that stage the Special Director was Adv MG Ledwaba (Ledwaba).

19.

Ackerman and I met with Ledwaba to arrange for the DSO to conduct the investigations specified in **Annexure RCM2**. The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters and that these should all be referred to SAPS. A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is attached hereto as **Annexure RCM3**.

20.

As a result of the decision by Ledwaba Ackerman and I met with Commissioner De Beer (De Beer), the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman informing him that the request had been discussed with the National Commissioner (Selebi). The letter was further to the effect that the investigation of the matters was a DSO responsibility and that if it was required that SAPS in fact investigate then either Ackerman or the NDPP should

approach the President and ask him to confirm which agency should conduct the investigations. A copy of the letter is attached hereto as **Annexure RCM4**.

21.

I can confirm that neither the NDPP nor Ackerman approached the President as recommended.

22.

Ackerman and I however made a number of attempts aimed at persuading Ledwaba to reconsider his decision not to investigate. These are set out in a copy of a letter written to Ledwaba by Ackerman dated 11 November 2003 appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate. Both the NDPP and Head: DSO were copied in the letter which is attached as **Annexure RCM5**. The NDPP shortly thereafter resigned and Dr Ramaite SC was appointed as the Acting National Director of Public Prosecutions (ANDPP).

23.

The DSO however did not appoint investigators as requested and consequently none of the TRC matters requiring investigation could be taken further.

24.

In 2004 I was assigned a case relating to an international nuclear weapons syndicate which required my attention on a full-time basis until late 2007.

25.

I therefore no longer continued to deal with TRC matters but Ackerman regularly discussed these cases with me.

26.

At a certain stage Ackerman informed me that he intended prosecuting three former Security Branch members for their role in the poisoning of Reverend Frank Chikane. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. He indicated that he had contacted the suspects' attorney to arrange for them to appear in court.

27.

Shortly thereafter he informed me that the ANDPP had put the prosecution on hold pending the formulation of special TRC Guidelines. He further indicated that there was now a moratorium on the investigation and prosecution of TRC cases pending the adoption of the Guidelines.

28.

Neither Ackerman nor myself were involved in the drafting of these Guidelines. At a certain stage Ackerman showed me a copy of the Guidelines. We were both of the view that they were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

29.

Subsequently an application was brought by members of civil society in the High Court sitting in Pretoria which resulted in the Guidelines being declared unconstitutional for that reason.

30.

Adv Pikoli (Pikoli) was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an inter-departmental task team which would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives in the task team. On one or two occasions I stood in for Ackerman in meetings of the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

31.

At a certain stage Pikoli was suspended and fired despite the Commission which enquired into his fitness to hold office in fact finding that he was competent to be the NDPP. Adv Mpshe SC (Mpshe) was then appointed as the ANDPP.

32.

If memory serves me correct in early 2009 Mpshe summoned me to his office and showed me a letter written by SAPS indicating that it was withdrawing from the task team. This would mean that again TRC matters would not be investigated because at that stage a decision had already been taken to disband the DSO. Mpshe instructed me to negotiate with SAPS to agree to investigate the matters which he said I should take over from Ackerman.

33.

Ackerman informed me that he had already disposed of a number of matters which had not required investigation and gave me a list of small number of cases (I estimate no more than ten (10)) which I had to attend to. The **Timol**-case was not one which he had indicated should be investigated.

34.

I attach as **Annexure RCM6** a trail of emails between myself and various role-players showing my efforts to try and have these matters investigated. I initially had a series of meetings with Rayman Lalla, the then Divisional Head of the Detective Service of SAPS. He however informed me that the National Commissioner had decided that the cases had to be investigated by the Directorate Priority Crimes Investigation (DPCI). I therefore made a number of unsuccessful attempts to secure a meeting with Commissioner Dramat, Head: DPCI.

35.

Ultimately I met with Assistant Commissioner Lebeya (Lebeya) on 26 November 2009 where the issue of conducting investigations was positively discussed resulting in me writing a letter on 18 January 2010, attached hereto as **Annexure RCM7**.

36.

As a result thereof Senior Superintendent Bester was appointed to oversee the investigations of the ten (10) cases I had identified.

37.

Adv Menzi Simelane (Simelane) was appointed as the NDPP and he instructed me to guide a series of serious corruption investigations being conducted by the DPCI in the Northern Cape. He thereafter appointed me to represent the NPA in two (2) civil matters where decisions not to investigate / prosecute international crimes were being challenged. I was thereafter seized with a number of cases where complaints had been made calling for the arrests of current or former Heads of State for war crimes or crimes against humanity. This made it very difficult for me to focus on the ten (10) TRC matters. I did however increase the number of investigations due to representations being received in new matters.

38.

When Mr Nxasana (Nxasana) was appointed as the NDPP I was removed from my duties in the PCLU in order to act as a dedicated prosecutor for foreign bribery cases. Adv SK

Abrahams (Abrahams), then a Senior State Advocate, was appointed to take the TRC matters over from me.

39.

In June 2015 Abrahams was appointed the NDPP and the issue as to whether I should continue as the dedicated foreign bribery prosecutor arose. I had meetings with him in which I indicated that if he did not wish me to continue with that responsibility I would again be willing to do TRC matters. He however informed me that he was thinking of taking all TRC cases away from the PCLU and did not make a decision on terminating my appointment as the foreign bribery prosecutor.

40.

Due to the fact that another business unit of the NPA had instructed the DPCI to take all the foreign bribery files away from me I could no longer work on those matters. The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters. One of the matters which I had decided should be investigated was the **Aggett**-matter which also related to a death in detention. At that stage the **Timol**-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that **Mr Timol** had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case.

41.

Adv Johnson (Johnson) who was at that stage acting as the Head of the PCLU informed me and a Senior State Advocate who was assisting me with the cases that we should not continue to work with TRC cases as they were going to be removed from the PCLU. I was however concerned that this would result again in the cases being neglected resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof.

42.

On 4 February 2016 I was approached by Dr Pretorius SC (Pretorius) who had then taken over from Johnson as the Head of the PCLU. He informed me that a request had been received to re-open the inquests in the **Aggett**- and **Timol**-matters and required an opinion

from me. I attached as **Annexure RCM8** a copy of my opinion of even date in which I expressed the opinion that both matters should be fully investigated and that consideration to re-opening inquests should only be given once a decision whether or not to prosecute had been taken. I emphasise para 12 of my opinion in which I indicated that it was imperative that the NDPP should decide whether TRC cases should remain with the PCLU or not.

43.

Subsequently I was informed by Pretorius that a decision had been taken to re-open the **Timol**-inquest. While the inquest was in progress Pretorius gave me a copy of a letter which I had written on 25 February 2004 to Mr Cajee, the nephew of **Mr Timol**. This letter is attached hereto as **Annexure RCM9**. He also showed me a report addressed by Ackerman to *inter alia* Ramaite and Pikoli dated 30 October 2006. I attach this report hereto as **Annexure RCM10**. He requested me to provide him with an affidavit responding thereto. I attach as **Annexure RCM11** a copy of the affidavit which I subsequently signed and which was commissioned. I have not attached the annexures referred to therein as they have either been attached elsewhere in this affidavit or are no longer relevant for the purpose of this application.

44.

At the time of deposing to this affidavit I was not in possession of **Annexure RCM1**. At this stage when I have now had sight of both this document and **RCM9** I recall that **RCM9** was written after both the DSO and SAPS had refused to investigate TRC cases. If memory serves me correct Leask had informed me that as a result of the decision taken by Ledwaba that the DSO would not investigate TRC cases he was unable to comply with my original request for investigations. Since he was however traveling to Cape Town on other investigations he contacted Ivor Powell and questioned him regarding the confession apparently made by the Applicant in this matter. The allegation was however denied by Powell and Mr Cajee was informed accordingly. I did not hear anything further from Mr Cajee and was shortly thereafter assigned other work.

45.

In order to depose to this affidavit I tried to locate such TRC files as may still be available resulting in me finding a report of 24 October 2006 addressed by Ackerman to Ramaite which is attached hereto as **Annexure RCM12**. This report identifies the advocates dealing with various TRC matters and reflects that I was not the person who decided to close the **Timol**-matter.

46.

In December 2017 I was contacted by the NDPP's Office Manager who requested me to collect certain of Pikoli's documents which he had found in a strongroom. I collected the documents from him and perused the contents. The documents included the following:

46.1 A second draft of an Indemnity Bill making provision for the President to grant indemnity to persons committing politically motivated crimes from 1 March 1960 (**Annexure RCM13**).

46.2 The terms of reference of the Amnesty Task Team dealing with the criteria which the NPA applies relating to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary. The document (**Annexure RCM14**) concludes by referring to the views of the intelligence agencies.

46.3 The further report of the Amnesty Task Team (**Annexure RCM15**) *inter alia* looking into whether private prosecution and civil litigation can be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute can approach the International Criminal Court (ICC).

46.4 A letter dated 8 February 2007 (**Annexure RCM16**) addressed to Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.

46.5 A Memorandum (**Annexure RCM17**) addressed to the Minister by Pikoli setting out in considerable detail what he construed to be interference with the dealing of TRC matters by other Government departments and concluding:

> "***I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and / or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end***."

47.

These documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated. The first three documents appear to have been authored by the Justice Department during the period when a moratorium was placed on TRC cases pending the formulation of Guidelines. The last two documents were authored by or addressed to Pikoli.

48.

On the limited occasions when I was seized with TRC matters I always believed that such matters including the **Timol**-matter should be properly investigated so that decisions whether or not to prosecute could be taken.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

R C MACADAM

Date: **1 November 2018**
Time: **09:15**
Place: **PRETORIA**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration, which was sworn to before me and the deponent's signature was placed thereon in my presence

at **PRETORIA** on **1 NOVEMBER 2018** at **09:20**

_____: (RANK)
COMMISSIONER OF OATHS

Full names:	**ALBERTUS MARTHINUS MATHYS FLYNN**
Rank:	**COLONEL**
Address:	**218 VISAGIE STREET, PRETORIA**
Ex Officio:	**SA Police Service**

807

KC M 1.

er/timol

Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

SCORPIONS

P. O. Box 752,
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VGM Building
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Pretoria
South Africa

Tel: (012) 845 6431
Cell: 082 498 6033

TO: DEPUTY HEAD

CC: CIO A G LEASK

FROM: HEAD SNPU

DATE: 5 MAY 2003 REF: A/INV/5/03 TRC

RE: INQUEST: AHMED TIMOL

1. On 2 May 2003 I was requested to investigate the above matter by the deceased's nephew Imtiaz Timol (082 445 2086) after he had been referred to my office by Minister Pahad in the President's Office.

2. The following documentation has been made available:
   - (i) Extract from George Bizoz's Book;
   - (ii) Article by Ivor Powell;
   - (iii) TRC hearing; and
   - (iv) Details of the SAPS members involved in the interrogation.

3. Imtiaz further informed me that:
   - (i) the inquest record has been destroyed;
   - (ii) he has the contact details of a fellow detainee now in England who can assist;
   - (iii) he has photographs of the body of the deceased; and
   - (iv) Ivor Powell informed him that Sgt Rodriquez had told his daughter what had really happened.

4. The following investigation focus areas are identified:

(i) George Bizoz must be interviewed to establish whether he has the post mortem report and any other information;

(ii) Ivor Powell (DSO Cpt) must be interviewed re 3(iv);

(iii) Researchers to establish whether there is any additional TRC material and whether the policeman involved after linked to any other human rights abuses;

(iv) the other detainee will have to be interviewed; and

(v) once all the evidence has been obtained the Chief State Pathologist will have to be requested for an opinion on the injuries and the claim that the witness fell from a 10 storey building.

.....

ADV R C MACADAM
HEAD
SNPU

RCM 2
809

s/ audit trc cases

Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

TO: NDPP REF: TRC GENERAL

CC: HEAD DSO
HEAD OPERATIONS
ADV ACKERMANN

FROM: HEAD SNPU

DATE: 15 MAY 2003

RE: AUDIT OF TRC CASES

A. CASES BEING PREPARED FOR PROSECUTIONS:

1. MOTHERWELL BOMBING

(a) Leg One

The accused were all refused amnesty. On review however the High Court ordered that their applications be reheard because the TRC failed to lead evidence. Investigations conducted by my office indicate that the accused supplied a false motive for killing the deceased. Evidence will be made available to the TRC so that amnesty can be refused on a proper basis. This will open the way for legs two and three.

SCORPIONS

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(b) Leg Two

The three accused convicted in the 1996 prosecution were granted leave to appeal against their convictions to the SCA. I have taken over the argument of the appeal from the DPP Eastern Cape due to the fact that the prosecutor has retired.

(c) Leg Three

The prosecution of SAP General van Rensburg for ordering the killing of the Motherwell Four.

2. BRIAN NGULUNGA

The prosecution of SAP General van Rensburg for ordering the killing of Brian Ngulunga.

3. PEBCO 3

The prosecution of the Security Branch members responsible for the kidnapping of the deceased at Port Elizabeth Airport.

4. WAUCHOPE

Prosecution of AZAPO leader George Wauchope for murder and other related charges. I am awaiting the Minister's response to representations by the accused that he not be prosecuted.

5. POWELL

The prosecution of Phillip Powell for possessing hand grenades in April 1994. The matter is with the NDPP.

6. NQUTU ARMS CACHE

The prosecution of J. M . Nqcobo and others for the concealment of the weapons found in the Nqutu Bunker in May 1999.

7. The prosecution of the CCB members responsible for the bombing of the Early Learning Centre (it must however be established that the accused did not receive indemnity in terms of the Indemnity Act of 1990).

B. POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE

1. Murder of the PEBCO 3

There is currently no reliable evidence on the murder charge. If the accused are however convicted of kidnapping it is likely that at least one of them may supply information as to the killings in order to obtain a lesser sentence.

2. Cradock 4

There is no reliable evidence on this case. The TRC however established that the crime was committed by the same people who were involved in the Motherwell and PEBCO 3 cases. The successful prosecution of these cases could lead to some of the perpetrators coming forward also to obtain lesser sentences.

C. NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES

1. Murder of the COSAS 4
2. Murder of Askari Strongman Sambo
3. Murder of detainee on the East Rand by "Timol" Coetzee
4. Murder of Askari Dan Maboto
5. Allegations by IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988
6. 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit
7. 6-8 dockets linking AWB to Pre election bombings previously dealt with by Advocate Fick

D. HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE

1. Murder of Victoria Mxenge
2. Kidnapping, torture and murder of Ntombi Khubeka
3. Kidnapping, torture and murder of Nokutulu Simelane
4. Decision by DPP Pretoria not to prosecute SAP General Engelbrecht
5. Uninvestigated allegations against SAP General Bassie Smit
6. Ciskei Coup De AT
7. Transkei Coup De AT

8. Pre Election Train Violence in Gauteng
9. Murder of Reggie Hadebe
10. Murder of Dulcie September
11. Refusal of Amnesty to 37 High Ranking ANC officials
12. Decision by DPP KZN not to prosecute IFP hit squads

E. REPRESENTATIONS TO INVESTIGATE SPECIFIC CASES

1. Death in detention Ahmed Timol
2. Murder of UDF activist Nelson Sithole
3. Murder of Pro Jack
4. Murder of IFP families in Table Mountain by A. M. Zulu
5. Murder of ANC supporter Batondo
6. False Conviction of Skouldies
7. Assault on A. Bult
8. Vlakplaas member Piet Snyders
9. Murder of Castro Khumalo

F. CASES IN THE PROCESS OF BEING CLOSED

1. Assault on Carl Niehaus- complainant does not desire a prosecution
2. APLA murder Mphahlela attacks on police stations: lack of reliable evidence
3. Mphaphela murder charges- lack of admissible evidence against him
4. Winnie Mandela- lack of reliable evidence
5. Steve Biko- crime prescribed in 1997
6. Smit Murders- perpetrators deceased
7. Ermelo Black Cats- lack of reliable evidence
8. IFP Murders Chadwick- accused in a mental institution in the United Kingdom

G. ASSISTANCE TO OTHER AGENCIES

1. Police Intelligence supplied with a breakdown of AWB amnesty hearings to assist in profiling of persons currently involved in Right Wing Activities
2. TRC supplied with material relating to IFP human rights abuses to assist them to oppose IFP application to have findings against it set aside

H. REPARATIONS RELATED ACTIVITIES

1. Exhumation of bodies of Mamelodi 10
2. Reparations of remains of victims in the Kwaggasnek incident in Lesotho
3. Representations by members of the public to locate their missing relatives
4. Partnership with SA Disappearance Foundation

I. INVESTIGATION PUT ON HOLD PENDING THE APPEAL IN THE BASSON CASE RELATING TO JURISDICTION FOR CONSPIRACY TO COMMIT CRIMES OUTSIDE THE RSA

1. Murder of Anton Lubauwski
2. Lesotho Raid
3. Botswana Raid
4. Swaziland Raid

J. POLICY CONSIDERATIONS

1. Prosecutions not to be conducted on a piece meal basis except where special circumstances (e.g. witness on point of death, accused about to leave RSA or engaged in current criminal activities)
2. Once all the cases earmarked for prosecution have been investigated a presentation will be given to the NDPP in order for him to confirm the prosecution strategy. Thereafter prosecutions will be instituted
3. After convictions have been obtained attention will be given to cases which currently had evidence since convictions may act as incentive for perpetrators to come forward

Kind regards,

.....

ADV. R. C. MACADAM
HEAD
SNPU

RCM 3
814

/nvestigations

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Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

INTERNAL MEMORANDUM

TO : CIO Leask

FROM : Adv M G Ledwaba

DATE : 15 JULY 2003

SUBJECT : SNPU INVESTIGATIONS

1. Due to the recent creation of the PCLU it has become necessary to re-define the mandate and operations of the SNPU as follows:

   (i) **TRC cases**

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

   (ii) **Operation Sunflower**

   Advocate **MACADAM** will continue to oversee the disruptive action with the Consumer Council with your assistance. Once the SAPS report is received and evaluated, I will make a decision on the final disposal of the case.

(iii) **Operation Black Widow**

Adv **TONGWANE** must oversee the finalization of the investigation and conduct the prosecutions which may arise.

(iv) **Operation Final Curtain**

SAPS must continue with the investigations under the direction of the prosecutor arranged by Adv **ACKERMANN**. You may give limited assistance to SAPS and the prosecutor on specific aspects when necessary.

(v) **Foreign Mercenaries**

Adv **PRETORIUS** has been delegated to assess all cases currently being investigated by both SAPS and the DSO. (I have communicated separately to the Regional Head Gauteng in this regard). I will make a decision as to the involvement of the DSO in such investigations once I have received a report from Adv **ACKERMANN**.

Adv M G Ledwaba
HEAD : OPERATIONS

/tp

O.P.S. 002-022 SAP 21

SUID-AFRIKAANSE POLISIEDIENS SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag X302

Verwysing Reference	3/9/9/1(93)
Navrae Enquiries	Div Comm De Beer
Telefoon Telephone	(012) 393 2191
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Afdelingskommissaris/Divisional Commissioner
Speurdiens / Detective Service
Hoofkantoor / Head Office
PRETORIA
0001

2003-09-26

Advocate AR Ackermann, SC
Special Director
Head: Priority Crimes Litigation Unit
National Prosecuting Authority
Church Square
PRETORIA
0001

Dear Advocate Ackermann

INVESTIGATION OF TRC CASES

Your letter dated 20 August 2003, as well as the preceding discussion between ourselves, have reference.

As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefor understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations(DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: **"In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard.".**

You are aware of the fact that the capacity created for the D'Oliveira Committee is presently with the DSO.

817

In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the **DSO** would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing. Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues.

You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary.

Kind regards.

DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER

RCM 5
818

er/memo

Office of the Head
Priority Crimes Litigation Unit
HEADQUARTERS

INTERNAL MEMORANDUM

TO: ADV GEOPH LEDWABA

CC:
1. NDPP
2. DR S RAMAITE SC
3. ADV LF MCCARTHY SC

FROM: ADV A R ACKERMANN SC

SUBJECT: INVESTIGATION OF TRC CASES BY THE DSO

DATE: 11 NOVEMBER 2003

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Dear Geoph

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

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

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

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

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

ONY

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

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

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

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

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

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

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

xi) On 10 November 2003, Adv Macadam presented you with Section 28(l)(b) declarations. You informed him:

a) That you are not prepared to sign any declarations

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

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

d) The President should not be approached to involve SAPS

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreplaceable damage

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

Kind regards

ADV AR ACKERMANN SC
SPECIAL DIRECTOR
HEAD: PCLU

RC 176
821

Helena Zwart (H)

From: Sibongile Mzinyathi
Sent: 20 May 2009 07:50 AM
To: Willie Hofmeyr (WA); Helena Zwart (H); Aubrey T. Mngwengwe
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: RE: Investigators for TRC cases

Thanda

This is for your information/attention.

Kind regards

S Mzinyathi

From: Willie Hofmeyr (WA)
Sent: 19 May 2009 08:56 PM
To: Helena Zwart (H)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman; Sibongile Mzinyathi
Subject: RE: Investigators for TRC cases

Hi

It sounds like a good idea, but let me do some consultation in the DSO on the issue.

Regards

Willie

From: Helena Zwart (H)
Sent: Mon, 18 May 09 13:23
To: Willie Hofmeyr (WA)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: Investigators for TRC cases

Dear Willie

I met this morning with Commissioner Lalla concerning the appointment of SAPS investigators to investigate the TRC cases where victims have asked the NPA to look at prosecutions. We have been taking quite a beating due to the fact that nothing has been done on these matters for a number of years and in fact, in certain cases, the victims are threatening us with *mandamus* applications. In this regard, Commissioner Lalla asked me to provide him with the names of three/four investigators who had the necessary experience. We are only looking at a small number of cases, plus-minus nine. Obviously, no progress at all will be made if the investigators do not have previous knowledge of the relevant Apartheid security structures and role players therein.

The only persons I could think of off-hand, were CSI Marion and three/four of his KZN DSO investigators, who were previously involved with the Goldstone Commission and ITU. All these persons have indicated their willingness to transfer to SAPS. Commissioner Lalla indicated that the TRC investigations would constitute a special tasking and the investigators would be permitted to finalise these cases before taking on other commitments. He also indicated that he would pay the costs of the investigations from his budget. This would ensure that they could deal with these matters irrespective of whether they are located in DPCI or any other police structure. He asked me to communicate directly with you on this issue.

Kind regards

Chris Macadam

822

From: Bezuidenhout Colla - Superintendent [mailto:BezuidenhoutColla@saps.org.za]
Sent: 07 July 2009 08:56 AM
To: Helena Zwart (H)
Subject: RE: TRC cases

Hallo Helena,

Comm Lalla agreed to the meeting but requested that we involved Deputy National Commissioner Dramat. Welma will speak to his office and let you know. We are currently looking at the week of the 20th July.

Regards,

Colla

Superintendent Colla Bezuidenhout
Staff officer: Divisional Commissioner: Detective Service
Tel : +27 12 393 1024
Fax : +27 12 393 2193
Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 01 July 2009 11:34 AM
To: Bezuidenhout Colla - Superintendent
Subject: TRC cases

Dear Colla

Can you set up a short meeting with the Commissioner when he is available to discuss the TRC matters? We are under intense pressure and have been called upon to report on progress to the Minister and the Justice Portfolio Committee. The one matter which requires investigation prescribes on 12 September 2009 and this case must be fully investigated and the family afforded an opportunity to exercise their right to a private prosecution before the crime prescribes.

Our previous discussions on this topic did not materialise due to the fact that Willie Hofmeyr was not appointed as the head of DPCI.

Kind regards

Chris Macadam

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www.npa.gov.za/ReadContent458.aspx

Helena Zwart (H)

From: Lalla Rayman - Divisional Commissioner [LallaR@saps.org.za]
Sent: 14 July 2009 08:32 AM
To: Helena Zwart (H)
Subject: RE: TRC cases requiring investigation

Dagsê Helena

Kommissaris Dramat se kantoor het nou net geskakel hy wil die vergadering uitstel na Augustus. Hy is nie beskikbaar volgende week nie.

Ek sal die nuwe datum met jou kommunikeer.

Groete

Welma

-----Original Message-----
From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 13 July 2009 04:08 PM
To: Lalla Rayman - Divisional Commissioner
Subject: TRC cases requiring investigation
Importance: High

Beste Welma

Aangeheg vind asb. 'n lys van die TRC-sake wat by die vergadering bespreek gaan word. Sal jy asb. so vriendelik wees om dit aan te stuur na die twee Kommissarisse, aangesien ons nog nie Kommissaris Dramat se kontakbesonderhede het nie?

Het Colla die dringendheid van die Lubowski-saak met jou bespreek?

Baie dankie en groete!

Helena Zwart
NPA

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824

Helena Zwart (H)

From: DPCI:Head [dpci.head@saps.org.za]
Sent: 28 August 2009 02:02 PM
To: Helena Zwart (H)
Subject: FW: TRC/Nuclear matters

Good day Mr Macadam,

We wish to acknowledge receipt of your e-mail. DNC Dramat is unable to meet with you presently but will revert back to you in due course.

Thank you

Secretary : Pumla N Mphothulo
The Head : Directorate for Priority Crime Investigations
6th Floor Koedoe Building
Tel : 012 393 5463
Fax : 012 393 5079
Cell : 082 778 3664
E-mail : (internal) DPCI : Head
(external) dpci.head@saps.org.za

From: Bezuidenhout Colla - Superintendent
Sent: 27 August 2009 07:18
To: Helena Zwart (H)
Cc: DPCI:Head
Subject: RE: TRC/Nuclear matters

Good morning,

Commissioner Dramat's office is at room 627, 6th floor, Koedoe building (opposite Police Head office in Pretorius str). His office number is 012 393 5463 and email dpci.head@saps.org.za His secretary is Pumla.

I will ask Comm Lalla about joining the meeting and will inform Helena.

Regards,

Colla

Superintendent Colla Bezuidenhout
Staff officer: Divisional Commissioner: Detective Service
Tel : +27 12 393 1024
Fax : +27 12 393 2193
Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 26 August 2009 12:19 PM
To: Bezuidenhout Colla - Superintendent
Subject: TRC/Nuclear matters

Dear Colla

825

I recently had a telcom with your Commissioner in which he advised that the TRC and the nuclear matters which we have previously discussed would now have to be attended to by Commissioner Dramat. Is it possible to provide me with Commissioner Dramat's address and fax number so that I can set up a meeting with him? Would your Commissioner be amenable to facilitate the meeting, as it might help if the two of us can inform Commissioner Dramat of the history of these matters.

Kind regards

Chris Macadam

Deputy Director of Public Prosecutions
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BMY

2009/09/16

RCM7
826

Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
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18 January 2010

Assistant Commissioner Lebeya
Directorate for Priority Crime Investigations
South African Police Service
Private Bag X302
PRETORIA
0001

Dear Commissioner Lebeya

INVESTIGATION BY SAPS OF CRIMINAL OFFENCES ARISING FROM THE TRC

My letter dated 13 July 2009, addressed to Deputy National Commissioner Dramat and Divisional Commissioner Lalla, and our meeting of 26 November 2009 have reference.

The issue related to the appointment of investigators to investigate the 11 matters identified by the NPA, which were itemised in my letter of 13 July 2009. Subsequently, the Acting National Director of Public Prosecutions declined to prosecute in the Lubowski matter and consequently, only the remaining 10 cases on the list required attention.

Senior Superintendent Bester of your office attended our meeting and informed you that he was in possession of a number of further dockets which he felt also required investigation. On 6 December 2009, I had a meeting with Senior Superintendent Bester and established that these dockets related to cases against the Liberation Movements in respect of which a decision was taken in 2004 by the then National Director not to prosecute. It should be noted that in the main, all the suspects implicated in the dockets had applied for and received amnesty. I therefore informed Senior

Superintendent Bester that there was no basis upon which these cases could be reopened.

Consequently, only the remaining 10 cases on the list require attention. Since you raised the sensitivity of the matters with me, the National Director of Public Prosecutions was given a full written briefing on the matters. I had a meeting with him today and he indicated that SAPS should in fact investigate all the matters which required investigation. The matters should be referred to my office once the investigations have been concluded. Should you require any guidance as to how the matters should be investigated, you are at liberty to approach me for any such assistance which you might require.

Given the nature of the cases, it may be desirable that we meet to discuss the issues in person and in this regard, I would be grateful if you could indicate when you would be available to meet with me.

Yours sincerely

ADV RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

RCM8
828

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

INTERNAL MEMORANDUM

Private Bag X752,
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VGM Building
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Weavind Park
0001
Pretoria
South Africa

Tel: X126431

TO	:	DR JP PRETORIUS SC ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS: PCLU
FROM	:	ADV RC MACADAM SDDPP: PCLU
DATE	:	4 FEBRUARY 2016 (Opinion requested on even date)
SUBJECT	:	OPINION: REOPENING TIMOL/AGGETT INQUESTS
REF	:	10/3/1/PCLU

Dear Torie

1. This opinion is provided arising from a meeting between members of the NPA and Messrs Varney, Dutton and others. An oral presentation was given, motivating the reopening of both inquests.

2. In order to address the request, it is necessary to briefly refer to the relevant provisions of the Inquest Act:

   2.1 Section 5 requires that an inquest be held in respect of each natural death where the deceased is suspected of having died of unnatural causes.

   2.2 Section 16 requires the inquest Magistrate to make findings as to:

   2.2.1 the identity of the deceased
   2.2.2 the date and cause of death
   2.2.3 whether the death was caused by a criminal act on the part of any person

   2.3 Section 17 requires the Magistrate to refer the inquest to the DPP in the event of either not being able to determine the death or in the event of a finding of criminal liability. He is also required to refer the matter to the DPP irrespective of his findings if so requested.

2.4 Section 17(2) empowers the DPP at any time [my emphasis] after receipt of the inquest request the Judicial Officer to reopen the inquest and take further evidence.

2.5 Section 17A(1) also empowers the DPP to request the Minister to request the Judge President to appoint a Judge to reopen the inquest.

3. Sections 17(2) and 17A(1) both empower the DPP to cause inquests to be reopened on the basis of further evidence. The sole difference is whether the Minister and the Judge President must be involved and whether the inquest would be reopened by the original Inquest Court or by a Judge appointed by the Judge President. The invocation of section 17A(1) would be a more time-consuming process and would also place a burden on the High Courts which are under pressure with their existing civil and criminal rolls.

4. In my view, it would be appropriate to invoke section 17(2) where the new evidence would lead to certain of the original findings being amended, but would have no other public interest consequences, e.g. a prosecution or in a transparent manner to test the new evidence orally. Section 17A(1) would in my view be appropriate if there was high public interest in the new evidence, but the DPP was of the view that it should first be tested before instituting a prosecution.

5. It has to be stated that if the DPP is of the view that new evidence justifies the institution of a prosecution, then there is no need to first reopen the inquest before instituting the said prosecution.

6. The background to the two cases is as follows:

6.1 Achmed Timol

6.1.1 He died in detention in Johannesburg in October 1971 while under interrogation by the Security Branch having been arrested on charges linked to his involvement with the SACP.

6.1.2 The then Attorney General declined to prosecute and a formal inquest was held in the Johannesburg Regional Court, which handed down a verdict that he had committed suicide and that the police were not responsible for his death.

6.1.3 Shortly after the establishment of the PCLU in 2003, Mr Timol's nephew (a member of the NIA) approached the unit and indicated that he had established that the inquest record and docket were not available. (Governmental archive directives require the destruction of documentation after a certain period.)

6.1.4 He however alleged that the daughter of Sergeant Rodriques (who had been alone with the deceased immediately before he fell to his death) had approached Ivor Powell (then a journalist) and informed him that her father had confessed to her that the deceased had been murdered. The NDPP had directed that the DSO must assist the PCLU with the investigation of TRC matters. The DSO reported that the journalist had been interviewed, denied the allegation and produced the newspaper article which he had written, which contained no confession or new evidence. In the circumstances the DSO deemed it inappropriate to approach Rodriques or his daughter. The nephew was satisfied with this explanation and the matter was not taken further.

6.1.5 In late 2015, I however asked the DPCI to register an enquiry due to extensive publicity given to the matter by the media and as a result of statements made by Adv Bizos SC and the family.

6.2 Neil Aggett

6.2.1 Dr Aggett died in police custody in Johannesburg in 1982 after a lengthy period of detention and interrogation by the Security Branch.

6.2.2 The then Attorney General declined to institute a prosecution and a formal inquest was held before a Regional Court Magistrate in Johannesburg. He handed down a verdict to the effect that the deceased had committed suicide and that the police were not responsible.

6.2.3 In 2013, a group of Dr Aggett's friends submitted a petition to the President and Minister of Justice, calling for the prosecution of the police officials responsible for his death.

6.2.4 As a result of this petition, the PCLU requested the DPCI to open an enquiry.

7. The status of the PCLU/DPCI investigations:

7.1 Achmed Timol (I/O Captain Ben Nel)

7.1.1 It has been established that the original inquest and docket are not available.

7.1.2 A copy of the inquest donated by the family attorney to Wits has been downloaded. It is missing 652 pages, which include the evidence and cross-examination of all the police officers involved. However, on the remaining evidence it was possible to establish who the witnesses were and what the issues in dispute were.

7.1.3 Captain Nel has been requested to canvas the availability of all the witnesses, i.e. the police officials, medical doctors and members of the deceased's family.

7.1.4 It has been established that other detainees who were never called as witnesses could possibly shed light on the matter. The first is a Mr Mohammed Essop, who was arrested at the same time as Timol. The second is Quentin Jardine, whose identity, it is alleged, led to the deceased deciding to commit suicide. The third is a Mr Pahad, whom it is alleged was arrested arising from Timol's interrogation. Ms Fullard has been tasked to uplift the detention files from DoJ&CD so that Captain Nel can conduct the necessary investigations in this regard.

7.1.5 It has been established that the TRC appointed a journalist, Piers Pigou, as an investigator and he dealt with the Timol matter. He has indicated that he is available for an interview when he returns to the country. As a matter of interest, it was in fact he who approached Sergeant Rodriques and not Ivor Powell. His notes reflect that Rodriques stood by his original statement. It may therefore be that Timol's nephew confused the two journalists and what Rodriques said.

7.1.6 It has been established that Gordon Winter published a book in which he claimed to have first-hand knowledge of the Timol incident. Ms Fullard has undertaken to establish whether he is alive and where he is residing.

7.1.7 A Methodist priest in the UK made public statements to the effect that when Timol's body was viewed in the mortuary, it showed signs of gross mutilations. This claim would have to be followed up although it is in conflict with the evidence of the three doctors who testified at the inquest, including a pathologist, appointed by the family.

7.1.8 What also has to be followed up is whether the police, who were involved in the incident, were involved in other cases, which could have a bearing on their version in this matter. It would also have to be established whether there were other incidents involving detainees which would be relevant.

7.2 <u>Neil Aggett</u> (I/O Col Sam Mahlangu)

7.2.1 Col Mahlangu indicated that he was unable to locate the original inquest and docket.

7.2.2 He however established that a copy of the inquest was available on the Wits website and requested the PCLU to peruse it and to thereafter indicate whether further investigations were required.

7.2.3 The record is in the regional of some 8 500 pages and has been uploaded in blocks, which makes online reading time-consuming. Obviously downloading 8 500 pages would place an extreme burden on the office's printing facilities.

7.2.4 It has however been established that Adv Bizos SC, who acted for the family, conceded that there was no evidence to justify the conclusion that the deceased had been murdered. (Adv Bizos SC was assisted by a private pathologist and other medical experts.) He however submitted that Whitehead and Cornwright (the two officers responsible for Aggett's interrogation) should be prosecuted for culpable homicide. If the learned advocate is in fact correct, then the crimes prescribed in 2002 and no prosecution is feasible as requested by the deceased's friends.

7.2.5 The matter is however complicated by the fact that the former Deputy Judge President of the KZN High Court (Nicholson DJP) has published a book, alleging that the facts of the Aggett matter demonstrate unequivocally the crime of murder by induced suicide. If the learned Judge is correct, then the NPA would still have jurisdiction to prosecute on a charge of murder.

7.2.6 It has been established that Goosen, Pollock and Erasmus applied for amnesty on charges relating to breaking into the house of Aggett's parents, looking for evidence to support the claim that he had committed suicide. The TRC material has been uplifted and has been perused.

7.2.7 Aggett's detention file was also uplifted, but it contains no relevant information.

7.2.8 Deborah Quin was given the list of witnesses, who testified at the inquest and was requested to establish their availability, present whereabouts and

also whether any of them were connected to other incidents which would be relevant. She is also looking into the issue of whether there were other deaths in detention at the same time, which could be relevant. She has already indicated that Cornwright is deceased and that Auret van Heerden, who was in detention in close proximity to Aggett, is currently in an old age home in the USA.

8. Currently the two matters are not receiving the attention of the PCLU due to firstly, operational constraints which arose since October 2015. (Adv Bukau was given an urgent espionage-related case and uncertainty surrounded Adv Macadam's position due to the NDPP on 8 October 2015, indicating that he had not cancelled his appointment as the OECD Foreign Bribery Prosecutor.) In a meeting with Adv Macadam in September 2015, the NDPP raised the issue as to whether the TRC matters should be taken away from the PCLU. As a result of all these uncertainties, a memorandum was prepared in January 2016, requesting the NDPP to confirm whether the PCLU should continue to deal with TRC cases or whether they should be referred to the DPPs. A response to this memorandum is still outstanding.

9. In my view, a decision on the request made by Messrs Dutton *et al* cannot be taken solely by the NPA.

9.1 Both are the subject of enquiries being conducted by the DPCI and clearly the views of the relevant senior managers within the DPCI should be canvassed.

9.2 In the Aggett matter a group of his former colleagues has formed an association, *"Friends of Neil Aggett"*, which has called for the prosecution of the police officials involved. The request to reopen the inquest runs contrary to the group's position. The group has a direct interest in the matter and its view should be consulted.

9.3 Also in regard to the Aggett matter, although Cornwright is dead, Whitehead is still available and would clearly be affected by the reopening of the inquest. He would be entitled to legal representation, access to relevant material and the right to challenge any new evidence.

9.4 In the Timol matter, it still has to be established whether any of the police involved in his interrogation are still alive and whether any new evidence could result in a prosecution of them on a charge of murder.

10. In my view, it would be inappropriate at this stage to reopen the two inquests. On what has been placed before me it would not appear that Mr Dutton has conducted a comprehensive investigation which would justify all the relevant factors which would have to be taken into consideration by both the NPA and the presiding officers of the inquests.

10.1 The original inquests are not available and consequently the NPA would have to request Wits to make available its originals and to pay for all the relevant copies to be made.

10.2 A decision would have to be taken as to whether to invoke section 17(2), 17A(1), which would require a determination as to whether the witnesses and suspects are available, whether a charge of murder is feasible, whether a *viva voce* hearing, which would involve having to provide the suspects with legal representation, is necessary.

10.3 In my view, a Presiding Officer and the Judge President (if section 17A(1) is invoked) would be reluctant to reopen the inquests, to receive only Dutton's evidence and before the police have concluded their investigations and the NPA decided that there are no prospects of a successful prosecution. This would be particularly apposite in

the Aggett matter where there are 8 500 pages of evidence to be perused, numerous witnesses who would be required to be recalled and where Whitehead could still be prosecuted.

11. In my view therefore, it would be inappropriate to accede to the request prior to the conclusion of the DPCI investigations and the NPA deciding not to prosecute. I am of the view that even if a decision not to prosecute is taken, then there would be new evidence which would justify the reopening of the inquests. At this stage it is not possible to predict what the consequences of this new evidence would be and therefore it cannot be predicted:

    11.1 whether the additional statements should simply be placed before the Regional Court, which could in chambers consider them and elect to amend the original Magistrate's findings

    11.2 whether a Judge should be appointed to hear the additional evidence *viva voce*

12. Having said that, it has to be, in the strongest possible terms, stated that it is imperative that the NDPP make a decision as to whether the TRC cases must remain with the PCLU or not. It will serve no purpose to decline the request, but to be placed in the position that two or more years down the line the cases have not been finalised because either the DPCI or NPA or both are unable to commit the necessary resources to finalise the matters timeously. It has to be emphasised that the Aggett matter requires a considerable amount of work due to the volume of evidence to be assessed, which may include an MLA request to the USA to interview Van Heerden. In the Timol matter there are also indications that evidence may be located in the UK, which would also have to be accessed through an MLA process.

13. Currently a member of the PCLU could give almost fulltime attention to the two matters. However, it is only to be anticipated that this will not be the case when shortly the unit's current workload will increase.

14. It is recommended that you:

    14.1 advise the NDPP not to accede to the request to reopen the inquests until the investigations have been concluded and a decision taken not to prosecute

    14.2 request the NDPP to, as a matter of urgency, make a decision as to whether the TRC matters must remain with the PCLU.

Kind regards

ADV RC MACADAM

RCM 9
834

Office of the National Director of Public Prosecutions

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25 February 2004

A/INV/5/03/TRC

Imtiaz Cajee
P O Box 1888
GARSFONTEIN EAST
0060

Dear Sir

INVESTIGATION INTO TIMOL CASE

I acknowledge receipt of your fax of 18 February 2004 and have to inform you hat the case is registered under the above reference number. Last year investigations were conducted into the allegations that former security branch officer Rodrigues head confessed to his daughter who in turn informed IVOR POWELL.

The investigations produced negative results. I confirm that you furnish me with the following documents:

i) Extract Bizos' book
ii) Article Powell
iii) TRC transcripts
iv) INPUT Detainee
v) Photographs

The testimony of a detainee who was held out of the window was not included.

I would be grateful if you would furnish me with a copy of it as well as any other relevant material, which you may have. The case will again be considered the light thereof.

Kind regards

RC MACADAM
DEPUTY HEAD: PCLU

RCT 10
835

/Z56 forms

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INTERNAL MEMORANDUM

TO: DR MS RAMAITE

CC: ADV VP PIKOLI

CC: ADV K PILLAY

FROM: ADV AR ACKERMANN SC

SUBJECT: 1. DETAILS OF TRC CASES CLOSED BY THE PCLU

2. REAPPOINTMENT OF SENIOR SUPER-INTENDENT BRITZ

DATE: 30 OCTOBER 2006

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1. On 25 October 2006, the PCLU was requested by the "TRC Committee" to furnish more details regarding all the cases which the PCLU had declined to prosecute. The PCLU was also requested to furnish the background which led to the prosecution of one Blani.

2. <u>TRC CASES CLOSED</u>

2.1 <u>Death in detention Ahmed Timol</u>

2.1.1 This death in detention matter goes back to 1971.

2.1.2 The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.

2.1.3 The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the

deceased had definitely been murdered and all other crimes had prescribed.

2.1.4 The matter was therefore closed.

2.2 Death in detention of Steve Biko

2.2.1 Mr Ngcuka asked that this matter be investigated because of its high profile.

2.2.2 The DPP: Eastern Cape had recommended that no prosecution be instituted due to lack of evidence.

2.2.3 It was established that all the doctors who had treated the deceased were dead, except for the Chief State Pathologist, who, when consulted, conceded that he could not exclude that the injury to the deceased's head could have been accidentally caused.

2.2.4 The police officer in charge of the interrogation who was responsible for making the decisions as to whether the deceased should receive medical treatment himself died after he was denied amnesty by the TRC.

2.2.5 The evidence against the remaining police officers only established *culpable homicide* which had prescribed in 1997.

2.2.6 The NDPP made a press statement to the effect that no prosecution was possible. An NGO organization obtained the opinion of Adv Trengove who also concurred with the decision.

2.2.7 Subsequent to this decision, the police officer who transported the deceased to Pretoria also died.

2.3 Carl Niehaus

2.3.1 A member of public asked for a prosecution after the media published an interview with Carl Niehaus in which he alleged that he had been tortured during detention.

2.3.2 Mr Niehaus was consulted and did not desire prosecution.

2.3.3 File closed.

2.4 Skoulides

2.4.1 Skoulides had been convicted of murder.

2.4.2 After his release from prison, his sister alleged that he had been framed by the CCB. There was no evidence to substantiate this claim and it was suspected that the purpose of the allegation was made so as to have the convict's criminal record deleted so that he could emigrate to Greece.

2.4.3 The file was closed.

2.5 Nelson Sithole

2.5.1 The deceased was a Cape Town activist. He was killed outside his home. No perpetrators were identified and arrested by SAPS.

2.5.2 His lawyer alleged that the perpetrators were known to SAPS.

2.5.3 The DSO interviewed the eyewitnesses, perused the SAPS docket and interviewed a convicted prisoner whom the lawyer claimed knew about the case. The prisoner denied all knowledge of it. The witnesses had not identified the attackers. SAPS were of the view that the deceased was the victim of a criminal gang which was terrorizing that area. An identification parade had been held to see if the victims could identify members of the gang who were in custody on other charges but with negative results.

2.5.4 File closed.

2.6 Pro Jack

2.6.1 A person was refused amnesty for the murder of a Western Cape activist.

2.6.2 The TRC asked that this matter be looked into.

2.6.3 The DSO investigated the matter and came to the same conclusion as the TRC's Amnesty Committee, to the effect that the amnesty applicant had lied in respect of each and every material aspect relating to the murder of the deceased. There was no acceptable evidence to prosecute him or any other person and the file was closed.

2.7 AM Zulu

2.7.1 A convicted prisoner was refused amnesty for his role in the killing of a number of people in the Table Mountain area.

2.7.2 The TRC: KZN recommended that this matter be looked into further.

2.7.3 The convicted prisoner was an unreliable witness in his amnesty application and there was no other acceptable evidence implicating the persons whom he alleged had taken part in the attack with him.

2.7.4 The file was therefore closed.

2.8 Bult

2.8.1 Representations were made to the NPS by Bult, who alleged that he had been assaulted by the police during the Apartheid Era.

2.8.2 His allegations were however not serious enough to warrant investigation by the TRC unit which had been mandated by the NDPP only to consider serious human rights

abuses.

2.8.3 The file was therefore closed.

2.9 Castro Khumalo

2.9.1 The victims requested that a prosecution be instituted.

2.9.2 The deceased was a member of a group of activists who had been killed by the Security Branch.

2.9.3 The perpetrators had however all received amnesty, but the bodies of the deceased had not been traced.

2.9.4 The case was therefore referred to the Missing Persons' Task Team for further action.

2.10 Winnie Mandela

2.10.1 She was implicated in the kidnapping of a youth in Soweto.

2.10.2 These allegations had been investigated by a component of the D'Oliveira Investigation Unit. It was established that all the relevant witnesses had been extensively interviewed and all had been found to be unreliable. Various allegations as to the location of the body of the missing person had been followed up with negative results.

2.10.3 There was therefore no reliable evidence to institute a prosecution against Mrs Mandela. It was noted that she had been convicted on another charge. The allegations that she was involved in the murder of Dr Asvat were also investigated with negative results. The allegations of Falati, Cebenkulu and Richardson were also looked into and it was found that these three persons were thoroughly unreliable and had strong motives to falsely implicate Mrs Mandela.

2.10.4 The file was therefore closed.

2.11 Ermelo Black Cats

2.11.1 The D'Oliveira Investigation Unit had charged members of an IFP grouping called the Black Cats for various crimes committed in the Ermelo area.

2.11.2 The investigations had been put on hold pending the finalization of the TRC.

2.11.3 The main 204 witness was interviewed by the DSO and found to be thoroughly unreliable.

2.11.4 The TRC had refused to grant him amnesty and the DPP: KZN had also rejected similar allegations made by him relating to activities in KZN.

2.11.5 The witness also indicated that he would not testify unless he was released from prison.

first. There was therefore no evidence to prosecute and the file was closed.

2.12 Chadwick

2.12.1 The accused was a UK citizen who absconded to the UK after being indicted for the murder of two suspected IFP supporters.

2.12.2 The DPP: Pretoria applied for his extradition which he resisted in the UK for a period of almost eight years.

2.12.3 When his final appeal against extradition was exhausted, the UK authorities requested an undertaking from the NPA that the evidence available was sufficient to ensure this conviction.

2.12.4 A key witness had retracted his statement and there were other evidential problems. The original extradition application had to be abandoned although a new witness had been found. The UK authorities indicated that a fresh extradition application would have to be lodged before extradition could be granted on his version. Given the fact that the accused had been in custody for several years, combined with the fact that there was medical evidence suggesting that he could have been insane at the time of the crimes, it was not considered worth bringing a fresh application.

2.12.5 The Acting NDPP confirmed this decision.

2.12.6 Interpol has been requested to establish whether there is truth to the rumours that the accused might try and return to South Africa. If he were to voluntarily come to South Africa, the extradition problems would not apply.

2.13 Anton Lubowski

2.13.1 The original TRC unit was looking into this matter which related to the murder of a Swapo leader in Namibia.

2.13.2 A South African Court would only have jurisdiction in the event of evidence of a conspiracy to murder the deceased formulated in South Africa.

2.13.3 All the available evidence was perused. The most likely candidate to have killed the deceased was an Irish citizen, Aitcheson, who was arrested in Namibia, but skipped bail.

2.13.4 There was no reliable evidence against any other parties and the file was closed.

2.14 Ciskei *coup d'etat*

2.14.1 The original TRC unit was looking into this matter.

2.14.2 It was established that although certain former Military Intelligence members had indicated their intention to apply for amnesty on the basis that the *coup* had been

orchestrated so as to ensure the murder of ANC supporters, they had withdrawn their applications.

2.14.3 The former Head of State of Ciskei had been prosecuted for ordering the killing of two alleged *coup* conspirators, but had been found not guilty by the Bisho High Court.

2.14.4 There was no other evidence available to justify a prosecution of any person and the file was closed.

2.15 General Basie Smit

2.15.1 Mr Ngcuka asked that this matter be looked into as a result of media attention.

2.15.2 The available evidence as gathered by the D'Oliveira unit was considered and found to be inadequate to base any prosecution for a human rights abuse. The suspect was a former Head of the Security Branch.

2.15.3 The file was therefore closed.

2.16 *S v Bonganí Wana*

2.16.1 This matter relates to the murder of Zolile Sangoni, Zonwabele Mayapi and an MK cadre Gift Mgibe who were killed by Vlakplaas operatives in 1988 in Umtata.

2.16.2 Mr Wana had applied for amnesty but later withdrew his application.

2.16.3 After a careful perusal of the TRC transcript and consulting with all relevant potential witnesses it became clear that there was no sufficient evidence upon which prosecution of Mr Wana can be instituted.

2.16.4 The matter was then closed.

2.17 Representation by Mr SM Mavuya

2.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

2.17.2 We however informed him that we have no such authority and that TRC committee has disbanded. His activity did not amount to any criminal offence thus we could not even consider it in terms of prosecution guidelines.

2.18 Representation by Mpho Masemola

2.18.1 This matter arose from a representation by Mr Masemola, a former ANC who claimed to have been arrested and subsequently tortured in 1985.

2.18.2 He also claimed that in 1991 members of the Counter Insurgency Unit shot at him during a march he had organised. We however informed him that in as far as the

torture in 1985 the matter has since prescribed and in respect of 1991 shooting there was no evidence to support his allegations as he bases his accusations on assumptions.

2.19. Representation by Mr N Dlamini

2.19.1 Mr Dlamini had made allegations against Swaziland police whom he claimed to have sold out some MK cadres during 1985 to 1986. Unfortunately he could not supply us with any proof apart from a newspaper article from Times of Swaziland which we did not receive.

2.19.2 Apart from lack of substance in his allegations the NPA does not have jurisdiction in crime committed in Swaziland. He could not indicate to us his interest in the matter when requested to do so.

2.20 Thabo Armando Sithole

2.20.1 The mother of Thabo requested the NPA to investigate death of his son who died in police custody after being arrested for robbery in 1976.

2.20.2 They received a report from Greytown police that he committed suicide by hanging himself.

2.20.3 The PCLU could not find any records of the inquest and the police in Greytown police station could not assist us as they could not find any records of Thabo though they remember that he was indeed detained there. The PCLU therefore decided to close the file as there was no further action contemplated.

2.21 Murder of Michael Mcetywa

2.21.1 The matter arises from a representation by Zolile Mcetywa who is the son of the deceased who was an ANC chairperson in Pongola and murdered in 1993.

2.21.2 A man called Mavuso is currently serving 25 years for the murder.

2.21.3 During his amnesty application which was refused, he implicated a number of IFP leaders.

2.21.4 The family of the deceased requested the PCLU to consider prosecution of the implicated IFP leaders.

2.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.

2.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.

2.22 Smit murders

2.22.1 Perpetrators all deceased except one suspect who apparently lives in Australia.

2.22.2 Insufficient evidence to apply for extradition.

2.22.3 Matter closed.

2.23 Refusal of amnesty to the President and other high-ranking ANC officials

2.23.1 The TRC refused amnesty to the President and plus-minus 37 other high-ranking ANC members certain of whom held Ministerial positions or other key positions in Government.

2.23.2 The TRC found that they had not disclosed that they had committed specified crimes.

2.23.3 There was no evidence implicating them in criminal offences and the file was closed.

2.23.4 The NDPP, Mr Ngcuka, made a media statement to this effect as the DA was making an issue of the matter.

2.24 IFP Hit Squads (allegations of Luthuli, Mbambo, Mkhize and Hlongwane)

2.24.1 The DPP: KZN asked that this matter be looked into as a result of the controversy which the allegations had caused in the province.

2.24.2 Certain IFP supporters, e.g. Luthuli, Mbambo, Mkhize and Hlongwane had made various allegations against high-ranking IFP officials.

2.24.3 Luthuli had been used as a witness in one case, but the accused had been acquitted and Luthuli was found to be an unreliable witness by the Court.

2.24.4 A Deputy in the DPP's Office: KZN had considered all the allegations and had declined to prosecute as a result of the discrepancies between the versions of the accomplice witnesses.

2.24.5 After their release from prison, Mbambo and Mkhize were interviewed and indicated that they did not want to testify in any matters. Hlongwane had been refused amnesty and indicated that he was not prepared to testify unless released from prison. He had a poor reputation for reliability.

2.24.6 There were therefore no reliable grounds upon which the decision of the DPP: KZN not to prosecute could be reversed and the file was closed.

2.25 Bombing of Early Learning Centre and other Western Cape CCB activities

2.25.1 A request was received from the Legal Resources Centre in Cape Town requesting that CCB members who had been refused amnesty for the above case be prosecuted.

2.25.2 It was established that the main perpetrators had either been granted indemnity under the Indemnity Act or in terms of section 204 of the Criminal Procedure Act, arising from their testimony in the Wouter Basson and Ferdi Barnard prosecutions.

2.25.3 The only persons who could be prosecuted were Ferdi Barnard and the whistle-blower who had assisted the victims.

2.25.4 In the case of Ferdi Barnard, he was serving a lengthy gaol sentence in C-max. Were he to be charged, he would have to be transferred to Cape Town, posing a burden on Correctional Services. Any sentence he would have received for this case would run concurrently with his current sentence. No useful purpose would therefore be achieved by prosecuting him.

2.25.5 The prosecution of the whistle-blower would undermine reconciliation.

2.26 Plus-minus 80 cases against members of the Liberation Movement

All these cases were investigated by SAPS and closed by Ackermann for a number of reasons, i.e. offences were not of a serious nature, amnesty had been granted to the perpetrators or the perpetrators could not be traced.

2.27 S v Blani

2.27.1 The two deceased were an elderly married couple who resided on the farm, Enhoek.

2.27.2 The accused was associated with an organization known as the "Addo Youth Congress".

2.27.3 At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

2.27.4 On the night of 17 June 1985, the accused and his co-conspirators armed themselves and travelled to the farm of the deceased.

2.27.5 Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

2.27.6 The group then broke into the house despite attempts by the deceased to defend himself with a firearm.

2.27.7 Both deceased were assaulted and killed inside the house.

2.27.8 The group ransacked the house and removed certain items.

2.27.9 The Murder & Robbery Unit in Port Elizabeth originally investigated this matter.

2.27.10 The suspect was linked to the crime by fingerprint evidence.

2.27.11 A warrant for his arrest was obtained but not executed, because he could not be traced. This warrant was never cancelled by SAPS.

2.27.12 As a result of Commissioner Fivaz's instruction of 7 November 1996, namely that all cases be referred to Dr D'Oliveira's Unit, the docket came into possession of Britz. The investigation diary of the docket confirms that on 16 July 2003, Director Nel received it for further investigation. Director Nel established that certain suspects were still outstanding on warrants and thereafter traced them. He thereafter furnished the Serious & Violent Crimes Unit in Port Elizabeth with copies of the witness statements with instructions to trace the suspects and witnesses.

2.27.13 In 2003, Britz referred the docket to the PCLU, requesting a prosecution of Blani on the basis that he had been traced by SAPS and had not applied for amnesty. This case is reflected as case No 266 in the SAPS register.

2.27.14 On 25 January 2005, the accused pleaded guilty and received a partially suspended term of imprisonment.

2.28 <u>The reappointment of Senior Superintendent Britz</u>

2.28.1 At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to investigate the dockets in possession of SAPS.

2.28.2 I wish to express my concern at this. Britz was a former member of the Security Branch, who, prior to the PCLU being involved with TRC cases, assisted the DPP: Pretoria with cases involving the Liberation Movement.

2.28.3 Former Police Commissioner General van der Merwe had formed an organization entitled "*The Foundation for Equality before the Law*" which was intended to ensure that no further prosecutions of Security Branch members would take place.

2.28.4 When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization, but had regular contact with General van der Merwe.

2.28.5 In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were Security Branch members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of Security Branch members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.

2.28.6 When the issue of prosecuting Security Branch members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.

2.28.7 The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.

2.28.8 This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the DPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.

2.28.9 I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe.

ADV AR ACKERMANN SC

RCM 11
846

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

In the matter of: Case Number: 01/17

RE-OPENED INQUEST: MR AHMED TIMOL

AFFIDAVIT OF ADV. RAYMOND CHRISTOPHER MACADAM

1.

I am a Senior Deputy Director of Public Prosecutions in the office of the National Director of Public Prosecutions.

2.

Since 2003 I have been a member of the PCLU.

3.

My attention has been drawn to paragraphs 27 to 30 of an affidavit made by Mr Imtiaz Cajee, which was placed before this Honorable Court on 14 August 2017. In my view this creates the impression that I had investigated a complaint made to the then National Director that the police officers involved with the death of Mr Timol be charged with murder and had advised Mr Cajee that my investigation had produced "negative results". This is not a true reflection of my involvement in the matter.

4.

I was not aware of a complaint made to the National Director but was approached directly by Mr Cajee who informed me that the daughter of Sgt. Rodrigues had approached a journalist Ivor Powell and informed him that her father had told her how the deceased was murdered. I immediately reported the allegations to the DSO ("The Scorpions") A Chief Investigating Officer was sent to interview Mr Powell and establish whether Sgt. Rodrigues could be charged with murder. I was informed that after

investigation no basis for the allegations could be established. Mr Powell was emphatic that no such approach had been made to him.

5.

On 25 February 2004 I wrote to Mr Cajee informing him that this investigation had produced negative results. I did however invite him to supply me with additional information so that the case could be reconsidered. I did not however hear anything further from him. I attach a copy of my letter addressed to him as RCM1.

6.

Shortly thereafter, I was assigned a very lengthy prosecution relating to an international nuclear weapons syndicate and was no longer involved in TRC cases.

7.

I have had sight of the letter dated 29 November 2006 entitled "Report of the progress made by the Task Team on TRC Cases" which was attached as Annexure "A" to Mr Cajee's affidavit. I was not the author of the report. As the report clearly indicates it related to the work of a task team. I was not a member of this task team. As the report also reflects it was the decision of this team to close the matter relating to the deceased.

8.

At a later stage I was again instructed to deal with TRC cases. The investigation of these matters was now the responsibility of the DPCI. In late 2015 I looked into this matter and was of the view that it should be investigated. I therefore requested the DPCI to open an investigation into the matter.

9.

I downloaded the copy of the inquest record which was held by Wits and requested the police to establish the whereabouts of the implicated parties, witnesses and medical experts. I also contacted Mr Piers Pigou who had dealt with the matter at the TRC. I also requested a researcher to obtain the detention files of persons who were detained at the same time as the deceased. Copies of my communications are attached hereto as RCM2 and RCM3.

10.

I was however assigned a very urgent matter relating to international terrorism and plans to carry out terrorist attacks in South Africa. I briefed Adv. Pretorius SC on what work had been commenced on

the matter of the deceased. He informed me that he would monitor the police investigation and later advised me that he had decided that it would be appropriate to hold a formal inquest.

_____

DEPONENT

Thus signed and sworn to at _____ on this _____ day of _____ 2017

The Deponent having knowledge that he knows and understands the contents of this affidavits, that it is both true and correct to the best of his knowledge and belief, that he has no objection to taking the prescribed oath and that the prescribed oath would be binding on his conscience.

_____

COMMISSIONER OF OATHS

FULL NAME: _____

BUSINESS ADDRESS:

_____

_____

_____

_____

CAPACITY: _____

AREA: _____

RC 7/2
849

/Z56 forms

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Tel: (012) 845 6474

INTERNAL MEMORANDUM

TO: DR MS RAMAITE

FROM: ADV AR ACKERMANN SC

SUBJECT: AUDIT OF CASES EMANATING FROM TRC PROCESS

DATE: 24 OCTOBER 2006

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1. HISTORICAL BACKGROUND

1.1 After the closure of the Goldstone Commission in 1993/94 the government of the day decided that its work in investigating human rights abuses relating to conflicts of the past should continue under the supervision of the then Attorney General of Pretoria, Dr J D'Oliveira. A team of the South African Police Service was seconded to his office to conduct the necessary investigations.

1.2 The team was divided into two groups. One focusing on offences committed by security force members and the other group on offences committed by Liberation Movements and the Right Wing.

1.3 This latter team comprised of Director Nel and Senior Superintendent Britz.

1.4 The Attorney General decided that Deputy Attorney General Fick would supervise all the investigations conducted by the two police officers while he would deal with cases involving security force members.

1.5 On 7 November 1996 the National Commissioner at the request

of Dr D'Oliveira instructed all his Provincial Commissioners to submit all outstanding and unsolved cases pertaining to the entire political spectrum of the conflicts of the past to Dr J D'Oliveira's office. Such instruction also related to cases where not all the accused had been prosecuted.

1.6 With the appointment of the NDPP the cases dealt with by D'Oliveira were transferred to his office while Fick continued to deal with the cases originally allocated to him i.e. the Liberation Movement cases. He continued to be assisted by the SAPS members, Nel and Britz. Their contracts were routinely extended by SAPS.

1.7 The NDPP however instructed Fick not to institute any prosecutions without his authorisation and no prosecutions were therefore instituted.

1.8 With the creation of the DSO in 2001 the cases with the NDPP were transferred to the DSO Head Quarters. Fick however continued with his cases assisted by the two police officers.

No prosecutions were instituted because the TRC's final report and the President's response thereto were outstanding.

1.10 With the creation of the PCLU in March 2003, the NDPP assigned all TRC matters to it after the TRC had tabled its final report and the President had mandated the NDPP to institute prosecutions where appropriate, arising from the TRC process.

1.11 The PCLU was not an investigative agency and was therefore dependant on SAPS and the DSO for investigations. The PCLU reports monthly to a Deputy National Director and the NDPP approved all its decisions to institute TRC prosecutions and, in certain high profile cases, certain decisions not to prosecute.

1.12 The DSO policy guidelines for prosecutions in these matters were accepted by the PCLU. In essence, these were to the effect that prosecutions should only be instituted for serious human rights abuses, based on reliable evidence while accepting that humanitarian factors and the interests of reconciliation could also be taken into consideration.

1.13 It was decided that Ackermann would take over Fick's cases and Macadam would take over the DSO cases.

1.14 The PCLU conducted an audit of all the cases in both offices.

1.15 In this auditing process it was established that the police officers at Fick's office at the DPP Pretoria had registered 395 police dockets.

1.16 During 2003/2004, Ackermann declined to prosecute in +- 80 of the abovementioned cases.

1.17 Similarly +- 50 cases from the DSO were finalised by Macadam and Ackermann.

1.18 The audit process further identified a small number of cases warranting prosecution which are dealt with hereunder.

1.19 The 395 police dockets which were in the possession of Nel and Britz were returned to SAPS and the NDPP informed Commissioner Tim Williams that these dockets were police property and that the NPA had no interest in them except if SAPS desired prosecutions in which case they could be re-submitted for these purposes. The then Director General of Justice, Mr V Pikoli and other high ranking officials were present when this discussion between the NDPP and Williams took place. As of the date of this memo, no such dockets have been submitted to the NPA for decision.

2. CASES FINALISED IN COURT

2.1 *S v Khwezi Ngoma and Others* (Mhaga)

This matter involved four APLA cadres who attacked Willowvale police station in 1994 resulting in the death of a policeman and another injured. They didn't apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges but it was rejected and entered into plea bargain and received suspended sentences.

2.2 *S v Aron Tyani & Another* (Mhaga)

The matter relates to the attempted murder and murder of Stembele Zokwe an MK cadre during 1987 and 1988 by the Transkei security police. They were convicted and sentenced to direct terms of imprisonment in 2005.

2.3 *S v Eugéne Terre'blanche* (Ackermann)

In November 2003 the accused pleaded guilty to several charges of terrorism, linked to 1994 pre-election bombings. He was sentenced to 6 years wholly suspended.

2.4 *S v Blani* (Macadam and Ackermann)

The accused was convicted on two counts of murder in Grahamstown High Court and sentenced to a partially suspended sentence.

3. MATTERS CLOSED BY PCLU

3.1 Death in detention Ahmed Timol

3.1.1 This matter relates to the death of Ahmed Timol who died in police detention on 27 October 1971 during interrogation by the Apartheid Security Police.

3.1.2 There was an allegation that one of the interrogators had confessed to a journalist that Timol had been murdered and that was followed up but was later denied by the said journalist.

3.1.3 The matter was therefore closed.

3.2 Death in detention of Steve Biko

The matter prescribed in 1997 as evidence only proves culpable homicide which according to our criminal law prescribes after 20 years.

3.3 Carl Niehaus (Macadam)

3.3.1 Victim tortured during detention.

3.3.2 Victim does not desire prosecution.

3.3.3 File closed.

3.4 Skoulides (Macadam)

3.4.1 Victim's sister alleged that her brother had been framed for a murder committed by the Security Forces.

3.4.2 No evidence to substantiate this claim.

3.4.3 File closed.

3.5 Nelson Sithole (Macadam)

Closed – no evidence as to perpetrators.

3.6 Pro Jack (Macadam)

Closed – no reliable evidence as to perpetrators.

3.7 AM Zulu (Macadam)

No admissible evidence arising from TRC.

3.8 Bult (Macadam)

Offence not serious – assault common.

3.9 Castro Khumalo (Macadam)

Matter was referred to Missing Persons' Task Team.

3.10 Winnie Mandela (Macadam)

No reliable evidence.

3.11 Ermelo Black Cats (Macadam)

No reliable evidence to prosecute IFP members in Mpumalanga linked to this incident.

3.12 Chadwick (Macadam)

Extradition request withdrawn because of a lack of evidence.

3.13 Anton Lubowski (Macadam)

No evidence.

3.14 Ciskei *coup d'etat* (Macadam)

No evidence.

3.15 General Basie Smit (Macadam)

No evidence.

3.16 *S v Bongani Wana* (Mhaga)

3.16.1 This matter relates to the murder of Zolile Sangoni, Zonwabele Mayapi and an MK cadre Gift Mgibe who were killed by Vlakplaas operatives in 1988 in Umtata.

3.16.2 Mr Wana had applied for amnesty but later withdrew his application.

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3.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

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3.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.

3.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.

3.22 Smit murders (Dr Pretorius)

3.22.1 Perpetrators all deceased except one suspect who apparently lives in Australia.

3.22.2 Insufficient evidence to apply for extradition.

3.22.3 Matter closed.

3.23 Refusal of amnesty to the President and other high-ranking ANC officials

No evidence that specific crimes had been committed, which attracted personal criminal liability could be found. Consequently, the case was closed.

3.24 IFP Hit Squads (allegations of Luthuli Mbambo and Mkhize)

No reliable evidence upon which to overturn the decision of the DPP: KZN not to prosecute.

3.25 Bombing of Early Learning Centre and other Western Cape CCB activities (Macadam)

The perpetrators were all granted indemnity in terms of the Indemnity Act or in terms of section 204 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

3.26 Plus-minus 80 cases against members of the Liberation Movement (Ackermann)

All these cases were investigated by SAPS and were all closed.

4. POTENTIAL PROSECUTIONS IDENTIFIED BY PCLU

4.1 *S v Otto & 2 Others* (poisoning of Rev. Chikane) (Ackermann)

4.1.1 Indictment already drafted in 2004 – prosecution was put on hold pending approval of guidelines.

4.1.2 In February 2006, NDPP authorized prosecution.

4.1.3 In terms of the guidelines, representations were received from the accused which were considered by the NDPP.

4.1.4 On 19 September 2006, Ackermann was directed to proceed with the prosecution against the accused.

4.1.5 Beginning of October 2006, it was decided to put prosecution on hold, pending the obtaining of a legal opinion on whether the accused have received indemnity or not in terms of the Indemnity Act, 1990.

4.2 Pebco 3 (Ackermann)

4.2.1 In February 2004, the three accused were charged in the High Court on three counts of kidnapping and murder.

4.2.2 The matter is currently on review.

4.2.3 Next court appearance of accused is August 2007.

4.3 Cradock 4 (Ackermann)

4.3.1 Potential prosecution.

4.3.2 Legal obstacles.

4.3.3 Extensive investigations required.

4.4 *S v Botha and Others* (kidnapping of Ntombi Kubheka) (Ackermann)

4.4.1 Priscilla Ntombi Kubheka was an MK operative who lived in KwaMashu township in Durban.

4.4.2 She was kidnapped by Askaris, interrogated, tortured and subsequently killed by members of the Security Branch C1 Unit in 1987.

4.4.3 Seven members applied for amnesty for kidnapping, killing and disposing of the body of Kubheka. Only Baker and Radebe received amnesty while Botha, Du Preez, Van der Merwe and Visagie were refused. Docket in possession of PCLU.

4.5 S *v Coetzee and Others* (Nokuthula Simelane Kidnapping) (Ackermann)

4.5.1 Nokuthula Simelane was an underground MK operative acting as a courier and had been a major communication link between an MK base in Swaziland and SA.

4.5.2 She disappeared in 1983 after being sent on a mission in SA .

4.5.3 Docket in possession of PCLU.

4.6 Cosas Four (Ackermann)

4.6.1 The matter relates to the killing of Eustice Bimbo Madikela, Ntshingo Mataboge, Fanyana Nhlapo and attempted killing of Zandisile Musi (collectively referred to as the Cosas Four) in an explosion at Krugersdorp on or about 15 February 1982..

4.6.2 The four officers and an Askari who were involved in the incident applied for amnesty and were refused.

4.6.3 The PCLU is not in possession of the docket.

4.7 Murder of Askari Strongman Sambo

The matter had been identified as a potential prosecution case but a decision has already been made by the DPP in Pretoria not to prosecute.

4.8 Matter of SAP General Engelbrecht

The matter had also been identified for prosecution but a decision was made by the DPP in Pretoria not to prosecute General Engelbrecht.

4.9 Death of George Mashele and Lilian Magosha (Mhaga)

4.9.1 This office received representation from Joseph Yende who claims to be the son of Lillian and brother of George.

4.9.2 George and his mother died during a raid by the SAP at his home in July 1992.

4.9.3 According to the police statements and post-mortem reports, the two died as a result of hand grenade explosion.

4.9.4 There is no evidence to rebut that version but Yende claims that there are witnesses who claim to have seen otherwise.

4.9.5 The PCLU is currently arranging consultations with them to verify these allegations. The family was compensated by the TRC for the incident.

4.10 Nicolas Boykie Thlapi (Dissappearance in police custody) (Mhaga)

4.10.1 ANC branch in Klerksdorp submitted a memorandum demanding investigation into the disappearance of Boykie in March 1986 after being arrested by police with other members of Ikakgeng Youth Congress.

4.10.2 The matter is currently investigated by Capt Mathi of Klerksdorp serious and Violent Crimes Unit.

4.11 Lethlapa Mphahlele (Heidelberg Tavern and St James Massacre)

4.11.1 A representation was received by PCLU from Democratic Alliance and the father of Lynn Fourie who was killed during the attack.

4.11.2 A number of APLA cadres involved in the attack applied for and received amnesty after serving sentences. Mr Mphahlele applied for amnesty but later failed to appear before the commission resulting in his application refused in his absence.

4.11.3 As soon as an investigator is appointed for the case a decision will be made on whether

to prosecute or not.

4.12 Bathandwa Ndondo (Murder by Vlakplaas operatives in 1985) (Ackermann)

4.12.1 Batandwa Ndondo was an MK underground cadre operating in Transkei after his expulsion from the University of Transkei for his political involvement.

4.12.2 He was wanted by the Security police in Transkei and the Vlakplaas operatives and subsequently murdered in 1985. We received a representation from Adv Dumisa Ntsebeza requesting prosecution of the police officer who did not receive amnesty.

4.12.3 A decision had been made by the former NDPP not to prosecute him, we are therefore still considering the request as this will require overturning the previous decision if we decide to prosecute.

4.13 Moss Morudu (kidnapping and murder) 1987

4.13.1 Moss Morudu was a Cosas member in Mamelodi and had been politically active during 1986.

4.13.2 He was alleged to be a member of the underground unit of Umkhonto Wesizwe under the command of Obet Masango.

4.13.3 He disappeared from his home during October 1986 after the Security police had been looking for him in connection with a landmine explosion.

4.13.4 He was kidnapped by three security operatives under the pretence that they were MK cadres taking him to exile for military training. He was never seen again by his family.

4.13.5 The three officers who kidnapped Moss received amnesty for kidnapping and others did not apply for amnesty. As soon as an investigator is appointed a decision will be made on whether to prosecute or not.

4.14 Kidnapping and murder of Betty Boom, Mashiya and Sejamane

The perpetrators were refused amnesty by the TRC.

4.15 Kidnapping and murder of Mbulelo Ngono

The perpetrators were refused amnesty by the TRC

4.16 Gaberone raid

The perpetrators were refused amnesty by the TRC

4.17 Maseru raid (General Johan van der Merwe implicated)

The perpetrators were refused amnesty by the TRC

4.18 Samora Machel (Dr Pretorius)

This matter was reopened in 2005.

4.19 Phillip Powell (Macadam/Ackermann)

4.19.1 NDPP directed that the PCLU apply for the extradition of Powell.

4.19.2 However, accused indicated that he wished to make representations.

4.19.3 Representations are awaited.

4.20 Victoria Mxenge (Macadam)

Allegations of an amnesty applicant must be investigated.

4.21 George Wauschope (Macadam)

4.21.1 The accused is a former leader of AZAPO. He was indicted to stand trial in the Johannesburg High Court in 1989 on charges of murder and attempted murder.

4.21.2 He absconded and took up exile in Zimbabwe.

4.21.3 The TRC rejected his application for amnesty, because he denied that he had admitted any crime.

4.21.4 In 2003, representations were made on his behalf to Minister Maduna to withdraw the charges.

4.21.5 The DSO evaluated the case in order to enable the Minister to respond.

4.21.6 The victims, who were also the eyewitnesses, were traced and they confirmed their allegations against the accused and also requested that he be prosecuted.

4.21.7 On their version, it would appear that the accused shot the deceased in the mistaken belief that he was a member of COSAS and in the process wounded an innocent bystander.

4.21.8 The former NDPP and the Minister decided that the prosecution should proceed.

4.21.9 The case was referred to the DPP: Johannesburg, who has in turn requested SAPS to conduct investigations.

4.21.10 These investigations are in progress.

4.22 Eugéne de Kock

4.22.1 De Kock's legal representative has indicated that he has laid a wide ranging number of charges with SAPS relating to matters which were not put before the TRC or in respect of which false testimony was presented to the TRC.

4.22.2 These allegations must be considered insofar as they are relevant to the TRC processes.

ADV AR ACKERMANN SC

RCM 13
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ANNEXURE "B"

REPUBLIC OF SOUTH AFRICA

INDEMNITY BILL

(Second Draft)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2003]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VRYWARING

(Tweede Konsep)

(MINISTER VIR JUSTISIE EN STAATKUNIDGE ONTWIKKELING)

[W - 2003]

010902AE

BILL

To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the period from 1 March 1960 to the cut-off date; for the said purpose to establish a Committee on Indemnity to consider and investigate applications for indemnity and to make recommendations to the President; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provided for a law to be adopted by Parliament in terms of which amnesty should be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

AND SINCE that law was adopted and the mechanisms and procedures established by that law have run their course and have been concluded;

AND SINCE there remains a need for reconciliation and reconstruction as contemplated in that Constitution;

TERMS OF REFERECE OF THE AMNESTY TASK TEAM

The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past.

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

3. Bearing the above-mentioned guidelines in mind, whether legislative enactments are required.

4. Whether any of the two Bills that have already been formulated can be proceeded with, bearing in mind the views of our intelligence agencies.

DRAFT

Leon Robinson
0824589621

AMNESTY TASK TEAM

FURTHER REPORT

SECRET

FURTHER REPORT: AMNESTY TASK TEAM

1. Background Information

1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.

1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:

(a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.

(b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.

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

(d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.

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

(f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

2. Discussion

2.1 The establishment of a Departmental Task Team

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

2.2 Ad paragraph 1.2(a): The involvement of existing structures

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

2.3 Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

2.4 Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

2.5 **Ad paragraph 2.1(d): National interest should be the paramount objective**

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

2.6 **Ad paragraph 2.1(e): The involvement of the International Criminal Court**

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

2.7 **Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work**

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is proposed that the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.

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RCM 16

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

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

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
9/2/07
NATIONAL PROSECUTING AUTHORITY

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COPY

RCM 17

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;

(ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;

(iv) such agreements should be in accordance with the NPA's prosecution mandate; and

(v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*).[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU **"shall be assisted in the execution of its duties"** by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the proseeuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "**B**" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C"** and **"D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken.".
- "In my view a comprehensive report...should be discussed by the Directors-General".

- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the **"normal legal processes"** and **"prosecuting mandate"** of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa. I am currently a special adviser to the Minister for the State Security Agency. I was the National Director of Public Prosecutions ("**NDPP**") between 1 February 2005 and 23

V.P.
M.R.

September 2007.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I have read the answering affidavit of **IMITIAZ AHMED CAJEE** and bear personal knowledge of the factual averments contained therein as far as they relate to me and developments at the National Prosecuting Authority ("**NPA**") while I was the NDPP.

4. I confirm the veracity and essence of the aforesaid affidavit, together with the annexes attached thereto, inso far as they relate to me and the NPA while I was the NDPP.

VUSUMZI PATRICK PIKOLI

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Bryanston on this the 19th day of **January 2019** in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

M.P. Zwane (B.Proc, LLB)
Advocate of the High Court
083 468 1964
Commissioner of Oaths

COMMISSIONER OF OATHS

SA2 882

WEBBER WENTZEL

in alliance with > Linklaters

Attention : Adv Abrahams

Attention: Adv Pretorius SC

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

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Your reference	Our reference	Date
	M Hathorn / M Peters 3005790	18 January 2018

CONFIDENTIALITY NOTE: This letter contains confidential information intended only for the person/s to whom it is addressed. Any other recipient is not entitled to read the rest of this letter or disclose its contents to any person, or take copies, and is requested to notify us immediately by fax, e-mail or telephone at the numbers listed above and we will reimburse the costs of doing so

Dear Advocates Abrahams and Pretorius

APARTHEID ERA CASES:

1. STATE v MSEBENZI TIMOTHY RADEBE & 3 ORS, CASE NO.: CC 16/2016
2. INQUEST INTO DEATH OF AHMED ESSOP TIMOL: CASE NO: I01-2017
3. LATE NEIL AGGETT
4. LATE MATTHEWS MABELANE
5. LATE HOOSEN HAFFEJEE
6. LATE SULIMAN BABLA SALOOJEE
7. OTHER UNRESOLVED DEATHS
8. SERIOUS CASES WHERE AMNESTY WAS REFUSED OR NO APPLICATION WAS MADE

1. We seek a meeting with you discuss the abovementioned cases.

Case 1: Late Nokuthula Simelane

2. In respect of case 1, which deals with the late Nokuthula Simelane, we have received no responses to our letter to Advocates Mathenjwa and Barnard dated 24 October 2016 and our letter to you dated 28 February 2017.

12209208_1

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa NG Alp OA Ampofo-Anti -RL Appelbaum DC Bayman AE Bennett AP Blair DHL Booysen AR Bowley JL Brink S Browne MS Burger RJ Carnie T Cassim SJ Chong A Christie KL Collier KM Colman KE Coster K Couzyn JJ Daniels JH Davies PM Daya L de Bruyn PU Dela JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Fejeki GA Fichardt G Fitzmaurice JB Forman C Gabriel CP Gaul KL Gawith CH Geldenhuys MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston M Kyle J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer CS Meyer AJ Mills JA Milner D Milo MP Mngomezulu S Mogale M Molosi LE Mostert VM Movshovich RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige ANT Pardini AS Parry S Patel GR Penfold SE Phajane TC Phala MA Philips D Ramjettan GI Rapson Z Ravjoot K Rew G Richards-Smith NJA Robb DC Rudman S Rugan M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh J Smit MP Spalding PS Stein MW Straeuli LJ Swaine JM Swanepoel Z Swanepoel A Thakor A Toefy PZ Vanda PP van der Merwe SE van der Heulen CS Vanmali JC Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

Webber Wentzel is associated with ALN

3. In these letters we raised grave concerns about the prosecutorial strategy adopted in this case, which in our view serves to undermine the prospects of a successful prosecution. Indeed we pointed out that our client has lost faith in the ability of this prosecutorial team to conduct a serious and vigorous prosecution. We accordingly seek the appointment of fresh prosecutors to take this matter forward.

Case 2: Late Ahmed Timol

4. Our letter to Adv Pretorius SC dated 25 October 2017 refers. Judge Mothle recommended that criminal charges be pursued against former Sergeant Joao Anastacio Rodrigues, former Warrant Officer Neville Els and former Colonel Seth Sons. We wish to discuss progress in these investigations and the prosecutorial approach to be taken.

Case 3: Late Neil Aggett

5 In case 2, the Neil Aggett matter, we are concerned that to date, no request has been made to the Minister of Justice to seek the reopening of the inquest into Aggett's death.

6. We have engaged in extensive correspondence with you in relation to this matter. In these communications we have pointed out why an early decision is important, including the fact that some witnesses are now elderly and sickly.

7. We have repeatedly pointed out that there is already more than sufficient new evidence to warrant the reopening. Moreover, there would be a time lapse of several months between such decision and the hearing, during which outstanding investigations could be concluded. In particular we refer you to:

7.1 Our presentation provided to you on 19 January 2016;

7.2 Our email dated 21 June 2016 and letter to you dated 8 July 2016;

7.3 Our letter to you dated 23 August 2016;

7.4 Our letter to you dated 21 February 2017.

8. Advocate T Pretorius SC has advised our investigators, Messrs Dutton and Bursik that he may not make available the files of the relevant detainees or SAPS members until the Minister of Justice had agreed to re-open the Inquest. The late delivery of such files in the Timol inquest placed enormous pressure on the legal teams in that matter.

9. We also place on record that our investigators are still waiting for a number of ID numbers of detainees and former SAP members.

10. We accordingly seek a firm date upon which the NDPP will recommend to the Minister of Justice to reopen the Aggett Inquest in terms of s 17A of the Inquest Act 58 of 1959.

Case 4: Late Matthews Mabelane

11. In this matter the late Matthews Mabelane fell to his death on 15 February 1977 from the tenth floor of John Vorster Square following 23 days of Security Branch detention. The Legal Resources Centre are the attorneys of record in this case.

12. We wish to discuss the progress of investigations in this case and what paperwork has been uncovered so far.

Case 5: Late Hoosen Mia Haffejee

13. In this matter the late Dr Hoosen Haffejee died on 3 August 1977 at the Brighton Police Station in Durban after 1 day of Security Branch detention. According to the police he committed suicide by hanging.

14. We understand that the NPA is seized with this matter and that investigations are proceeding. We would be pleased to hear of the progress in these investigations. We also wish to ensure that the Haffejee family is legally represented.

Case 6: Late Suliman Babla Saloojee

15. The police claim that Babla Saloojee, who died on 9 September 1964, committed suicide by jumping from the 7th floor of the Greys Building in Johannesburg following 65 days in detention. Imtiaz Cajee is in touch with the wife of the late Saloojee who has indicated a desire to have the inquest reopened.

16. We wish to enquire whether this matter is on your books, and if so the state of the investigations.

Other cases

17. We would be pleased to hear whether the NPA is seized with any other apartheid-era cases. When we met with Advocate Abrahams after the launch of civil proceedings in the Nokuthula Simelane matter in 2015 he indicated that the NPA was pursuing an additional 10 cases.

18. Mr. Imtiaz Cajee is also in contact with the families of:

18.1 Nicodemus Kgoathe: He died in detention 4 February 1969 after "slipping in the shower' at the Silverton Police Station;

18.2 Solomon Modipane: He was arrested with Kgoathe and died on 28 February 1969 after "slipping on a piece of soap" at the Silverton Police Station;

18.3 Jacob Monnakgotla: He was arrested with the above and died in Pretoria Prison on 10 September 1969, apparently of natural causes.

18.4 Dr Albert Luthuli: He died on 21 July 1967 in Groutville, near Durban, after apparently being run over by a train.

19. Other deaths in detention which ought to be followed up include:

19.1 Imran Haroon: After being held incommunicado for 123 days by the Security Branch Imam Haron died on 27 September 1969. During an inquest into his death, police claimed that his injuries were from falling down a flight of stairs at the Maitland police station. At his post mortem several pre-death injuries were found. Haroon had 28 bruises on his legs as well as other injuries inconsistent with a fall down stairs. The inquest predictably found that nobody was to blame for his death.

19.2 The well-known case of Bantu Stephen Biko who died in Security Branch detention on 12 September 1977.

20. We also wish to raise the possibility of opening or reopening the inquests into the abovenamed.

Serious cases where amnesty was refused or no application made

21. Eleven cases have been selected following an analysis of the amnesty records of the TRC.

22. All the crimes are serious. They include murder, conspiracy to murder, attempted murder, kidnapping and torture. In all the matters listed the evidence is either available or can be secure through the most basic investigative steps. The 11 cases are:

22.1 Murders of Eustice "Bimbo" Madikela, Ntshingo Mataboge & Fanyana Nhlapo

22.2 Murders of Sipho Charles Hashe; Qaqawuli Godolozi & Champion Galela (Pebco 3)

22.3 Murders of Matthew Goniwe, Sparrow Mkhonto, Fort Calata & Sicelo Mhlauli (Cradock 4)

22.4 Kidnapping, Torture & Disappearance of Peter Thabuleka

22.5 Kidnapping & Murder of Ntombikayise Khubeka

22.6 Murder of Richard Motisi & Irene Motisi

22.7 Kidnapping & Disappearance of Moses Morudi

22.8 Kidnapping, Torture & Murder of Jameson Ngoloyi Mngomezulu

22.9 Murder of Johannes Sweet Sambo

22.10 Murder of Adriaano Louis Bambo

22.11 Murder of Welcome Khanyile

23. The potential accused are those persons who were denied amnesty by the Truth and Reconciliation Commission (TRC) or who declined to apply for amnesty. Details of these cases are annexed hereto in a memorandum marked "A".

24. The 11 cases set out in Annex A are ripe for investigation and possible prosecution, and have been so for many years, if not decades. Where prosecutions are not possible inquests should be held or reopened.

25. Aside from discussing each case mentioned in this letter we also wish to discuss the possibility of these cases being handled by a small group of dedicated and committed prosecutors within the NPA, supported by carefully selected investigators.

26. In the circumstances we seek a meeting with you at your earliest convenience.

Yours faithfully

WEBBER WENTZEL
Moray Hathorn
Partner
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LEGAL RESOURCES CENTRE
Naseema Fakir
Regional Director (Johannesburg)
Tel: +27 11 836 9831
Email: naseema@lrc.org.za

Letter submitted electronically without signature.

SA3 (1)

FRANS NGWAKO MATHIPA state under oath in English that:

1

I am a Captain in the South African Police Service stationed at the unit Crimes Against the State, Serious Organised Crime, Directorate for Priority Crime Investigation, General Piet Joubert Building, 218 Visagie Street, Pretoria CBD, from the context hereof, the facts herein contained are within my personal knowledge and belief both true and correct.

2

I am the current investigating Officer of Johannesburg Central CAS 798/10/2017 with the following team members:

- ✓ Sgt Dlamini
- ✓ Sgt Khoza
- ✓ Const Ubisi

3

The reason the case was booked to us was that, the initial Investigating Officer was on sick leave, Capt Ben Nel. We received the docket in May 2018.

4

During the course of our investigation, we completed the outstanding investigation and obtained outstanding documentation.

5

During the course of our investigation we had to establish the whereabouts of Mr Roderigues to obtain his warning statement. His address on the docket which was registered by Captain Nel listed the address as 853 11th Street, Wonderboom South, Pretoria. Sgt Khoza and I visited this address twice but we could not find it. I then obtained Mr Rodriques contact number 0829566010. I contacted Mr Rodriques and an appointment was made to meet him on the 9th June 2018 at 10 o'clock. His address was actually 835 11th avenue, Wonderboom South, Pretoria.

5

On 9 June 2018 at 10 o'clock Mr Rodriques was visited. Sgt Khoza accompanied me but I entered first. Sgt Khoza came around the other side for safety reasons. We could not enter the yard as there were vicious dogs. Mr Rodriques had to come and collect me at the gate. He was walking fine with no difficulty and we walked into his study room where the interview was conducted. I told him about the purpose of my visit and he understood. Whilst we were busy, Sgt Khoza informed me that he was at the gate.

6

I further told him my colleague Sgt Khoza is on his way. He needed to be let in. As we started talking, Sgt Khoza was at the gate and we had to go and fetch him. He again walked with me and he was fine. He walked with no difficult. After informing him of why we were there again, we warned him of his rights and obtained his warning statement. We conversed comfortably in Afrikaans. He confirmed that he was the last person in the room with Mr Timol and that Mr Timol jumped out of the window. He confirmed his testimony at the inquest of 1972 & IQ 01/2017.

7

On 20 July 2018, an application for J50 warrant was requested and was granted. An arrangement was made with Mr Rodriques's legal team to hand their client at Johannesburg Police Station on Monday, 30 July 2018. It was not our intention to arrest him and keep him in a cell until bringing him to court. The legal team of Mr Rodriques brought him to Johannesburg Police Station, handed him to me and I proceeded with him to the second floor of the police cells, using the stairs. It was the first time I saw him walking with a crutch. He never complained to me that he couldn't walk. He was charged and appeared in Johannesburg Magistrate Court and the case remanded to 18 September 2018.

At his unopposed bail application, which I attach at FM 1, it was noted that the accused suffered from the "usual ailments and illnesses associated with old age". He was able inform the court that the problem with climbing up the staircase was nothing more than because of an operation he had on his leg two months prior. The court canvassed the issue of elaborating on his "sickness and health conditions", and he informed the court, through counsel, that he suffered from "diabetes...and things like that...but there is nothing specific that will effect him in such a way". No mention was made of a pacemaker and his heart condition, or a serious difficulty with his left knee and hip, or a problem with a fading memory.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

Date: 2018/11/29

Time: 13:55

Place: Pretoria

(SIGNATURE OF DEPONENT)
FN MATHIPA

I certify that the deponent has acknowledged that he knows and understand the contents of this statement which was sworn to before me and the deponent's signature was placed thereon in my presence at Pretoria on 29 Nov 2018 at 13:57

SERIOUS ORGANISED CRIME: HEAD OFFICE
PRIVATE BAG X1500
29 NOV 2018
SILVERTON, 0127
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

Capt

COMMISSIONER OF OATHS
ANNELIEN BREEPT
GENERAL PIET JOUBERT BUILDING
218 VISAGIE STREET, PRETORIA
CAPT SA POLICE SERVICE

SA3(ii)

TRANSCRIBER'S CERTIFICATE

This is to certify that, **insofar as it is audible**, the aforegoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

STATE // JA RODRIGUES

CASE NUMBER	: 48/08/2018
RECORDED AT	: JOHANNESBURG
DATE HELD	: 2018-07-30
TRANSCRIBER	: RENATE SONEMANN
NUMBER OF AUDIO FILES	: 1
NUMBER OF PAGES	: 31

REPORT ON RECORDING

1. The defence advocate is not using a microphone. He can only be heard via channel 1 and the noises generated by the magistrate and in the background frequently make his speech indistinct.

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Recordings, Transcriptions & Translations

IN THE MAGISTRATES COURT

FOR THE DISTRICT OF JOHANNESBURG CENTRAL

HELD AT JOHANNESBURG

CASE NO: 48/08/2018

DATE: 2018-07-30

In the matter between

THE STATE

versus

JOAO ANASTACIO RODRIGUES Accused

BAIL APPLICATION

BEFORE	:	MR LABUSCHAGNE
ON BEHALF OF THE APPLICANT	:	ADV COETZEE
ON BEHALF OF THE RESPONDENT	:	ADV KHUMALO
		ADV SINGH
INTERPRETER	:	MS MANNISENG

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Pro Transcriptions cc

Recordings, Transcriptions & Translations

PROCEEDINGS HELD ON 30 JULY 2018 [11:20]

COURT: Thank you you are on record. You may proceed and place everybody on record.

PROSECUTOR: Thank you Your Worship. Today being the 30 July 2018. The court's composition is as follows. Presiding officer Mr Labuschagne, for the state Advocate Khumalo and Advocate Singh, interpreter Ms Manniseng, and for the accused is Advocate Coetzee.

COURT: Thank you.

PROSECUTOR: Court pleases. Your Worship the accused appears on a charge of murder and also defeating the ends of justice. Murder which falls within schedule 6. And the matter is on roll for bail application. It is a formal bail application. Although in principle it is not opposed, but processes and procedures has to be followed. And the defence, or the applicant will move the bail application. As the Court pleases.

COURT: Thank you.

MR COETZEE: Thank you Your Worship. I confirm my appearance on behalf of the accused. Your Worship I can inform the Court that the accused is Afrikaans speaking. But he follows English very well, and he has no problem if the proceedings proceed in Afrikaans [sic].

Your Worship ...[intervened]

COURT: Before we just proceed, let me just sort out a few ... I just want to establish his surname. Is it Anastotio or is

it Rodrigues?

MR COETZEE: Rodrigues is his surname.

COURT: Is his surname. Because I have written surname first and then a name. I just want to ... so Rodrigues is the surname?

MR COETZEE: Rodrigues is the surname.

COURT: I just want to confirm, you said that murder is applicable on count 1. Is the minimum sentence act going to be applicable on the charge?

PROSECUTOR: That is correct, My Lord.

COURT: Are the state going to rely in terms of section 51(1) Part I or II? So is it pre-meditated or your are not going to allege pre-meditated?

PROSECUTOR: That is 51(1) My Lord, 51(1).

COURT: So it will be pre-meditated?

PROSECUTOR: That is correct.

COURT: Sir your advocate have indicated that you can be seated. They have informed me that you had an operation on your leg, so you can be seated there.

Firstly I just want to establish, you follow in English, you do not need the Afrikaans interpreter?

APPLICANT: I can follow in English Your Worship.

COURT: You can follow in English. Sir secondly what I must explain to you. The charges against you is one of murder and the second count is defeating the ends of justice. So

firstly it is a schedule 6 offence, the first count of murder. So what it means is that you must ... there is an onus on you to prove that there is exceptional circumstances in your life which should permit you to be released out on bail.

Secondly, on the first count the State have indicated that the minimum sentence act is applicable. They are going to allege that it is a pre-meditated offence. So section 51(1) Part I of schedule 2 of act 105 of 1997 is applicable. If you are convicted of this charge the minimum sentence is one of life imprisonment. But the trial court can deviate from the minimum sentence in certain circumstances. Do you understand that?

Thank you advocate. You may proceed with the bail application.

MR COETZEE: Thank you Your Worship. I have prepared an affidavit. It was commissioned this morning at the police station. Which I will beg leave to read here. If I can hand Your Worship copy of the original thereof. And I will give the State as well a copy of the affidavit. And I beg leave to read it into the record.

COURT: You may proceed.

MR COETZEE: Thank you Your Worship.

"I the undersigned Joao Anastacio Rodrigues do hereby state under oath as follows.

I am an adult male person and the accused in this case.

The facts contained in this affidavit falls within my personal knowledge unless stated to the contrary and are [indistinct 11:24:44] correct.

I am the applicant in this application.

The nature of the application: this is an application for my release on bail pending the finalisation of the above trial.

Personal circumstances: my identification number is 3903275032086, my date of birth is on 27 March 1939. I am a South African citizen. I have no travel documents. I have never travelled outside the borders of the Republic of South Africa [indistinct 11:25:18] in any foreign country. The only relatives that I have living outside the Republic of South Africa is my brother Edward Rodrigues who is a Botswana citizen.

I have no assets outside the Republic of South Africa.

My personal background: I was born in Viljoenskroon in the Free State, I matriculated. I do not undergo any tertiary training or education. My work history is as follows. I was in the South African Police Service from 1956 to 1972. I was a senior journalist and an editor

of the Hopestad press. And I was employed at the National Parks Board.

I reside at 835 11th avenue, Wonderboom South, Pretoria. I have resided at the same address for a period of 34 years. My previous address was at 227 Myburgh street, Capital Park.

I am married to my wife [indistinct 11:26:15]. I have no other dependants. I am a pensioner. My only income is from my pension. I own the fixed property where I reside [indistinct].

Should my bail application be granted I would be able to afford an amount of R2 000 towards bail which will be available in cash from my own resources.

Should the Honourable Court set bail in a higher amount [indistinct 11:26:46] to facilitate the funding of the bail.

I submit further that all my financial, cultural ties are in the province [indistinct] the jurisdiction area of the above Honourable Court.

History of [indistinct 11:27:03]: I have one previous conviction in 1956 on a charge of perjury. I have not other pending trials.

I have been warned by the legal representative about the consequences of misleading the Court about my previous convictions and pending trial in terms of section 60(11)B) of the Criminal Procedures Act as amended which may result in my bail being revoked and [indistinct 11:27:30].

The [indistinct] background [indistinct]: I was arrested on 30 July 2018. [Indistinct] a warrant after my legal advisers were informed of my pending [indistinct] were made [indistinct] to the police. I understand that I am charged with murder that allegedly took place in 1971 whilst I was employed as a police officer.

I am advised that the charges brought against me fall under schedule 6 of the Criminal Procedures Act. I intend to plead not guilty to the charges against me.

The legal frame work for bail: I am advised that [indistinct 11a:28:09] will have regard to [indistinct] the discretion as to what is in the interest of justice would require as set out in section 64 of the Criminal Procedures Act and [indistinct] that there is exceptional circumstances to justify my release on bail.

I further submit the [indistinct] in terms of section 60(4)(A) of the act I will not endanger the safety of the public or any particular person or commit any offence. I further submit that there is no evidence of any likelihood that I will pose a danger to the public or the individual safety.

I further submit as provided for in section 60(4)(B) of the act that I will not attempt to evade any proceedings that might take place up to the conclusion of my trial. I intend to prove my innocence at the trial.

I have no desire to forfeit everything I have worked for up to now to become a fugitive of the criminal system.

I further submit the [indistinct] provided for in section 60(4)(C) of the act I will not attempt to influence or intimidate any person, or conceal or destroy any evidence. I am to my knowledge [indistinct 11:29:19] identity of all the state witnesses that might be called against me.

Should I know the identity of these witnesses the Court may impose any condition that cause me to refrain from any contact with such person. And I intend to abide by these

conditions.

I further submit that as provided for in terms of section 60(4)(E) of the act I will not do anything that will undermine or jeopardise the objective of the proper functioning of the criminal justice system including bail system.

I further submit the fact provided for in terms of section 60(4)(E) of the act I will not do anything that might in any way disturb the public order or undermine the public peace and safety, nor will my release on bail cause such [indistinct].

Exceptional circumstances: The alleged crime was committed in 1971 when the deceased [indistinct 11:30:16] whilst in detention as a political detainee at John Vorster Square police station, Johannesburg.

I have been aware of the allegations that the deceased was murdered since the finalisation of the inquest in the above Honourable Court when it was finalised in 1972 to [indistinct 11:30:35] newspaper articles [indistinct] media publications.

The inquest finding of the Honourable Justice Motley was that I was not present when the accused died, but that my actions might be as

901

an accessory after the fact. The Honourable Justice Motley made the following finding in the inquest in paragraph 335(d). The cause of death was brought about by an act of him being pushed from the 10th floor of the roof of John Vorster Square building to fall to the ground. Such act having been committed to *dolus eventualis* as a form of intent and *prima facie* amounting to murder. There is *prima facie* evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time when he was pushed and fell to his death. But previous [indistinct] to conceal the crime of murder as an accessory after the fact, and went on to commit perjury by presenting contrary [indistinct] evidence before the 1972 and 2017 inquest which should accordingly be investigated with a view of this prosecution.

The finding of the learned Justice was made on 22 May 2017 and I remained at resident at my house and did not in any way attempt to evade prosecution. When I became aware of that there was a warrant issued for my arrest, and after communications though my legal team and the prosecution, I presented myself to the

police for arrest and presentation to this Honourable Court. I am no longer a young man and had no desire to end my days [indistinct] of the law. As most people of my age [indistinct] I suffer from ailments and illness [indistinct] associated with old age and suffer greatly should I be detained in cells..

I further undertake to adhere to any condition that this Honourable Court may impose if this Honourable Court indeed exercise its discretion in favour and order my release pending the finalisation of these proceedings.

In the circumstances I submit that my release is in the interest of justice and that I have proven that exceptional circumstances exist justifying my release on bail.

I therefore request the Honourable Court to order my release on bail pending the finalisation of the proceedings against me."

This affidavit was then signed [indistinct 11:33:05].

COURT: Thank you.

MR COETZEE: Thank you. [Indistinct].

COURT: Do you confirm the correctness of the contents of this statement which you have signed sir?

APPLICANT: Yes [indistinct].

COURT: The statement is marked as EXHIBIT A for the bail proceedings. Is that the application from the applicant sir?

MR COETZEE: That the application [indistinct 11:33:23]

CASE FOR THE APPLICANT

COURT: Thank you sir.

PROSECUTOR: As the Court pleases. Your Worship I submitted earlier that the State is not fundamentally opposed to a bail application being granted. I, however, have an affidavit from the investigating officer which I beg leave to read into record.

COURT: You may proceed.

PROSECUTOR: "In the State versus Rodrigues, Joao Anastacio, I Frans Marko Matiba hereby state under oath that I am a captain in the South African Police Services stationed at [indistinct 11:34:01] Crimes against the State, that is Directorate for Priority Crime Investigation in Pretoria.

From the context here of, the facts herein contained are within my personal knowledge and belief both true and correct.

I am the investigating officer of Johannesburg Central CAS 798/10/10/2017. The accused is charged of murder and defeating the ends of justice. The offence falls within schedule 6,

that is the offence of murder.

The nature of the offence of which the accused is charged stems from the death of Mr Ahmed Timol who died in police detention in 1971 at John Vorster Square as it was then known, now called Johannesburg Central.

At an inquest into the deceased's death in 1972 the inquest court found that the deceased had committed suicide. However, new evidence led at a subsequent inquest held in 2017 before Judge Mothle. The re-opened inquest overturned the verdict of the suicide finding that Ahmed Timol did not commit suicide but was in fact murdered.

At all times relevant to the charge sheet the accused was employed as a police official within the security branch of the South African Police. By his own admission he was the last person to see the deceased alive on office 1026 at John Vorster Square police station.

From the investigations that I have undertaken, and the affidavits which I have in my possession it transpired that on the evening of 22 October 1971 a Ford Anglia bearing registration number TUW2315 driven by Mr

Salim Issor, a 3rd year medical student was intercepted at a road block on Fuel road, Coronationville. Mr Ahmed Essop Timol the deceased a teacher, was a passenger in the vehicle.

The road block set up on 22 October 1971 at approximately 22:40 in the midnight was manned by amongst others, but not limited to members of the then South African Police uniformed branch members: Sergeant Leonard Kleyns, Constable Adam Alexander Theunis and the station commander of the Newlands police station Major Kloppers.

The above mentioned vehicle was stopped at the road block. After searching the boot of the vehicle both the deceased and Essop were arrested for allegedly being in possession of prohibited pamphlets and documents of banned political organisations namely the South African Communist Party, the SACP, and the African National Congress, that is the ANC.

Both the deceased and Essop were transferred in custody to Newlands police station and further detained for contravention of the provisions of section 6 of the Terrorism Act 83

of 1967.

The security branch was a branch of the South African Police whose function amongst other was to gather intelligence so as to assess the threats to the State in the then Apartheid South Africa.

Apartheid was a system of [indistinct 11:37:46] racial segregation and discrimination that was in existence from 1948. Members of the security branch at John Vorster Square police station, including senior members were informed of the arrest of both the deceased and Essop.

At Newlands police station Essop and the deceased were separated from each other. Soon thereafter, and during the early hours of the morning of the 23 October 1971 other senior members of the security branch at Johan Vorster Square, including but not limited to Captain Dekker, Colonel Freyling arrived at [indistinct 11:38:30] station.

Essop was interrogated and repeatedly assaulted by members of the security branch. After the assault Essop was handcuffed, placed in an unmarked police vehicle, driven by

Freyling and another police official. They drove to the offices of the South African Police station at John Vorster Square. During the early hours of the morning of 22 October 1971 the deceased was transported to John Vorster Square police station by Derrick and Kleyns. Lieutenant Colonal Willem van Wyk from the security branch head quarters in Pretoria was informed of the arrest of Essop and the deceased.

He arrived a John Vorster Square police station at around 03:15 in the morning. During his period of detention from the 23 October 1971 to 26 October 1971 Essop was tortured and severely assaulted by members of the security branch at John Vorster Square police station.

On 26 October 1971 Essop was hospitalised in a comatose state as a result of assault and torture on him by members of the security branch.

From the time of his detention on 22 October 1971 until his death on 27 October 1971 the deceased was still in police detention in room 1026 and subjected to continuous interrogation and torture by the security branch.

On 27 October 1971 the deceased was still in room 1026 on the 10th floor of John Vorster Square police station. Never having ever been detained in any cell at any stage of his detention at the said John Vorster Square.

At the time of his death the deceased was under the care of the accused Captain Johannes Hendrik Gloy and Johannes Zakarias van Niekerk. Gloy and Van Niekerk arrived at John Vorster Square on the morning of the 23rd October 1971 at 06:00 in the morning.

On instructions of Van Wyk all three police official Gloy, Van Niekerk and the accused were based at the security branch head quarters in Compol building in Pretoria.

The accused arrived at John Vorster Square police station on 27 October 1971. The accused Gloy and Van Niekerk tortured and assaulted the deceased. Prior to his death, and whilst in their custody and under their care, the deceased sustained multiple bruises and fractures, including but not limited to inter alia the nasal bone, left orbital rhombus, right inferior rhombus, fractures of the left and upper jaw, and isolated depressed skull fracture,

extensive contusions on the right leg and dislocated left ankle.

Subsequently they thereafter either pushed the deceased out of the window out of room 1026 and or threw the deceased down from and/or rolled the deceased from the roof of John Vorster Square police station on 27 October 1971.

After the demise of the deceased the accused and his cohorts alleged that the deceased committed suicide by jumping from the window of the 10th floor, that is room 1026 of the John Vorster Square police station.

Therefore the State will allege that the offence of murder was committed by the accused and his cohort and that it was premeditated or planned and/or that the offence was committed in the execution of the common purpose.

I have been informed that the accused intends or is applying for bail on today 30 July 2018. I am not opposed to the granting of bail for the following reasons.

The accused is not a flight risk. A warrant of arrest was authorised for the accused who then voluntarily handed himself over to me.

I have established that the accused has a fixed address. The accused has a permanent residential address at home at house 835 11th avenue, Wonderboom South, in Pretoria. And he has resided at this address for the past 54 years.

The accused is a South African citizen with identity number 3903275032003. He is not a holder of a passport. He is 79 years old, he is retired and a pensioner. He is married and has 5 self-supporting adult children who reside on their own.

I submit that he has sufficient personal ties to stand trial.

The accused has only one registered fixed property namely that mentioned in paragraph 24.2 above. He is also an established author and has published at least 8 books, besides serving as a member of the South African Police. He also worked as a senior journalist at Pretoria newspaper and at Parks Board.

I have established that the accused has no outstanding warrants and no pending cases. He does, however, have a previous conviction in that on 27 June 1956 he was convicted of

[indistinct 11:45:03] perjury for contravention of section 9 of act 16 of 1914 and was given a suspended sentence for 5 years provided he was not convicted of any offence involving dishonesty.

I submit that under the circumstances the accused does have exceptional circumstances to justify his release on bail. He is almost 80 years' of age. Was aware of the possibility of being charged already in October 2017 and did not flee.

Furthermore his personal circumstances as well as the fact that he has a fixed property establish a reason for him to remain in South Africa.

If the accused is admitted to bail an amount of approximately R2 000 with normal bail conditions would be appropriate."

Thus signed by the investigating officer Captain FM Matiba. Your Worship I beg leave to hand in same as EXIBIT B and be made to form part of the record. Further Your Lordship that will be the case for the respondent.

COURT: Respondent.

CASE FOR THE RESPONDENT

COURT: Statement of the investigating officer is

marked as EXHIBIT B to the record. Thank you. Advocate Coetzee. You may proceed addressing the Court on bail.

MR COETZEE ADDRESSES THE COURT: Your Worship I can indeed [Indistinct 11:46:39]. Your Worship it is not [indistinct] that the law has been very clear in relation to what the standard of proof is that the accused has to reach to show the Court what is exceptional circumstances, as to what actually is exceptional circumstances. I think it is less clear and it is being said that it can be normal circumstances which in a specific case the Court can do a value judgment to consider as to whether or not it is exceptional circumstances.

[Indistinct] with to address the Court and to be exceptional circumstances this [indistinct] the mere fact that the accused has been residing at the same address for past 54 years in itself, although perhaps not [indistinct] it is something to be [indistinct] there is the fact that he clearly show that he is a very secure person and that he is not a flight risk at all.

One should have, with respect, at all stages pertaining to account that the two main issues when considering bail, and even when considering the exceptional circumstances is whether it will ensure the presence of the accused at the trial. And second of course whether there is a risk that he will either interfere with the state case or [indistinct 11:48:06] whilst he is out on bail.

It is respectful my submission that there is no such likelihood and that that coupled with his old age and the fact that

this offence was committed in 1971. He has been aware of this allegations, even more particularly so of the 2017 inquest. And he has not done anything to try and evade the prosecution and/or to interfere with the police investigation.

Your Worship the inquest finding is quite interesting. The Honourable Judge found there, and one will have to look at the fact which is contained in the docket once we have the docket in relation to the charges that is preferred against him. Specifically in the line of the premeditated murder claim by the State to see what exactly that entails and how did they get to that.

And at this stage it is difficult for me to address that issue in that we have not had the discovery as yet. To the best of our ability we have referred Your Worship to the finding of the judge in the inquest.

Your Worship I can stress to the Court that it is the discretion of the Court obviously to grant or not to grant bail. And on that value judgment as to what does the interest of justice require in the instance of this matter. And whether that at all is advanced by the exceptional circumstances or not that was presented by the accused.

It is my respectful submission that indeed there was such evidence shown and that it was shown on a balance of probability. And I would ask the Court to grant the accused bail and to grant the bail in the amount of R2 000.

If there is anything specifically Your Worship on which to

address you on, I will gladly do so.

COURT: Sir, yes. I see on page 12, paragraph 9.7 you refer in general to ailments and illnesses regarding age. I do not know if your client do not want to elaborate may be on that. Because I had to wait, because I know there was difficulty for him to get into court because of the steps.

MR COETZEE: Your Worship I was worried. If I may say I was worried about the steps. It seems to be it was not as problematic for him as I thought it would be. This is quite steep steps. And he had two months ago he had that operation in his foot. As a concern, I was worried that he might have problems. It seems to be my worry was not necessarily founded.

Your Worship I have asked the accused regarding sickness and what is his health conditions. He has got diabetes and he has got things like that Your Worship. But there is not specific, I cannot tell Your Worship that he has got a specific illness that will effect him in such a way. As I said he is a bit proud, he does not want [indistinct 11:51:28]. I just wish to put [indistinct] on record is that I was concerned as to whether he would get up the stairs because they was steep steps.

COURT: Alright.

MR COETZEE: Thank you.

COURT: Thank you advocate. Thank you. From the State's side.

PROSECUTOR ADDRESSES THE COURT: As the Court pleases

Your Lordship like we initially said and submitted that in principle the State is not fundamentally opposed to the granting of bail. And we believe and submit that the applicant has made out a case which meets the requirements of section 60(4).

And it is my, therefore, submission that bail may be granted in the amount of R2 000. And that normal bail conditions must accompany the granting of bail.

As for the assumption by my colleague that his client was unable to walk the stairs that is the case for another day. As the Court pleases.

COURT: Thank you. Thank you sir.

JUDGMENT

BAIL APPLICATION

The applicant is charged of count 1 murder and count 2 defeating the ends of justice. The charge sheet was not drafted by the State but was verbally set out in the bail application what the charge is going to be against Mr Rodrigues.

The applicant was represented by Advocate Coetzee, and for the State Advocate Khumalo appeared.

Both the applicant and respondent agree that this is a schedule 6 offence. The Court then proceeded to explain to Mr Rodrigues the proceeding regarding schedule 6 and the onus which is placed on him to prove to get bail.

Further the Court also explained to him section 51 of act 105 of 1997 which entails the minimum sentence act which is applicable on count 1.

Advocate Coetzee then confirmed that they would proceed by way of affidavit and read out a statement into the record. And after confirmation by Mr Rodrigues this affidavit was received as EXHIBIT A to the record.

I am not going to give a summary of the affidavit, it was read out here in open court and it is so fresh in everybody's memory.

Thereafter the applicant closed its case and the State proceeded to read out a statement from the investigating officer which was received as EXHIBIT B to the record. Now I am also

not going to give a summary of that statement regarding this bail application.

Now it is common cause that the applicant is charged of an offence listed in schedule 6 of the Criminal Procedures Act. And that in terms of section 60(11)(A) of the said act the Court is obliged to order the detention and will only be empowered to grant bail if the applicant can advance exceptional circumstances why he should be released.

The onus is on the applicant to satisfy the Court on a balance of probabilities that such exceptional circumstances exist.

In State versus Vanga 2000 (2) SACR 371 TK, Jafta J put forward the following two fold enquiry:

"The applicant for bail is first enjoined to establish that his circumstances are exceptional as envisaged in section 60(11)(A). Secondly he is required to prove that such circumstances justify in the interest of justice that bail be granted.

If the first leg of the enquiry that distinguish the onus born by the applicant is not successful then the second leg will not be applicable.

Now we have heard from the statements the applicant is 79 years old. He already knew from October 2017 that there is a possibility that he will be formally charged for the murder of Mr Timol. He is residing at his home address for 54 years. And he is not a young man. He handed himself over to the police after it

came to his knowledge that a warrant of arrest was issued for him.

And as stated by the State they are not formally opposing to bail for Mr Rodrigues.

Now it is true what Advocate Coetzee has said. There is numerous cases which discuss the question of what is exceptional circumstances. But what is more important is all these cases states firstly that each case must be dealt on its own merits. You cannot generalise when it come to the decision what is exceptional circumstances.

Taking in consideration the facts placed before this Court, and the fact that the State is not opposing to bail for Mr Rodrigues, taking in consideration his age and that he does not have a passport, the Court is of the opinion that the applicant has overcome the onus placed on him to prove exceptional circumstances. And thus the first leg has been proven by the applicant.

Secondly the question if it is in the interest of justice to be released out on bail. The Court is led by section 60(4)(A-E) of the Criminal Procedures Act which sets out grounds. If that exist then the Court cannot grant bail. And after evaluating the evidence placed before the Court, the Court can find none of the grounds as set out in section 60(4)(A-E) to exist.

In light of that the Court is satisfied that it is also in the interest of justice that Mr Rodrigues be released out on bail.

On a question on what amount must be set by the Court, the applicant and the respondent have agreed to an amount of R2 000. I can see no reason why must the Court interfere at this stage with the agreement between the applicant and respondent.

Thus bail is set in the amount of R2 000 from Mr Rodrigues and I will set out the normal set of bail conditions when I remand the case further for Mr Rodrigues. Thank you sir.

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PROSECUTOR: As the Court pleases. Your Worship the indictment for the accused is ready. And we have in fact issued ... the indictment is ready to be served on the accused. And we request that the matter be then transferred to the High Court for appearance on 18 September this year.

COURT: Do you have copy of indictment. Because I am must serve it on the accused in court physically.

PROSECUTOR: That is correct.

COURT: And if I do not have a copy then it is going to be difficult. So I need just the orderly to physically hand Mr Rodrigues the indictment here in open court.

PROSECUTOR: That is correct.

COURT: You can just ...

PROSECUTOR: The appearance will be for pre-trial conference on 18 September 2018.

COURT: Advocate Coetzee I still do not understand the DPP. I am said that there is somebody from the DPP's office because they have a lot of instructions usually for this Court to do for indictments. But in light that it is for pre-trial conference I do not know if it is necessary that I must go for everything: what language, what witnesses must be subpoenaed by the defence for the state etc. I do not know if it is just for pre-trial conference is it necessary for the Court to go through all these aspects as set out from point 4 to 8.

PROSECUTOR: Your Lordship the Court can dispense with

that.

COURT: Can I dispense with that?

PROSECUTOR: That is correct Your Worship.

COURT: Advocate I just want to place ... have you on record, are you going to appear formally in the trial for Mr Rodrigues in the High Court?

MR COETZEE: I do have instructions [indistinct 1:59:51].

COURT: If you just formally can place me on record the instructing attorney's name and address and telephone number, as well as your telephone number. That it is just on the record which is typed for the High Court, because that they want.

MR COETZEE: Certainly Your Worship. Your Worship I [indistinct 12:00:13] Advocate Stephanus Coetzee from the Pretoria Bar has been briefed by the State Attorney Pretoria. The attorney briefing me in this instance is Mr Ben Minnaar from the State Attorney. The telephone number for the State Attorney [indistinct 12:00:27 someone blowing his nose loudly] on the Pretoria code 012 309 1538. And my telephone number, I prefer my cell number, because I am in court most of the days, is 082 410 3188. That is my place where I practice is in High Court chambers, 220 Madiba street, room 717.

COURT: Thank you.

MR COETZEE: Thank you sir.

COURT: Mr Rodrigues you have received the indictment here in open court. This case is in terms of section

75(1)(C) of act 51 of 1977 transferred to the High Court in Johannesburg for the 18 September 2018. This will be for pre-trial conference which will be held on that date. Unfortunately the indictment does not indicate what court you must appear in. So usually when you arrive there at the High Court at the entrance there will be a court roll and they will tell you which court to go to.

Your bail is fixed in an amount of R2 000. If you pay the bail you may be released. Then you must sure you are back at the High Court in Johannesburg on 18 September 2018 at 08:30 in the morning.

You will be kept in custody until you pay your bail of R2 000. Do you understand. Thank you. Court will adjourn.

COURT ADJOURNS [12:02]

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IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

In the matter between:	**Case No.: 2018/76755**
JOAO RODRIGUES	**APPLICANT**
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
MINISTER OF JUSTICE	**SECOND RESPONDENT**
MINISTER OF POLICE	**THIRD RESPONDENT**
IMITIAZ AHMED CAJEE	**FOURTH RESPONDENT**

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

Mabina Samuel Mahlangu

do hereby make oath and state as set out below.

1 INTRODUCTION

1.1 I am a Colonel in the South African Police Service and a Section Commander of Crime Against the State under the Directorate for Priority Crime of Investigation (DPCI), Head Office.

MSM MC

1.2 During the year 2010 after the world cup, cases of the Truth and Reconciliation Commission were received from the office of the National Prosecuting Authority (NPA) for investigation by Crime Against the State (CATS). All the cases immediately received attention and greater progress was achieved.

1.3 On the 5th of March 2018 a second batch of the cases were sent to the Directorate for Priority Crime of Investigation (CATS) Section for investigation. These cases were also booked out to CATS members for investigation. The cases were prioritised and the investigators are ensuring that family members of the victims are fully informed of the investigation.

1.4 From the overall cases which were received some have been sent to the office of NPA for decision as investigation is complete while others are ready for court. In cases which are not ready for court, the state of readiness is between thirty and forty percent in terms of investigation.

1.5 As for the allegation that two senior members who were former Security Branch are reported to investigate these cases, it is untrue. Neither of the two officers is the commander nor investigating officer of these cases after they were removed on request by Webber and Wentzel Attorneys. One member who is Captain Simpson was a member of Security Branch conducting administration and was never operational. The other senior officer who is Colonel Vreugdenburg never worked for Security Branch Units as reflected on his police history SAPS 96.

MSM JL

2. AD FOURTH RESPONDENTS ANSWERING AFFIDAFIT

Ad Paragraph 94

2.1 It is correct that the third respondent had initially decided not to take part in these proceedings. This decision was based on the fact that the applicant's founding affidavit did not warrant the third respondent's response thereto. However, as a result of the fourth respondent filing his answering affidavit in which he seeks to blame the DPCI for the delays in prosecuting the applicant in this case, this requires to be answered as these allegations are, as pointed out above, factually incorrect.

2.2 In paragraph 94 of his answering affidavit, the fourth respondent seeks to suggest that the National Prosecuting Authority and the DPCI are not doing anything about the possible prosecution of cases such as the present. I deny this.

2.3 The cases to which the fourth respondent refers are 9 deaths cases and 11 cases relating to the murder, kidnapping and torture of political activists. These cases include the so-called Cradock 4 and Pebco 3 murders and were placed before the Directorate for Priority Crimes Investigations and the National Prosecuting Authority in January 2018. I deny that "*absolutely no progress has been made in any of these 20 cases.*"

2.4 One of the above cases relates to the death of Hoosen Haffejee. In this case, the second respondent has approved the re-opening of the inquest into this death and the fourth respondent is fully aware that this matter is under investigation.

2.5 Since the aforesaid cases where allocated to the Directorate for Priority Crimes Investigations and the National Prosecuting Authority, all the required support and resources have been provided to investigate and to then prosecute these matters.

2.6 A task team of 15 police officers has been constituted and each case has been allocated at least two investigators. This task team consists of members of the Crimes Against The State unit of the South African Police.

2.7 Progress meetings have been held on these cases and the fourth respondent and the fourth respondent's investigator, Frank Dutton have attended some of these meetings.

2.8 I am also aware that the fourth respondent's investigator, Frank Dutton, has interacted with our Captain Chantelle Simpson on these matters and the fourth respondent must be fully aware of such interactions but creates a wrong impression that nothing has been done. This wrong impression is deliberately created in order to portray the National Prosecuting Authority and the DPCI in a negative light – which does not serve any purpose in proceedings such as the present.

2.9 I deny that two former members of the old South African Police's Security Branch were appointed "*to lead these investigations.*" It serves no purpose for the fourth respondent to accuse the DPCI and the National Prosecuting Authority and their officials without producing any evidence to support such accusation.

2.10 I strongly deny the contents of paragraph 94.2 in which it is suggested that the DPCI appointed *"two former SB officers ... to lead these investigations."*

2.11 Johannes Hendrik Vreugdenburg, whose confirmatory affidavit is attached hereto as **AA1**, was not at any time a member of the security branch of the old South African Police of the apartheid government. Furthermore, he was never *"appointed to lead these investigations."*

2.12 It is very unfortunate and prejudicial for the fourth respondent to recklessly accuse officers such as Johannes Hendrik Vreugdenburg of having been members of the notorious security branch of the old South African Police of the apartheid government. This officer is one of the highly decorated senior police officers in the South African Police Service and has been awarded the South African Police Service Silver Cross for bravery twice for his role in the investigation conducted against the right-wing extremist group called the Boeremag. His loyalty to the South African Police Service and the people of the Republic of South Africa should not be questioned without any credible evidence.

2.13 The fourth respondent, for reasons not explained by him in his answering affidavit, does not tell the court of the correspondence exchanged between his attorneys and the DPCI about Johannes Hendrik Vreugdenburg. I attach such correspondence hereto as **AA2**.

2.14 It is clear from the above correspondence that the fourth respondent's allegation against this officer was rejected and that in order to protect the investigation from malicious accusations and to protect its integrity, this officer withdrew

from the investigation. It is unfortunate that the fourth respondent does not himself tell the court of this.

2.15 I deny the insinuation made in paragraph 94.3 of the fourth respondent's answering affidavit. The contents of this paragraph are clearly intended to create an impression that *"absolutely no progress has been made in any of these 20 cases"* because the DPCI appointed *"former SB officers ... to lead these investigations."* There is absolutely no evidence to support this unfounded and unfortunate speculation. In any event, such insinuation and speculation is inconsistent with the fourth respondent's main theme that the delay in prosecuting the applicant was occasioned by political interference and political pressure brought to bear upon the National Prosecuting Authority and the DPCI

CONCLUSION

2.16 Even on the fourth respondent's own version, the conduct complained of by him levelled against the DPCI does not in any way justify the granting of the permanent stay of prosecution which the applicant seeks in this application. For this reason, it is not clear as to why the fourth respondent deemed it necessary to burden his answering affidavit and the Court with matters which the applicant himself did not raise, which matters the fourth respondent himself says do not justify the relief which the applicant seeks in this application.

2.17 In the light of the above, I also state that the criticisms levelled against the DPCI and the National Prosecuting Authority is intended to generate unnecessary negative publicity and to create negative atmosphere against these two institutions.

MS MAHLANGU

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Cape Town on the 4th day of February 2019, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

OFFICE:

TERTIA LIZETTE KRIEL
KOMMISSARIS VAN EDE
COMMISSIONER OF OATHS
PRAKTISERENDE PROKUREUR (R.S.A.)
PRACTISING ATTORNEY (R.S.A.)
LANGSTRAAT 22 LONG STREET
KAAPSTAD / CAPE TOWN 8001

AA1

AFFIDAVIT

I, **JOHANNES HENDRIK VREUGDENBURG,** hereby state under oath in English:

1.

I am a Colonel in the South African Police Service (hereinafter referred to as "SAPS") with Persal number 0087157-5 and presently stationed at the Crimes Against the State component (hereinafter referred to as "CATS"), Organised Crime Unit, Directorate for Priority Crime Investigation (hereinafter referred to as "the DPCI"), General Piet Joubert Building, 218 Visagie Street, Pretoria. I have 38 years' experience as a member of SAPS.

2.

I have been mandated to submit this affidavit in response to paragraphs 94.2 and 94.3 of the affidavit of Imtiaz Cajee in the matter of Sv Rodriques

3.

Although I am not named in person by the deponent in paragraph 94.2, a conclusion can be made that he is referring to me as the Security Branch member. The conclusion is derived from the fact that a newspaper article was handed to Adv Dr Pretoruis and Adv Barnard on 23 May 2018 by the Law firm Weber and Wentzel in an attempt to remove me from the Nokuthula Simelane investigation (Jhb Central Cas 1469/02/1996 – Murder). A copy of the newspaper article is attached as "JHV1" and forms part of this affidavit. In the newspaper article from 1995 allegations is made that I was involved in the torture and murder of Richard Motasi

BACKGROUND ON THE RICHARD AND IRINE MOTASI CASE:

4.

During 1987 I was a member of the then South African Police and stationed at the Hammanskraal police station. I was still a sergeant and working on the patrol vehicle attending to complaints by the public. On a specific day, unknown to me now, I was called by Sergeant Chris Raath to assist him with the execution of a warrant of arrest on Sergeant Richard Motasi. The warrant of arrest was issued by the Pretoria North Magistrate on a charge off Absent from duty without leave according the old Police act and Regulations for Richard Motasi. Sargeant Raath, Constable Wynand van Vuuren and I arrested him in Temba in a public area and placed him in the patrol vehicle. Constable van Vuuren drove the vehicle with Richard Motasi in the back. Sergeant Raath and I followed him with another police vehicle to the Hammanskraal police station. At the police station Richard Motasi was detained and place in the police cells. That is the only involvement that I had with Richard Motasi. The criminal docket against him was investigated by sergeant Raath and I was merely assisting him with execution of a warrant of arrest.

I deny all allegations that I or any of my colleagues torture or assaulted him in my presence.

Early December 1987 I heard that he and his wife ,Irine was killed in their house in Temba. I was not involved in that.

During the Truth and Reconciliation Commission (TRC) ex Security Branch members were granted Amnesty Applicants in this matter

They are:

Phillipus JC Loots (AM5462/97)

Paul J Janse van Vuuren (AM2777/96)

Jacques Hechter (AM2776/96)

5

CAREER PATH

I was never attached to the South African Police's Security Branch. Attached to this affidavit ("JHV2") is my SAPS 96 that states clearly that I was attached to the Hammanskraal Police station uniform and detective branches from 1984 to 1992 and never to the Security Branch. The allegations of the deponent is completely false.

6.

TRC INVESTIGATIONS AT CATS SECTION

When the TRC cases were assigned to the CATS members by the Section Commander, Colonel MS Mahlangu I noticed that the Motasi case was also amongst it. I immediately declared to him that I was involved in the arrest of Motasi prior to his murder in 1987.

I was assighened one investigation, the murder of Adriano Louis Bambo in 1991 in Nelspruit. I traced the original inquest and identified the possible suspects in the case. I did at no stage delay the investigation.

7.

On 9 Apil 2018 a meeting was held at the PCLU boardroom in Silverton with Maj Gnl Ledwaba as chairperson. Present in the meeting was all the investigation officers, prosecutors from the PCLU, mr Frank Duton and the deponent, I Cajee. During the meeting I was requested by Maj Gnl Ledwaba to give feedback of the status of the investigations on behalf of Colonel Mahlangu that was not available. I gave feedback from a pre prepared report by Colonel Mahlangu. At no stage was I in charge of the investigation team. The deponent is misleading the court with that allegation.

8.

In June 2018 I was interviewed by Brigadier N Xaba. He explained to me that the law firm Webber and Wentzel wrote a letter to the National Head, DPCI requesting that all ex Security Branch members must be removed from the TRC

MSM JC

AA1

investigations. I told him that I was never a member of the Security Branch and that I will not be forcefully be removed from that investigations. I however informed him that I am willing to step back from the investigations due to other pending investigations I was leading.

9.

I further want the court to know that I am a highly decorated senior police officer who was awarded the South African Police Service Silver Cross for Bravery twice for investigation conducted against the Right Wing extremist in the Boeremag and the Mangahung cases. My loyalty toward the South African Police Service and to the Republic of South Africa is unquestionable.

10.

I see the allegations against me by the deponent as a malicious attempt to mislead the Honourable court with false information and request the court to disregard his evidence.

I know and understand the contents of this declaration.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

DEPONENT

Date: 2019/02/04

Time: 13:30

Place: Pretoria

MSM JL

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I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at PRETORIA on this 4TH day of FEBRUARY 2019, the Regulations contained in Government Notice No R.1258, dated 21 July 1972 (as amended) and Government Notice No R4648, dated 19 August 1977 (as amended) having been complied with.

CRIMES AGAINST THE STATE
PRIVATE BAG X1500
2019 -02- 04
SILVERTON, 0127
DIRECTORATE FOR
PRIORITY CRIME INVESTIGATION

COMMISSIONER OF OATHS
- 6 FEB 2019

935

JHUI

Excusing the unconventional

There is some logic in the argument used in the current indemnity debate that the State was fighting a war during the "total onslaught" era, and that the crimes its operatives committed should therefore be treated as "normal" execution of duties, even though it was an undeclared, unconventional war.

I have two problems with this. The first is that this sort of excuse has been carefully nurtured even before the "total onslaught" era. Shortly after the 1976 Soweto riots, the Broederbond, explaining its support of the use of proxy black organisations in black townships, gave the following instruction in a secret circular:

"We want to call on our members to cultivate an understanding that the average African is different from whites in his view of violence and power ... the routines and methods which their own people use will, sometimes be different from those of a white community. It would be self-defeating ... to keep on using rules which can (only) be applied to a Western community where they are generally respected."

In other words, the managers of "unconventional" activities knew from the start what they were doing. That they themselves identified their methods as "different", and in writing, can only be described as premeditation. One cannot premeditate the unconventional and afterwards protest that you were just doing your conventional duty.

But the more serious problem — and this also concerns the spurious argument that crimes the ANC committed are somehow on a higher moral plane — is that the "unconventional war" was fought in the security forces' own ranks.

Let's take a case study — the death of one Sergeant FR Motasi, who was killed along with his wife in Temba north of Pretoria on the evening of November 30 1987. Their six-year-old son was left alone with their bodies until the next morning, when neighbours responded to his crying.

The police ascribed his death to the ANC, but the strange thing was that he did not get a burial with military honours, as was usual in such cases. Not a single police officer attended the couple's funeral, in fact, not a single policeman. They were all too scared.

Motasi's story begins on September 8 1984, at the Hammanskraal police college when he was requested to supply the personal details of one Warrant-Officer Letsiboene, who had not yet reported for riot duty, shortly after the outbreak of the Vaal Triangle riots on September 3.

Damaged

Perhaps trying to protect his colleague, Motasi only supplied these particulars when his superior, Colonel WP van Zyl, asked for them. Van Zyl then slapped him "very hard on my left ear with his open hand," shouting: "I am still having trouble with you and I should have killed you long ago."

To make a long story short, Motasi's ear was severely damaged, and he had to undergo nearly a dozen operations and treatments during the next three years. He decided to lay a charge against Van Zyl.

The police bureaucracy, and the Department of Justice took Van Zyl's side. A long and grievous saga follows of attempts by Van Zyl and various colleagues to get Motasi to withdraw his charge. They ban him from college premises, dogs are set on him on one occasion, they try to transfer him to riot duty in Soweto, and they try to trap him into misconduct charges.

"I am penalised for nothing because I am a black man who can do nothing to bring the criminals to justice, as they are whites with all the powers," he writes in one of numerous affidavits.

One cannot but feel admiration for the way in which Motasi always stayed one step ahead of his bureaucratic pursuers. Even when they got him suspended from the force, he was too sharp for them, and used all the courtroom tricks he had learnt from them to get the suspension overturned.

Eventually he is assaulted again, on trumped-up charges that he wasn't wearing his sergeant's stripes while going shopping, although regulations actually require them to be removed while he is on sick leave. He is illegally detained for four days, during which his medicine is withheld, and he has to suffer excruciating pain.

The men involved are Constables Vrougdenburg and Van Vuuren, and a Sergeant Raath.

When nothing comes of the formal charge against Van Zyl, Motasi institutes civil proceedings, demanding a meagre R20 000 in compensation. The claim is served on Van Zyl, who has retired with the rank, and pension, of a brigadier, at his home in Nylstroom.

On November 30 1987 Motasi and his wife are killed. On December 7 1987, the State Attorney writes to Motasi's lawyer: "My instructions are that your client has recently passed away. Kindly confirm, and if so, I look forward to receiving your notice of withdrawal."

More than a year before, in August 1986, Motasi had already foreseen his death: "If it happened that I am killed, please know that it will be my stand in fighting for my rights and justice."

It would be interesting to know whether Vroegdenburg and Raath's names were among those of the 8 500 policemen who applied for indemnity recently. Maybe they are completely innocent, but that is the point. How are we going to know?

More pertinent, how are their black colleagues going to know? By all accounts, Motasi was a popular man. Quite conceivably some or all of his colleagues are waiting for the day when they could get back the perpe-



after the 1976 Soweto riots, the Broederbond, explaining its support of the use of proxy black organisations in black townships, gave the following instruction in a secret circular:

"We want to call on our members to cultivate an understanding that the average African is different from whites in his view of violence and power ... the routines and methods which their own people use will nonetheless be different from those of a white community. It would be self-defeating ... to keep on using rules suited are somehow on a superior moral plane — is that the unconventional war" was fought by security forces' own ranks.

Let's take a case study — the death of one Sergeant PR Motasi, who was killed along with his wife in Tembisa north of Pretoria on the evening of November 30 1987. Their six-year-old son was left alone with their bodies until the next morning, when neighbours responded to his crying.

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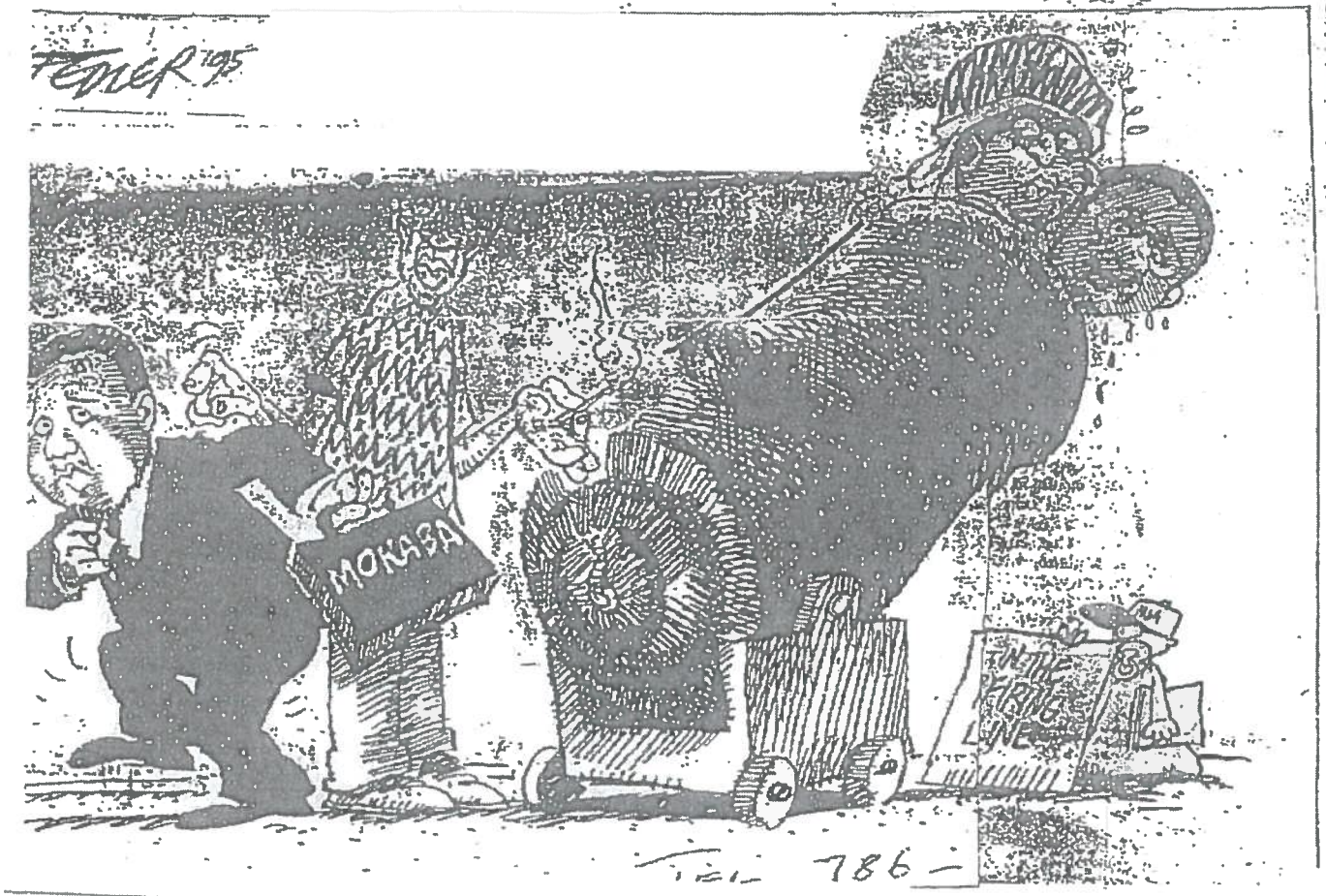
More pertinent, how are their black colleagues going to know? By all accounts, Motasi was a popular man. Quite conceivably one or two of his colleagues are waiting for the day when they could get back the perpetrators of this evil deed — or those who they think perpetrated it.

The same goes for the many other cases in which black policemen were killed in suspicious circumstances. Probably the most notorious is the car bombing of four black policemen, revealed during the Goniwe inquest, apparently because they were present when the Goniwe Four were killed.

Nobody in his right mind could call these deaths and that of Motasi "legitimate warfare". The more grievous consideration is that if this sickness in police ranks is not cut out through the exposure of the truth commission, it will remain institutionalised — especially if the ANC is allowed, as a quid pro quo, to hush up similar atrocities in its own ranks.

Whites are still very much in control of the police. But they will not remain in power for long. Then their younger, innocent, colleagues might find that the same "routines and methods" are used against them.

The truth commission will not only serve people outside the security forces, it will also do these forces themselves a world of good.



JHU 2

Document Name: untitled

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RSAP                    SAP 96 (900354 KLEYNHANS NJ)                08:56:28
1.50(03)                      NAVRAAG : SAP 96                      2019-01-16
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970401 37269 SUPERINTENDENT (P) BEEN 1
990701 80346 FUNKSIONELE PERSONEEL SA POLISIE DIENS SR10 BEEN 1
151201 80348 FUNKSIONELE PERSONEEL SA POLISIE DIENS SR12 BEEN 1

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801205 000045 PRETORIA SENTRAAL         000001 BEHEERSUBKOMPONENT
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840206 000022 HAMMANSKRAAL              000001 BEHEERSUBKOMPONENT
900913 000022 HAMMANSKRAAL              000012 SPEURDIENS STASIE
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971201 000939 NYLSTROOM                 000119 M&R
010627 000144 A KOMM WATERBERG          000809 SPEURDIENS:AK
090501 000949 BELA-BELA                 000012 SPEURDIENS STASIE
151201 000003 NAS\HOOFKANTOOR           001976 ENFORCEMENT
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MSM JL

19/01/16 Time: 09:02:54 AM

JHV 3

https://mg.co.za/article/2019-01-18-00-justice-for-cradock-four-delayed

Justice for Cradock Four delayed

Ra'eesa Pather18 Jan 2019 00:00

An assassination plotted by the highest echelons of the apartheid regime is slowly being resurrected nearly 33 years after it sent shockwaves throughout the South African liberation movement.

But now, as a spark of hope is ignited that the murders of the four men known as the Cradock Four might finally be investigated, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) have been accused of suppressing apartheid-era investigations.

In 1985, the apartheid state was thrown into panic when people from an obscure township called Lingelihle, next to Cradock in the Eastern Cape, wrested power from the government with protests that culminated in the resignation of members of the Lingelihle puppet council, which was dissolved. The protests were led by the Cradock Four, in a resistance movement aligned with the United Democratic Front.

Fort Calata, Matthew Goniwe, Sparrow Mkhonto and Sicelo Mhlauli were executed by the apartheid police in an effort to suppress dissent. On the day of their funeral, then-president PW Botha declared the 1985 state of emergency.

Their killers were members of the Security Branch.

But Cabinet members, including FW de Klerk, sat in meetings to discuss the assassination. Others, such as Adriaan Vlok, deputy minister of law and order, were implicated in the planning of their deaths. Vlok had been to Calata's house less than a month before he was killed.

A reopened inquest found in 1994 that the apartheid state was responsible for their deaths. Calata's son, Lukhanyo, has steadily applied pressure on the

democratic government to prosecute those responsible for his father's murder since the inquest's findings.

In 2018, Lukhanyo, a journalist, met Shaun Abrahams, when he was still the national director of public prosecutions. A reopened investigation into his father's death was under way and Abrahams was waiting to hear from investigators.

But court papers reveal that the lead investigators, a Colonel Vreugdenburg and Captain C Simpson, assigned by the Hawks to the case, were former Security Branch officers. Hawks spokesperson Hangwani Mulaudzi confirmed this. The Hawks did not confirm the two investigators' first names, but said they had been removed from the case following complaints.

The court papers were filed by Imtiaz Cajee, the nephew of anti-apartheid activist Ahmed Timol, in his case to have his uncle's murder prosecuted. He said he believed that the SAPS and the NPA had been "captured" by political forces because of their conduct in cases related to the Truth and Reconciliation Commission (TRC).

In January last year, the NPA had a list of 20 TRC-related cases that could be reopened for investigation. "Astonishingly, two former SB [Security Branch] officers were appointed to lead these investigations," Cajee said.

In 1986, one year after the Cradock Four were murdered, Richard Motasi was arrested and tortured by the security police. Motasi was a sergeant in the police force, but he was accused of being a double agent.

In an affidavit filed against the police for assault, Motasi wrote that Vreugdenburg was involved in his torture. A line of his affidavit, as quoted in a thesis by John Miles at the University of the Western Cape, reads: "tortured by W/O La Grange, sgt Raath and const Vreugdenburg".

Moray Hathorn, an attorney at Webber Wentzel who is working on some of the apartheid-era cases, confirmed his team made a complaint to the Hawks when they realised who the investigators were.

Mulaudzi said that when the complaint was made the investigators were removed from all TRC cases.

JHV3

For Lukhanyo Calata, the appointment of the Security Branch officers to the case is not surprising. He has access to declassified apartheid-era documents that detail how De Klerk attended a meeting at which his father's murder had been discussed by the State Security Council. These documents are also available in the South African History Archive. The paper trail reveals the planning involved in the assassination plot.

In total, six policemen were denied amnesty at the TRC for the murders. They included former security police head Harold Snyman, who led the interrogation of Steve Biko in 1977.

Calata believes that, if his father's death is prosecuted, the ANC itself would be in trouble.

"There is a very high probability that they [the ANC] used my father's life to negotiate for this democracy that we have today," Calata said.

The Cradock Four case could also see senior apartheid leaders would be prosecuted. Calata believes the ANC is trying to avoid this to protect its own members from prosecution in TRC-related cases.

Allegations of political interference in the prosecution of TRC cases have a long history. In 2015, Vusi Pikoli, the former head of the NPA, filed an affidavit in the high court in Pretoria stating that he had been blocked from prosecuting TRC cases by members of government. He implicated former national police commissioner Jackie Selebi in the attempts to obstruct prosecution.

In Cajee's court papers, a secret memo written by Pikoli to then justice minister Brigitte Mabandla in 2007 sets out some detail about the interference the NPA experienced. Pikoli told Mabandla that Selebi, the National Intelligence Agency (NIA) and representatives from the justice department who were meant to assist the NPA in its investigations of TRC-related cases were trampling on the NPA's mandate by insisting they had powers to make decisions about prosecutions — a role reserved for the national director of public prosecutions.

"I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally, I have reached a

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JHV 3

dead end," Pikoli wrote. "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 [do] not allow that."

Pikoli added he could not carry on with the TRC cases and would await direction from the government.

In 2008, the Amended Prosecution Policy, which formulated the NPA's handling of TRC cases, was struck down by Judge Francis Legodi in the high court in Pretoria. He found there had been political interference. The case was brought by the widows of the Cradock Four, Thembi Nkadimeng (the sister of slain Umkhonto weSizwe operative Nokuthula Simelane) and civil society organisations.

Calata believes there is still interference within the ranks of the NPA and the SAPS in TRC cases. He said there was enough evidence to begin a prosecution, but he had had no feedback on the case since his meeting with Abrahams last year.

"I'm just a journalist but, with just a little bit of digging, I found a proper paper trail. I'm not a prosecutor, I'm not an investigator for the NPA or for the Hawks, but here I have got those documents in my house," he said.

"This evidence is in the state's hands. It's the state's responsibility. It's in their hands."

MSM NL

AA2

South African Police Service — Suid-Afrikaanse Polisiediens

Private Bag X1500, Silverton, 0127 — Fax No: (012) 846 4414

My reference: 2/5/1

Enquiries: Lt General Lebeya, Brigadier Xaba

Tel: 012 846 4802

E-mail: dpchead@saps.gov.za

THE NATIONAL HEAD

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

SOUTH AFRICAN POLICE SERVICE

Webber Wentzel Attorneys
90 Rivonia Road
MARSHALLTOWN
2107

Dear Mr M Hathorn

COMPOSITION OF INVESTIGATION TEAMS: TRC CASES

Your letter with reference M Hathorn / N Fakir dated 25 June 2018 has bearing on this matter.

Kindly be advised that the officers refered to in your letter have been relieved from the investigation team.

They have been informed accordingly to discontinue with the TRC investigations in order to keep cordial relationship that exists between the current investigators, the victims and the victims' families.

This decision will also be communicated to the National Prosecuting Authority and the entire team.

With kind regards

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
(DR/ADV) SG LEBEYA (SOEG)
Date: 2018-07-25

MSM TL

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FILING SHEET

DOCUMENT: Supplementary replying affidavit of applicant

Nature: Opposed Motion

Filed by:

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ATTORNEYS FOR THE APPLICANT
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E-Mail: benjaminnaar@gmail.com
TEL:082 4462644
REF: BM 01/09/18

TO: **THE REGISTRAR OF THE HIGH COURT**
PRETORIA

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
First Respondent
C/O State Attorney
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SALU Building
Pretoria
Ref: Peter Seleka

Served by e-mail as agreed to:
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AND TO: **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
Second Respondent
C/O State Attorney
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AND TO: **THE MINISTER OF POLICE**
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Ref: Peter Seleka

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AND TO: **LEGAL RESOURCE CENTRE**
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Email:
Ref: Moray Hathron
3005789

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/2018

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

SUPPLEMENTARY REPLYING AFFIDAVIT OF APPLICANT

I, the undersigned,

JOAO RODRIGUES

do hereby declare under oath as follows:

1.

1.1. I am an adult pensioner presently residing at 835 Eleventh Avenue, Wonderboom South, Pretoria, Gauteng. I have been residing at the address for the past 54 years.

1.2. I am the Applicant in this application.

1.3. The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary, and are both true and correct.

2.

I have read the supplementary affidavit filed on behalf of the First Respondent in this application and I have also been informed that it is necessary to reply to such supplementary affidavit.

3.

At the outset I wish to inform the Honourable Court that it is basically impossible to properly deal with the new issues raised in the

supplementary affidavit filed on behalf of the First Respondent for the following reasons:

3.1. In the supplementary affidavit the First Respondent now made a turnaround in their previous approach followed in the answering affidavit. First Respondent now admits that the delay in prosecuting me was caused by a specific decision not to prosecute following an agreement/arrangement by Government and other interested parties and political interference in the criminal justice system from the highest levels of Government.

3.2. Although it appears to be common cause I wish to emphasise that I was not a party to any political interference in the criminal justice system and I did not even have knowledge of such interference prior to the information now disclosed in this application.

3.3. Although the First Respondent now, in the supplementary affidavit, admitted the deliberate decision not to prosecute in matters of this nature, including the one relevant to this application, they still failed

to provide all the relevant documentation and/or information to the Honourable Court.

3.4. It is further inexcusable that the Second Respondent, who was clearly a party to the political interference and/or agreement/ arrangement not to prosecute, failed to disclose any information relating to its conduct to the Court. In this regard it appears from documentation now before Court that the Minister of Justice personally participated in decisions and/or agreements not to prosecute certain politically motivated crimes he/she still failed to disclose the material relevant information and/or documentation to Court.

4.

My attorney of record indeed addressed a letter to the attorneys of record acting on behalf of the First to Third Respondents, expressing our dismay and concern for the conduct of the Respondents and requesting them on an urgent basis to disclose all relevant documentation and information to the Honourable Court.

5.

It was emphasised in the letter that this is a matter of material importance and that the interests of justice demand a full disclosure to the Court. A copy of this letter and a schedule annexed thereto is annexed hereto as **Annexure "JR1".**

6.

I will now deal with the allegations contained in the supplementary affidavit filed on behalf of the First Respondent. I will deal so in a general manner and without referring to the specific paragraphs in the supplementary affidavit. I have to, however, emphasise that I reserve my rights to further supplement this affidavit insofar as further documentation and/or information become available.

7.

I take note of the fact that First Respondent now formally and under oath admitted that the failure to prosecute me originated from a specific decision not to prosecute as a result of the agreement/ arrangement and/or interference by Government on the highest level.

8.

Although the deponent on behalf of the First Respondent now admit the decision not to prosecute it appears that an attempt is made to shift the full responsibility for this decision to the State President, the Second Respondent (Minister of Justice) and other politicians. The attempt is to clear First Respondent from any blame, insofar as blame should be ascribed to any person and/or entity.

9.

I deny the correctness of the allegations in the above regard and the attempt by the First Respondent to escape responsibility for the decision not to prosecute. I refer *inter alia* to the following:

9.1. The then National Director of Public Prosecutions (Advocate Pikoli) stated in a memorandum addressed to the Minister of Justice that:

> *"... I indicated that I was unable to deal with these cases in terms of the normal processes and sought guidance on the way forward."*

9.2. I am advised that the above acceptance by the First Respondent not to comply with its obligations in terms of our Constitution is clearly wrong unless based on a valid agreement/arrangement and/or instruction from Government not to proceed with prosecutions.

9.3. It is significant that the First Respondent does not explain the basis for the acceptance not to proceed with prosecutions in this regard.

9.4. I am advised that our Constitution provides that the authority to institute prosecutions lies with the First Respondent. I am further advised that it is specifically provided that the First Respondent must exercise this responsibility and its functions without fear, favour or prejudice. I am also advised that the First Respondent must, in terms of section 179(5) of the Constitution, determine prosecution policy with the concurrence of the Second Respondent. The First Respondent, however, failed to provide the Court with an explanation what the basis of the interference by *inter alia* the Second Respondent was in this instance.

9.5. First Respondent did not explain to this Court in the supplementary affidavit why it initially chose to deliberately withhold these very material and relevant facts from Court. Clearly the First Respondent as a Constitutional Institution has a duty to disclose all relevant and material facts to a Court in cases where First Respondent is a party to proceedings. It is clear that the only reason why First Respondent indeed disclosed some of the relevant facts and admitted their deliberate failure not to prosecute was only prompted by the answering affidavit filed on behalf of the Fourth Respondent.

9.6. It is significant that the deponent on behalf of the First Respondent actually criticises Fourth Respondent for disclosing these issues to Court in the answering affidavit and thereby forcing First Respondent to admit the inevitable. This criticism is levelled despite the fact that these issues are relevant and extremely important to the issue to be adjudicated on in this application.

10.

I deny all allegations and/or suggestions by the First Respondent that these circumstances do not justify the relief that I seek in the notice of

motion. Legal argument will be addressed in this regard to the Honourable Court at the hearing of this matter.

11.

I, however, submit that it is of cardinal importance and in the interest of justice that all relevant documentation and facts be put before Court in order to enable the Honourable Court to properly adjudicate the application.

12.

I therefore persist with my application for the relief set out in the notice of motion.

DEPONENT

SIGNED and SWORN to at PRETORIA on this 14th day of ~~JANUAR~~February 2019 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

MAWELELEWELE TR
(W/O) 06102607

COMMISSIONER OF OATHS

FULL NAMES: Thulaphezwi Robert Mgwebedla
BUSINESS ADDRESS: 17TH AVENUE 580
AREA:
DESIGNATION: RETIRED

MAWELELEWELE TR
(W/O) 06102607

2019 -02- 14

SOUTH AFRICAN POLICE SERVICE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 76755/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

..... 3/6/2019.
SIGNATURE DATE

In the matter between

JOAO RODRIGUES	**Applicant**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	**First Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
MINISTER OF POLICE	**Third Respondent**
IMTIAZ AHMED CAJEE	**Fourth Respondent**
YASMIN SOOKA	**First Amicus Curiae**
DUMISA BUHLE NTSEBEZA	**Second Amicus Curiae**

MARY BURTON	**Third Amicus Curiae**
WENDY ORR	**Fourth Amicus Curiae**
GLENDA WILDSCHUT	**Fifth Amicus Curiae**
FAZEL RANDERA	**Sixth Amicus Curiae**
SOUTHERN AFRICA LITIGATION CENTRE	**Seventh Amicus Curiae**
PAN AFRICAN BAR OF SOUTH AFRICA	**Eighth Amicus Curiae**
LAW SOCIETY OF SOUTH AFRICA	**Ninth Amicus Curiae**

JUDGMENT

Flynote

Criminal Procedure – Permanent stay of prosecution – Delay in prosecution – section 35 (3) of the Constitution, 1996 in relation to the delay in prosecution – Factors to consider include the length of the delay, reasons the government relies on to justify the delay, the accused's assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration – new factor to add in is the interests of family and/or the victims of the crime – length of delay was unreasonable especially in light of political interference – age and infirmity are to be considered at sentencing - however, no trial prejudice and no exceptional circumstances present to justify radical and far reaching relief of a stay of prosecution – application for stay of prosecution dismissed.

Headnote

The Applicant seeks a permanent stay of prosecution with respect to a charge of murder and another charge. The Applicant alleges that he has suffered a delay in respect of the prosecution which results in an infringement of his right to fair trial in terms of section 35(3) of the Constitution, 1996. The charge of murder relates to the death of Mr Ahmed Timol, an anti-apartheid activist who died on or about 27 October 1971. This case comes before the courts after the reopening of an inquest in 2017 (2017 Inquest) conducted in 1972 following Mr Timol's death (First Inquest) which

found that Mr Timol had committed suicide and no one alive was responsible for Mr Timol's death. The 2017 Inquest however found that Mr Timol was murdered.

The court discussed the factors to consider for a permanent stay of prosecution namely the length of the delay, the reasons the government relies on to justify the delay, the accused's assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration. The court also added a new factor, namely, the interest of the family or victims of the crime.

The applicant alleged that he suffers memory loss as a result of his age and therefore will be prejudiced. The court provided that age and infirmity are considered at sentencing or prior to the trial. The court held that there is no prejudice to the accused as there is no evidence to prove that poor memory will taint the fairness of the trial as the State carries the burden of proving guilt beyond reasonable doubt.

The court was faced with the issue of political interference in the National Prosecuting Authority in finalising the prosecution of the applicant. The period in question was considered to be the period between 2003 and 2017. The court directed that the conduct of the relevant officials and others at the time needed to be brought to the attention of the National Director of Public Prosecutions for her consideration so that she may take any necessary action. The court concluded that although there was political interference, investigating it further in this court was not necessary.

The court held that while the delay in prosecution has caused some measure of prejudice, it cannot be said to taint the fairness of the proposed trial which the Applicant is entitled to. The court held the interests of justice and the societal need to ensure accountability for the commission of serious offences and the nature of the crime located in its historical context all militate against the granting of a permanent stay of prosecution. The court dismissed the application grounded in section 35(3) of the Constitution.

KOLLAPEN J (MOSHIDI J and OPPERMAN J concurring)

Introduction

[1] In this application, the Applicant seeks a permanent stay of prosecution in respect of a charge of murder and one other charge. The application relates to events that span some 47 years and covers large periods of South Africa's painful and turbulent past as well as the steps taken to deal with and come to terms with that past in the building of a new future and society. In broad terms, it involves the death of the late Mr Ahmed Timol, attempts to uncover the truth of what happened to him, the State's decision to prosecute the Applicant for the death of Mr Timol and the Applicant's assertion that he is entitled to a permanent stay of prosecution.

The relief sought

[2] The relief the Applicant seeks is set out fully in the Notice of Motion and is described as follows:

1. "A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is envisaged in section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.
2. A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(5) of the Constitution read with section 342A of the Criminal Procedure Act, Act 51 of 1977.
3. That the Applicant is granted a permanent stay on the charge of murder in the criminal proceedings against the Applicant relating to the death of the late Ahmed Essop Timol on or about the 27th of October 1971.
4. That the First and/or Second Respondents are prohibited from proceeding with the criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol.

5. That the First and/or Second Respondents are ordered to withdraw the criminal proceedings against the Applicant relating to the death of Ahmed Essop Timol.
6. That the Respondent(s) is/are ordered to pay the costs of this application only in the event of them and/or anyone of them opposing [sic] this application and in such instance only against the Respondent(s) who oppose /opposes this application.
7. Further and/or alternative relief."

[3] In *Sanderson v Attorney-General, Eastern Cape*[1] the Constitutional Court described the relief of a permanent stay of prosecution as being "radical, both philosophically and socio-politically"[2] and went on to observe that "[i]ndeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."[3]

The Respondents

[4] The First to Third Respondents are State parties who all oppose the relief sought. The Fourth Respondent is the nephew of the late Mr Timol and was given leave by this Court to be joined as a party. Whilst he is a party in his personal capacity, he also speaks for the extended Timol family.

The *Amici*

[5] The applications by the *amici* were not opposed by any of the parties. An order was made at the hearing of the matter admitting them as *amici.* The Court was satisfied that it was in the interests of justice to do so and that they would

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[1] 1998 (2) SA 38 (CC). *Sanderson* deals with the delay after a person has become an accused but the four factors distilled were accepted, with qualification, and applied in respect of a pre-trial delay. See *Bothma v Els and Ohers* 2010 (2) SA 622 (CC) at para [37].

[2] Id at para 38.

[3] Id.

advance submissions that would be of assistance to the Court in adjudicating the matter.

[6] The first to sixth *amicus curiae* are former TRC commissioners who sought to offer their expertise and unique experience in matters related to reconciliation, amnesty, and the appropriate treatment of crimes committed under apartheid.

[7] The seventh *amicus curiae*, the Southern African Litigation Centre (SALC), has developed expertise in the area of human rights and international law and sought to offer its expertise in the area of the best international law practice in dealing with crimes against humanity.

[8] The eighth *amicus curiae*, the Pan African Bar Association of South Africa (PABASA) is a voluntary organisation of advocates committed to the values of the Constitution such as equality, freedom and dignity.

[9] The ninth *amicus curiae*, the Law Society of South Africa, is an association of attorneys who are committed to the rule of law and accountability for criminal conduct and was admitted on the basis of its experience in that area.

Background facts

The late Ahmed Timol: the man and the political activist

[10] The late Mr Ahmed Timol (Timol), a teacher by profession, was a passionate and courageous advocate for freedom and justice who became actively

involved in the political struggles in South Africa as a member of the South African Communist Party (SACP).

[11] On the night of 22 October 1971, at around 23h00, Timol and his colleague Salim Essop (Essop) were arrested at a roadblock when documents and pamphlets of the banned SACP were found in the boot of the vehicle they were travelling in. Both Essop and Timol were arrested and initially taken to Newlands Police Station from where they were transferred to John Vorster Square by members of the Security Branch.

[12] Essop testified during the Inquest opened in 1972 (1972 inquest) that the last glimpse he had of Timol was when he saw Timol with a black hood placed over his head, being dragged along by two Security Branch officers. Timol, according to Essop, seemed unable to walk normally and the two Security Branch officers were holding him up. Essop testified about the torture he suffered at the hands of the Security Branch officers, such as electrocution, and thought that Timol suffered the same fate, if not worse.

[13] On 27 October 1971 Timol died and the police, in whose custody he was at the time, said he had committed suicide by jumping from Room 1026 on the 10th floor of John Vorster Square. An inquest held in Johannesburg in 1972 came to the same conclusion and found that no person was responsible for his death. It also found that the Applicant was the only other person with Timol when the latter was said to have moved towards the window in Room 1026, opened it,

and jumped out despite unsuccessful efforts by the Applicant to reach Timol before he jumped.

[14] The Timol family were not satisfied with the finding of the 1972 Inquest Court and, determined to uncover the truth and seek justice, began a long process in which they undertook further investigations; obtained new evidence that was not placed before the 1972 Inquest Court; and prevailed upon the authorities and others to seek the reopening of the inquest into Timol's death. Those efforts spanned a long period of time and ultimately resulted in a decision by the Second Respondent to reopen the inquest.

[15] The second inquest was held in the Gauteng Division of the High Court of South Africa in 2017 (the 2017 inquest) before Mothle J. The Court heard evidence from a number of witnesses who knew Timol and who were in detention at the time he was. These witnesses were able to testify with regard to the methods of interrogation and torture that many detainees experienced at the hands of the Security Branch. The Applicant also testified in this inquest, as did members of the Timol family. The court also heard expert evidence from pathologists who concluded that the injuries suffered by Timol prior to the fall were so serious that Timol would not have been able to walk, eat, or drink unaided. The 2017 Inquest Court found that Timol's death was brought about by him having been pushed from the 10th floor or the roof of John Vorster Square with the necessary intent to kill in the form of *dolus eventualis*. The Court also found that the Applicant, on his own version, participated in the cover up to conceal the crime

of murder and that he be investigated with a view to being prosecuted for being an accessory after the fact in respect of the crime of Timol's murder.

[16] The findings of the 2017 inquest were in stark contrast to those of the 1972 inquest with the conclusion being that Timol had been murdered and that the Applicant had participated in the cover up to conceal the murder of Timol and committed perjury.

[17] Of relevance in this application are the events that led to the first democratic elections in 1994 and the agreements reached between the National Party and the liberation movements in dealing with the past which ultimately resulted in the promulgation of the Promotion of National Unity and Reconciliation Act (the "TRC Act").[4] The Truth and Reconciliation Commission (TRC), which was established in terms of the TRC Act was tasked with establishing "as complete a picture as possible of the nature, causes and extent of the gross violations of human rights"[5]. It was also required to facilitate the granting of amnesty for those who had committed crimes with a political objective and who had made full disclosure of all relevant facts.

[18] The mother of Timol participated in the TRC process at a victims hearing seeking to know who killed her son and the circumstances under which he died. The Applicant did not participate in that hearing and in its final report, the Truth and Reconciliation Commission concluded that:

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[4] 34 of 1995.

[5] The preamble of the TRC Act.

"[T]the commission finds that the SAP and in particular Colonol Greyling, Captain Bean, Sergeant Rodrigues, Warrant Officer Cloete, Sergeants FJ Ferreira, MC Pelser and DL Carter were directly responsible for the death of Mr Ahmed Timol. The commission finds further that the inquest magistrate's failure to hold the police responsible for Ahmed Timol's death contributed to a culture of impunity that led to further gross human rights violations".[6]

[19] The Applicant did not apply for amnesty in terms of the TRC process and it was not disputed in these proceedings that the State retained the right to prosecute those who had committed crimes in the past if either they did not apply for amnesty or were unsuccessful in their application for amnesty.

[20] The finalisation of the work of the TRC as well as the amnesty process was concluded in approximately March 2002 when the TRC was dissolved by Presidential Proclamation. What should have followed, according to the submissions of the first to sixth *amici*, was what they describe as a 'bold prosecutions policy' which would require the State to prosecute those who had not applied for amnesty in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. There was however no bold prosecutions policy rather what can only be described as a timid retreat.

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

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[6] TRC Final Report, Volume 3, Chapter 6, page 542 at para 61.

[22] The First Respondent describes this interference as follows:

> "The only conclusion to arrive at is that the delay in prosecuting the Applicant was not as a result of the First Respondent's own doing or its malice- it was as a result of the political interference and the 'severe political constraints' to which the First Respondent was subjected".[7]

[23] There was thus what can only be described as high level executive interference on investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017. In an affidavit filed in other proceedings before this Court (*Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and 8* others[8]) the former National Director of Public Prosecutions, Advocate Vusi Pikoli describes what he regarded as an assumption on the part of the then Minister of Justice that TRC matters will not be prosecuted. He says 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 TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear favour or prejudice".[9]

[24] In the same affidavit he then deals with a Memorandum he prepared arising out of this improper interference and concluded:

> I complained that such interference impinged upon my conscience and oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal process and sought guidance on the way forward."[10]

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[7] See First Respondent's Supplementary Affidavit at para 2.12.

[8] Gauteng Division, case no 35554/2015.

[9] See Fourth Respondent's Answering Affidavit, Annexure IC6 at para 49.

[10] Id at para 52.

This Memorandum is dated 15 February 2007 and in September that year, Advocate Pikoli was suspended from office.

[25] The Applicant was arrested and charged with murder on 30 July 2018. He was brought to Court and released on bail. His case has been transferred to this Court where it is currently pending - awaiting the outcome of this application.

The legal basis upon which the relief is founded

[26] The application is advanced on the basis that the Applicant's rights in terms of Section 35(3) of the Constitution - to have his trial begin and conclude without delay - has been violated by the delay of some 47 years. This delay, he contends, has redounded to his prejudice and has undermined his right to a fair trial. He accordingly seeks relief on that basis.

[27] In addition, he argues that his prosecution is premised upon an improper motive as the 2017 Inquest Court did not recommend that he be investigated for murder, but rather as an accessory after the fact to murder and that the charge sheet which charges him with premeditated murder is accordingly advanced for an improper motive given the 2017 Inquest Court's findings.

Preliminary issues for determination

[28] Whilst the Applicant has sought to argue that he has advanced a proper case for the main relief he seeks, he has also raised a point *in limine* which may be conveniently dealt with at this stage.

In Limine

[29] It is argued by the Applicant that in the face of the undisputed political interference that was brought to bear on the prosecutorial machinery - and which I have described above - there is insufficient information before this Court that explains in detail how and why such political interference occurred. The Applicant contends that it is unclear whether the nature of the political decisions arrived at constituted an amnesty and/or a pardon and that this Court is accordingly hamstrung by the lack of such information in determining the relief.

[30] The Applicant therefore takes the position that the Court should not finalise the application before it but rather use its powers to make an order directing that all relevant information relating to the genesis and the detail of the political interference be placed before it before deciding the application.

[31] While the issue of the political interference is a matter of great seriousness, and is one I will deal with in greater detail, including the manner in which the evidence about the interference was revealed, I do not agree that the matter cannot be finalised in the absence of the details the Applicant contends for.

[32] While these details will no doubt be relevant in the writing of the history of this episode in our democracy - and no doubt more will emerge around it - the absence of such detail would not stand as an obstacle to this Court determining the issues before it. In particular, all of the parties are in agreement that there was political interference and that such interference may well have delayed the investigation and prosecution of the Applicant. It does

not take the matter any further to seek the finer detail of how the political interference materialised.

[33] In so far as there was a possible amnesty or pardon, I am of the view, for the reasons that will emerge, that whilst it is extremely unlikely that there was an amnesty or pardon, even if there was, its legal basis and legal validity would be highly questionable. I deal fully with those issues later in this judgment but for now, I am not persuaded that there is any merit in acceding to the request by the Applicant in respect of the point *in limine.*

[34] For these reasons the point *in limine* is not sustainable and is dismissed.

The merits

[35] A few preliminary observations may be necessary in locating the relief sought within its proper legal and factual context.

Pre-trial delay versus prosecution delay

[36] The legal basis for this application is founded upon the right contained in Section 35 (3)(d) of the Constitution which provides that:

"Every accused person has a right to a fair trial, which includes the right –

...

(d) to have their trial begin and conclude without unreasonable delay".

It is not the case for the Applicant that there has been an unreasonable delay following the commencement of the prosecution in July 2018 and accordingly, this is not an application that activates the provisions of Section 342A of the

Criminal Procedure Act which deals with what was termed as "intra-curial delay" by the High Court in *State v Naidoo*[11]. This application relates to the alleged delay in the investigation of the matter and the commencement of the prosecution.

The factors necessary to consider when determining relief for a permanent stay of execution

[37] In *Bothma v Els*[12] the Constitutional Court referred with approval to the approach taken in *Sanderson*,[13] that in determining relief for a permanent stay of prosecution, the Court was required to engage in a balancing exercise in which the conduct of both the prosecution and the accused were weighed and the following considerations examined:

a. The length of the delay;
b. The reasons the government assigns to justify the delay;
c. The accused's assertion of a right to a speedy trial; and
d. Prejudice to the accused.

[38] The Court however, went on to caution that the above factors did not constitute a definitive check list and added a fifth factor - the nature of the offence and the public policy considerations that may be attached to it.[14] This, in my view, also has relevance in these proceedings as the offence in question is the crime of murder allegedly committed during the apartheid era and, in respect of which,

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[11] 2012(2) SACR 126 (WCC).

[12] 2010 (2) SA 622 (CC) at para 36.

[13] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

[14] *Bothma* above n 9 at para 37.

there has been considerable legal and policy considerations that sought to guide the new democratic society in its approach to such crimes.

[39] A sixth factor may also become important. This relates to the interests of the family and/or the victims of the crime. The role and participation of victims has been a central feature in the approach to dealing with crimes committed in the past. A victim's interests and voice, whilst not dispositive, is an important part of the balancing exercise that *Sanderson* contemplates.[15]

Main issues for determination

[40] The following issues accordingly arise for determination and are not to be dealt with in an insulated fashion, but rather as part of a weighted balancing exercise.

The length of the delay

[41] While it remains the assertion of the Applicant that there was a delay of some 47 years from 1971 - when the crime was allegedly committed - to 2018 - when he was charged - the timeline of 47 years is more nuanced and complex than that and may be broadly divided into 3 periods.

I. The period from 1971 to 1994

[15] *Sanderson* above n 10 at para 36.

[42] The relevance of this period and the 1994 cut-off date is that the approximately 23 years it spanned, covered the pre-democratic era. It was a time when a minority government was in power and one that was, in law, responsible for a system of arrest and detention without trial and under whose watch some of the most serious and systemic violations of human rights took place. The Applicant was in the employ of that government and in particular, in its security machinery. It hardly could have been expected from that government that the will to investigate such crimes as the murder of Mr Timol would have emerged and persisted, resulting in a proper investigation and charges being proffered.

[43] On the contrary, the 2017 Inquest found a cover up that was engineered, and of which, the Applicant was a part of and in respect of which he committed perjury. The conclusion of the TRC in this regard - that the First Inquest failed to properly hold the police accountable, thereby contributing to a culture of impunity - is also relevant in this context.

[44] It can therefore hardly be open to the Applicant to suggest that the 23 years from 1971 to 1994 could be characterised as constituting a delay when, objectively speaking, all of the legal and factual considerations to which I have referred, would have militated against any action on the part of the authorities by way of an investigation or a prosecution. The Applicant had elected to make himself a part of that system, had participated in its oppressive machinery, and allegedly sought to cover up his wrong-doing. Surely he cannot now be seen to reap a benefit from such a state of affairs and locating part of the culpability in the delay over those 23 years to that system. To allow him to do so would

seriously offend notions of fair play and the interests of victims that have become a central feature of our criminal justice system.

[45] Accordingly, whilst this period does chronologically fall into the timeline of 47 years, it should not, for the reasons given, be reckoned as constituting part of the delay.

II. The period from 1994 to 2002

[46] This period was characterised by the formation of a newly elected and democratic government. It included policy and legal initiatives to deal with the crimes of the past. An important aspect of these initiatives was the establishment of the TRC which created a process that allowed for victims to be heard as well as for perpetrators of crimes that were politically motivated to apply for and receive amnesty.

[47] During this time it would have been open to all who had committed crimes in the past with a political motive to come forward and apply for amnesty. Provided that full disclosure was made and the crime was committed with a political motive, a perpetrator would have been entitled to obtain amnesty.[16]

[48] The amnesty provisions in the TRC Act were not universally accepted, particularly by families of loved ones who were murdered during the pre-apartheid period. This difficulty was eloquently captured by the

[16] Above n 4 at section 20(1) (a)-(c).

Constitutional Court in *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*:

"Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured,

maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue." [17]

[49] The cut-off date for amnesty applications was initially 14 December 1996 but was extended to 10 May 1997. The TRC was dissolved on 31 March 2002. On 15 April 2003, the President placed the final TRC Report before Parliament and directed that the National Director of Public Prosecutions institute prosecutions where appropriate.[18]

[50] This period in the 47 year timeline largely encompassed dealing with the past. During this time the process of victims and perpetrators coming forward was encouraged and it was certainly the view of the former TRC Commissioners that upon the conclusion of the Commission there would be a bold prosecutions policy to deal with perpetrators of crimes who never came forward to seek amnesty.

[51] The TRC report captures this desire in the following terms:

"... the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent

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[17] 1996 (4) SA 672 at para 17.

[18] Government Gazette (Notice 1539 of 2008) (12 December 2008), 31723. See also the Fourth Respondent's answering affidavit, annexure IC7, the affidavit of Adv Anton Ackermann at para 13.

on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law."[19]

[52] Accordingly, this part of the timeline, to the extent that it constituted a delay, was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism – flawed, but the product of a historical compromise - to seek and find closure.

[53] It could not, in my view, be said to be a part of the delay when, by operation of the law, it was a period of hiatus that was contemplated by the TRC Act. Even if it could be regarded as a period of delay, then there are meritorious reasons why it was the kind of delay that could hardly be regarded as culpable. It was a historic and unique time in the history of South Africa. A difficult political compromise was being given effect to. The nation was collectively prevailed upon to give the process an opportunity to succeed in the hope that it would advance the twin objectives of reconciliation and reconstruction. It was imperative that South Africa embrace this process if it were to have any chance of growing as a new nation and overcoming the deep distrust and suspicion that characterised the relationship between its people for so long.

[54] That being the case, one then moves to deal with the third period. It is the delay during this period in which the Applicant locates his case.

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[19] TRC Final Report above n 6, Volume 6, Section 5, Chapter 1, page 595 at para 24.

III. The period from 2003 to 2017

[55] This is the period characterised by the political interference to which reference has already been made. There can be little argument that the political interference resulted in TRC cases (and one must assume the Timol case) not receiving the necessary attention by virtue of investigation that could have led to a decision to prosecute.

[56] There are, however, a number of issues that span this period – this includes the issues deemed necessary to consider by *Bothma* i.e. the reasons the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and the prejudice to the accused – which require special attention.

i. The nature of the interference and its impact on the Prosecuting Authority

[57] Whilst it is manifestly clear that the political interference materially affected the ability of the NPA to properly deal with the TRC cases in that the resources that were necessary to conduct proper investigations were not forthcoming, the NPA cannot, as it seeks to do, portray itself purely as a victim of the political machinations of the time. Whatever form the political interference took, the NPA was enjoined in terms of both its constitutional and legal responsibilities to act on behalf of society and protect the public interest.[20]

[20] See First Respondent's Supplementary Affidavit, page 766 at para 2.30.

[58] Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the State,[21] whilst Section 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.[22]

[59] That legislation is the National Prosecuting Authority Act[23] and provides as follows:

> "**32 Impartiality of, and oath or affirmation by members of prosecuting authority**
>
> *(a)* A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.
>
> (b) Subject to the *Constitution* and *this Act* , no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.
>
> ...
>
> **41 Offences and penalties**
>
> (1) Any person who contravenes the provisions of section 32 (1) *(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment."

[60] In these circumstances it must follow that the NPA had a duty to assert its authority and independence and resist the political interference. It cannot be

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[21] Section 179(2) of the Constitution provides:

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings".

[22] Section 179(4) of the Constitution provides:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

[23] 32 of 1998.

acceptable for it to simply have allowed, as it did, the manipulation of the criminal justice system in the serious manner in which it occurred.

[61] The constitutional design that is evidenced in South Africa's Constitution can only be advanced if the institutions of State accept and discharge their responsibilities in the manner contemplated. Unwavering fidelity to the Constitution and the law must, at all times, be displayed. It is therefore not open to the NPA to seek to absolve itself of its constitutional duty in failing to pursue the TRC cases.

[62] In *S v Basson*[24] the Constitutional Court described the importance of this duty in the following terms:

> "... In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime.
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> ... By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter."[25]

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[24] 2005 (1) SA 171 (CC).

[25] Id at paras 31 and 33.

[63] The necessity of an independent prosecuting authority was highlighted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others*:

> "At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. In *Democratic Alliance* Yacoob ADCJ observed that the office of the NDPP "is located at the core of delivering criminal justice". If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself. Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties.
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> ...
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> Improper interference may take any number of forms. Without purporting to be exhaustive, it may come as downright intimidation. It may consist in improper promises or inducements. It may take the form of corruptly influencing the decision-making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution."[26]

[64] Of course it may well be asked, what was the NPA required to do in the face of high level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. Society as a whole had an ongoing interest in the work of the TRC and the follow up that the government had committed itself to. Parliament, which ultimately represents the legislative authority of the State, had a right to know when the letter and spirit of legislation that it had

[26] 2018 (2) SACR 442 (CC) at paras 20-21.

passed was being deliberately undermined. None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part.

[65] It is also for these reasons that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted.

Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.

ii. The manner in which the Respondents have introduced the issue of political interference into evidence

[66] Very much related to the above, is the manner in which the NPA dealt with the disclosure of the acts of political interference in these proceedings. The main answering affidavit of the NPA was signed on 3 December 2018 and filed shortly thereafter. There was no mention made of the political interference that was brought to bear on the NPA. The Fourth Respondent then filed an answering affidavit in January 2018 wherein he set out, in considerable detail, the political interference. This included the affidavit deposed to by Adv Pikoli in the *Nkadimeng* matter as well as the Memorandum prepared by him in

February 2007 expressing his grave misgivings about such interference and his reluctance to go along with it.

[67] It was only after this affidavit was filed that the NPA then revealed the existence of the political interference and then also filed the affidavit of Adv Macadam which further detailed the extent of the political interference the NPA was subjected to. MacAdam's affidavit was signed on 1 November 2018, well before the NPA's answering affidavit was signed and filed. It begs the question as to why such an important affidavit was not filed as part of the answering affidavit when it was ready and presumably available to being filed.

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

[69] This is not how an organ of State, that is meant to act without fear, favour or prejudice and in the public interest, should conduct litigation.

[70] In *Grootboom v NPA*[27] the Constititonal Court, in dealing with the manner in which state organs are expected to litigate and be of assistance to Courts, remarked as follows:

"There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist

[27] 2014 (2) SA 68 (CC).

and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[28]

iii. The question of whether an amnesty or pardon may have been granted and if so, the consequences thereof

[71] The Applicant, in dealing with what may have prompted the political interference, suggested that an amnesty or a pardon may have been given by the President in respect of TRC cases - including his. He contends that he may well have been the beneficiary of such an amnesty or pardon. At best, this assertion amounts to nothing more than speculation on the part of the Applicant as there is nothing on the papers to suggest that either an amnesty or a pardon was granted to the Applicant.

[72] While there were political attempts made to consider pardons and amnesties post the TRC process, none of them materialised. The Courts took the firm view, particularly in matters relating to pardons, that when such power was exercised, it triggered the duty to hear persons affected and that the exclusion of victims from such a process was irrational.[29]

[73] Therefore, on this aspect there is simply no evidence of an amnesty or pardon being granted to the Applicant. Even if one was granted, it would, at best, have been a private process to the exclusion of victims and would not survive legal

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[28] Id at para 30.

[29] See *Albutt v CSVR* 2010 (3) SA 293 (CC) at para 69 where the Constitutional Court held:

> "In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational."

or constitutional scrutiny in the light of the observations of the Constitutional Court in *Albutt*.[30]

iv. The effects of the delay and the Applicant's assertion to a speedy trial.

[74] Reverting then to the timeline of 47 years that the Applicant advances as being the period of the delay. It must follow that certainly the period from 1971 until 2003 must be excluded for the reasons already given. What remains, and what the Applicant has focussed on in a substantial manner, is the delay from 2003 until 2017. There can be little doubt that this constitutes a substantial period of time and the reasons advanced by the State - namely that of political interference - cannot serve to justify the delay. It is arguable that, excluding the process of the Second Inquest, had the necessary resources been made available to investigate the case and the evidence been placed before the NPA without any political interference, it may have been possible for a decision to prosecute to have been taken somewhere earlier within that 14 year period. That it did not happen, must be largely attributable to the political interference and the willingness of the NPA to yield to such interference.

[75] Whilst it must therefore follow that there was a delay of a lengthy period in bringing the Applicant to trial, this cannot be the end of the enquiry. In *Bothma* the Court, in dealing with a lengthy pre-trial delay which it described as "the extreme belatedness of the prosecution", located the enquiry in the following terms:

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[30] Id at para 74.

"In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence."[31]

[76] Further, in *Sanderson* the Court, in dealing with time, observed that:

The amount of elapsed time is obviously central to the enquiry. The right, after all, is to a public trial "within a reasonable time after having been charged". Understanding how this factor should be incorporated into the enquiry is not straightforward. In the United States and Canada, time is considered to be a "triggering mechanism" which initiates the enquiry and it also functions subsequently as an independent factor in the enquiry. In my respectful view, time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation.

Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state - waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay - all seek to diminish the impact of elapsed time."[32]

[77] Even though the delay would have resulted in some prejudice to the Applicant - the trial he is now required to face could have occurred much earlier - the question this Court is required to consider in the balancing exercise is not prejudice in isolation, but rather, as posited in *Bothma,* whether the delay would "inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence".[33]

v. Prejudice to the Accused

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[31] *Bothma* above n 9 at para 35.

[32] *Sanderson* above n 10 at paras 28-29.

[33] Above n 26.

[78] The Applicant argues that the lengthy delay will materially prejudice his right to a fair trial. In support thereof he states, "[a]s mentioned at this stage basically all the material witnesses passed away and/or disappeared and the memory of available witnesses, including my own memory, faded significantly because of the passage of time".[34]

[79] In *Bothma*, the Court in dealing with what would constitute irreparable trial prejudice said the following:

> "These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."[35]

[80] Also in *Wild and Another v Hoffert NO and Others* the Constitutional Court, having found that there was an unreasonable delay, nevertheless concluded that there was no trial related prejudice or exceptional circumstances to justify a permanent stay of prosecution.

> "Those interests, so it was held, had to be taken into consideration in assessing the fundamental question whether there had been an infringement of the protection afforded by the constitutional imperative of a speedy trial. Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is

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[34] See Applicant's Founding Affidavit at para 63.

[35] *Bothma* above n 9 at para 68.

not merely a trigger to an enquiry as to prejudice. It remains the most important consideration throughout the enquiry, bearing on the other considerations and, in turn, being coloured by them. Furthermore, other than is the case in some comparable jurisdictions, no formal line is drawn in our law between particular time spans regarded as acceptable and those that do not pass muster. Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case, starting with the nature, gravity and extent of the prejudice suffered, or likely to be suffered, by the accused. The most invasive prejudice suffered by a person pending trial is obviously pre-trial incarceration, which entails not only loss of personal liberty but often loss of livelihood and the ability to maintain dependents. Ordinarily, therefore, this form of prejudice will weigh heavily in deciding how long a wait is reasonable."[36]

[81] In examining the trial prejudice that the Applicant contends he will face, it is not in dispute that the Applicant has access to the full docket in the criminal trial the State seeks to pursue. The Applicant is at liberty to engage experts, if he regards that as necessary, in supporting his defence and importantly, the trial Court, in such proceedings, is constitutionally bound to ensure that the trial is conducted in a fair manner.

[82] The Applicant is currently on bail and his legal fees are being paid for by the State – these exclude the risk of pre-trial incarceration and the financial burden of funding his defence.

[83] The applicant alleges he suffers from memory loss due to old age. Notably, age and infirmity are generally considered at the stage of sentencing. In the case of *S v Hewitt*,[37] a 75 year old man convicted of the rape of two girls during the

[36] 1998 (2) SACR 1 (CC) at para 6.

[37] 2017 (1) SACR 309 (SCA).

1980's and the indecent assault of another girl in 1994 appealed his sentence of eight years imprisonment. The court expressed the view that "[r]egarding his age, whilst courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment".[38] Our courts have, prior to this case, also taken the position that old age is not a bar to imprisonment.[39]

[84] More so, it is accepted that old age is not a bar to prosecution and imprisonment internationally. In *Papon v France*[40] the European Court of Human Rights dealt with the case of Maurice Papon who had been convicted of aiding and abetting crimes against humanity during World War II. He appealed his sentence on the basis of his age and ill-health. The court concluded that although Papon was 90 years of age and was ill, he would be under constant medical supervision and therefore there was no bar to his imprisonment.

[85] Similarly in the United States, the case of *Killen v State of Mississippi*[41] which concerned the deaths of 3 persons by members of the Ku Klux Klan on 21 June 1964 is illustrative. In January 2005, Edgar Ray Killen, at the age of 80, was indicted for the deaths. He was found guilty of three counts of murder and was sentenced to serve 20 years for each count.

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[38] *Hewitt* para 15.

[39] *S v Zinn* 1969 (2) SA 537 (A) at 542B-C.

[40] (No. 1) Application 64666/01.

[41] 958 So. 2d 172 (2007) Mississippi Supreme Court.

[86] Furthermore, there is also no evidence that the alleged poor memory of the Applicant and other witnesses is likely to taint the fairness of the trial. If anything, that remains a neutral factor as it applies equally to the State and ultimately, it is the State that carries the burden of proving guilt beyond reasonable doubt.

[87] Indeed in *Wild* the Court made reference to the continuing remedy that an accused person enjoys during a trial to obviate any possible infringement of rights during trial in the following remarks:

> "The conclusion that a permanent stay of prosecution is not appropriate relief to be granted to the appellants here, by no means puts paid to their rights under s 25(3)*(a)*. Those rights and the duty to devise appropriate remedial relief for their infringement will continue throughout the trial. For example, it is trite that a judicial officer, when structuring sentence, is obliged to have regard to pre-trial detention and any other significant prejudice suffered as a result of the case hanging over the accused's head for a protracted period. Similarly, should it transpire that there had indeed been trial-related prejudice, this judgment would constitute no impediment to appropriate relief then being granted."[42]

[88] Hence age and infirmity are not grounds upon which the applicant can singularly rely as a form of prejudice. These are grounds which, generally, a trial court must consider at sentencing.

[89] In conclusion, while the delay has caused some measure of prejudice, it cannot be said that it will taint the fairness of the proposed trial or that such a trial, if it proceeds, will not of necessity incorporate the safeguards of fairness that the

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[42] *Wild* above n 30 at para 36.

Applicant is entitled to. In any event, the right to a fair trial is subject to the limitations envisaged in section 36(1) of the Constitution.

Nature of the Crime

[90] The charge the Applicant faces is one of murder and in *Zanner v Director of Public Prosecutions, Johannesburg*, the Supreme Court of Appeal observed that:

"The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."[43]

[91] Similar sentiments were expressed in *Bothma* where the Court alluded to, what it termed, the "profound societal interest in bringing a person charged with a criminal offence to trial."

"The judgment in *Sanderson* points out that in determining reasonableness it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest will loom very large. "The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structural legal system; a system which

[43] 2006 (2) SACR 45 (SCA) at para 21.

requires the prosecution to prove its case in a public forum." The judgment notes that "[w]e also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused.

...

The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, 'Molato ga o bole' (Setswana) or 'ical'aliboli' (isiZulu) there are some crimes that do not go away."[44]

[92] The seventh *amicus curiae* also urged the Court to seriously consider the nature of the crime in determining the relief sought. They contended that the facts advanced in support of the crime of murder, which is reflected in the indictment, would also sustain a conclusion that the alleged crime in question would constitute a crime against humanity of apartheid. Alternatively, it would constitute a crime against humanity of persecution on racial or political grounds; further alternatively, a crime against humanity of murder. They, together with the eighth *amicus curiae*, argued that each of these offences triggers an obligation in terms of customary international law on the part of the South African government to investigate and prosecute such offences.

On that basis, the seventh *amicus curiae* contend that the application for a stay of prosecution should be refused as to grant it would undermine South Africa's ability to discharge its obligations in terms of international law.

In addition it has urged the Court to construe the charge sheet as constituting the elements necessary to found a crime against humanity, alternatively to use its inherent power to correct the charge sheet to reflect the legal

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[44] *Bothma* above n 9 at paras 41 and 77.

characterisation of the offence as a crime against humanity, further alternatively, to refer the charge sheet back to the First Respondent for reconsideration.

[93] The charge sheet read with the summary of substantial facts locate the alleged crime within the apartheid system which is described in the summary of substantial facts as "a system of institutionalised racial segregation and discrimination that was in existence from 1948". The State, however, has not elected to charge the Applicant with committing a crime against humanity. I have doubts whether under such circumstances it is open to the Court to amend the charge sheet or to direct that the State reconsiders the charge sheet.

Section 86 of the Criminal Procedure Act, upon which the *amicus* relies on for this submission, provides for the amendment of the charge sheet in very limited circumstances and in the main deals with charge sheets that are defective for want of any essential averments therein and instances where there is a variance between an averment in the charge sheet and the evidence led in Court.[45] Clearly section 86 is not of application here.

In addition, and given the principle of the separation of powers, the independence of the prosecutorial authority, and its role as set out in Section

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[45] Section 86 (1) provides:

> *(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is and in any other part thereof which it may become necessary to amend.*

179 of the Constitution, it may be inappropriate and outside the boundaries of judicial authority for a Court to direct that the charge sheet be amended as the amicus suggests. This especially in a matter where the State has already decided to prosecute. It may well be different if one was dealing with a refusal to prosecute which is not the case here.

[94] In argument, counsel for the seventh *amicus*, in response to a question from the Court, accepted that if the prosecution of the Applicant were to continue, that would be a proper discharge of the international obligations South Africa has in terms of international customary law. Under such circumstances it becomes unnecessary to make a determination on whether this Court is dealing with conduct which goes beyond laying the basis for a murder charge but also constitutes a crime against humanity. That argument may well be possible and indeed a compelling one, but given the relief I intend proposing, there would be no need to deal with it and make a determination thereon. Of course it would be open to the State, if they so desire, to reconsider the charge sheet, alternatively, to leave it as it is but upon conviction (if that was to follow) to argue in mitigation that the conduct of the Applicant would also have constituted a crime against humanity. Those are matters for the future and for the Trial Court.

The interest of the victims and the family

[95] While the interests of the victims and family can never be dispositive in an application of this nature, in the context of this application, those interests

warrant mention. The Timol family have, for many years, simply sought to establish what had happened to the late Ahmed Timol and the circumstances that led to his death. They persisted in seeking the truth and finding a measure of justice and, for a long time, their efforts seemed to come to nothing. They were not in search of revenge, but rather the truth and participated in the victims hearing of the TRC. They also implored the Applicant to come forward and reveal all. They accepted that the prospect of amnesty being granted to those responsible for the murder of Timol, was one that was real and a prospect that was contemplated by the TRC Act.

[96] It was largely through their efforts that a decision was taken to reopen the Inquest and the Second Inquest was ultimately held. Now that a decision to prosecute has been taken, and someone is at least indicted for the death of Timol, they too are entitled to the justice that has eluded them for so long. Whatever the outcome of the criminal trial may be, they have an interest in ensuring that there is a proper process to ventilate the truth of what occurred and for the Applicant's guilt or innocence to be determined in a court of law. It will no doubt bring a measure of closure after almost 50 years.

Conclusion on the unreasonable delay challenge

[97] In conclusion, whilst it is accepted that there was a delay that would correctly be characterised as unreasonable in its duration and in respect of the justification advanced for it, there is no evidence that the delay will result in trial prejudice nor are there any exceptional circumstances present that would justify granting the radical and far reaching relief the Applicant seeks.

[98] If anything, the interests of justice; the societal need to ensure accountability for the commission of serious crimes; and the nature of the crime located in its historical context all militate against the grant of the relief sought.

[99] The application grounded in section 35(3) of the Constitution accordingly falls to be dismissed.

Improper Motive

[100] The second thrust of the Applicant's challenge is that the prosecution has been advanced for an improper motive. In this regard, he contends that the Inquest Court concluded that he be investigated for his role as an accessory after the fact to murder and not in respect of the crime of murder.

[101] He therefore concludes that the State, in charging him with the offence of murder, acted on an improper motive as it was a decision not supported by the findings of the Inquest Court.

[102] The Respondents' stance is that the Inquest Court never excluded the possibility that the Applicant be charged with murder and that its conclusions are, nevertheless, not definitive of the charge the State may elect to bring. In addition, they point out that the evidence led at the Inquest Court may well sustain a charge of murder on the basis of *dolus eventualis*.

[103] One has to guard against the temptation to utilise this hearing to determine the strength of the case the Applicant is to meet in the criminal proceedings the

State has initiated. This is not the forum for the ventilation of such issues and, as the ninth *amicus curiae* has pointed out, the Applicant has remedies to deal with those issues, including the utilisation of section 22(c) of the NPA Act and Section 174 of the Criminal Procedure Act. Motive and, reasonable and probable cause, should not be conflated. We are satisfied that the evidence intended to be presented at trial, meets a basic threshold and that the applicant has sufficient remedies available to him to deal with the nature and quality of the evidence intended to be presented against him.

[104] In any event, the First Respondent, without admitting in any manner that the prosecution was brought with an improper motive, argues that the motive will, in any event, be irrelevant. It relies on the dicta in *NDPP v Zuma* to the following effect:

> "The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute. This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr. Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.
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> This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had

nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive."[46]

[105] There is, in my view, nothing to suggest that the prosecution was advanced for an improper motive.

Costs

[106] None of the parties seek an order as to costs and have cited the *Biowatch* principle in support thereof.[47]

Concluding remarks

[107] This, in many respects, is a difficult case. Not necessarily on account of the legal issues it raises, but rather to the extent that it compels us to revisit our troubled past; examine what occurred there; recognise the need for reconciliation; and the consequences that invariably went with it. Importantly, this case reaffirms that justice and the truth were never meant to be compromised during all that our young society sought to do in dealing with its troubled, turbulent and shameful past.

[108] The refusal of a permanent stay of prosecution is not a signalling that we are required to be vengeful to those who are alleged to have committed serious crimes in the past but rather, an affirmation that the principles of accountability

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[46] 2009 (2) SA 277 (SCA) at paras 37-38.

[47] Biowatch *Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 21.

and responsibility for breaching the rules of society stand at the doorway of our new constitutional order.

Order

[1] The application is dismissed

[2] No order is made as to costs

NJ Kollapen
Judge of the High Court of South Africa
Gauteng Division, Pretoria

I concur

DSS Moshidi
Judge of the high court of South Africa
Gauteng, Local Division, Johannesburg

I concur

I Opperman
Judge of the High Court of South Africa
Gauteng, Local Division, Johannesburg

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Date of hearing: 28th and 29th March 2019

Date of Judgment: 3 June 2019